Chapter 27

SETTLEMENT AND MEDIATION

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§ 27.1 • INTRODUCTION

Attorneys often perceive the risk of a malpractice suit after an adverse verdict or, in the transactional context, when a dispute arises over a document drafted by the attorney. Somewhat counterintuitively, nearly 10 percent of legal malpractice claims arise *after* the client has voluntarily entered into a settlement. American Bar Association Standing Committee on Lawyers’ Professional Liability, *Profile of Legal Malpractice Claims* (Sept. 2012). Thus, while settlement often indicates the conclusion of the representation, it does not necessarily mean the end of the case.

A multitude of factors can turn a settled case into a subsequent malpractice case, particularly where a client suffers from buyer’s remorse, in emotionally charged cases,
where a client has not been fully informed of the case status, or where the client’s expectations are unrealistic. Attorneys owe various ethical duties to their clients in the context of settlement, such as the duties of competence, diligence, and communicating settlement offers. Similarly, attorneys can be liable for malpractice for failing to convey settlement offers, for errors affecting the value of the case, and for lost settlement opportunity. Whether representing a plaintiff or a defendant, an attorney must take care to ensure that the advice is based on an investigation and understanding of the facts, sufficient knowledge of the applicable law, an assessment of the likely outcome of the case absent settlement, and a reasoned evaluation of the strengths and weaknesses of the case, all of which should be explained to the client. This chapter will discuss an attorney’s ethical duties regarding settlement and best practices for avoiding malpractice claims due to conduct prior and during settlement. Preventing malpractice is not the same as preventing a malpractice claim. Many malpractice claims arising out of settlement involve criticisms of an attorney’s strategy and valuation assessment of a case, with the benefit of hindsight. Attorneys are particularly susceptible to these types of lawsuits as most advice is just that — a strategic decision. Accordingly, this chapter focuses on best practices aimed at avoiding malpractice claims. These “best practices” do not represent the standard of care, violation of which would result in malpractice.

§ 27.2 • SETTLEMENT AND PUBLIC POLICY

Unquestionably, public policy in Colorado favors settlement of civil disputes. Jones v. Feiger, Collison & Killmer, 903 P.2d 27, 34 (Colo. App. 1994), rev’d on other grounds, 926 P.2d 1244 (Colo. 1996) (stating “It is the declared public policy of this state that parties to litigation have the right to control their own cases.”); see also White v. Jungbauer, 128 P.3d 263, 265 (Colo. App. 2005) (“Colorado courts have long recognized the important public policy in favor of settlement. . . .”). Legal malpractice claims arising from a settlement almost invariably involve questioning the attorney’s judgment with the benefit of hindsight. Although courts have considered these public policy interests, they generally have found them insufficient to bar malpractice claims altogether after settlement of the underlying case. The only court to have barred malpractice claims alleging negligent settlement advice per se is the Supreme Court of Pennsylvania. In Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346 (Pa. 1991), the defendant attorneys represented the Muhammads in an underlying medical malpractice case stemming from the death of their infant son, which settled following the completion of discovery based upon their attorneys’ recommendation. After entering into the settlement, the clients became dissatisfied and sued their attorneys for malpractice. The Pennsylvania Supreme Court affirmed the trial court’s dismissal of the case, based upon the “strong and historical public
policy of encouraging settlements.” *Id.* at 1349. The court held that a lawyer could not be found liable for negligence in recommending a settlement. *Id.* at 1352. The court stated:

The primary reason we decide today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients is that to allow them will create chaos in our civil litigation system. Lawyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that “could have been done, but was not.” We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A longstanding principle of our courts has been to encourage settlements; we will not now act so as to discourage them.


Other courts, including Colorado, have declined to follow *Muhammad*’s bar to malpractice claims alleging negligent settlement advice. See, e.g., 4 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 33.32, p. 870 (2013 ed.) (hereinafter Mallen & Smith) (“Most courts expressly have refused to accept *Muhammad* or broadly protect lawyers from allegations of negligence.”); *White v. Jungbauer*, 128 P.3d 263 (Colo. App. 2005); *Ziegelheim v. Appollo*, 607 A.2d 1298 (N.J. 1992); *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195 (Conn. 1994). In *White*, the defendant attorney represented the client in a lawsuit related to injuries sustained while working for a railroad company. During the underlying trial, the client settled his case after the attorney allegedly failed to subpoena medical expert witnesses and failed to prepare him for his testimony. *White*, 128 P.3d 263. The defendant attorney asserted the claim was barred as a matter of law due to the client’s decision to enter into settlement pursuant to *Muhammad*. The Colorado Court of Appeals rejected an absolute bar to malpractice claims, reasoning:

We are not persuaded that fear of malpractice suits will make lawyers reluctant to settle cases, nor are we persuaded that prohibition of such suits in settled cases is necessary to encourage settlements. Malpractice lawsuits arising out of settlement have proceeded before Colorado courts in the past, and we see no reason to bar such suits at this time.”

*Id.* at 265.
Considering the often-quoted adage “the best settlement is where all parties are unhappy,” practitioners can understandably be wary that they will face exposure to a malpractice claim any time a client perceives they settled for too much or too little. On a positive note, the authors of a leading malpractice treatise remark that, given the public policy in favor of settlement, courts have generally been reluctant to find attorneys liable for malpractice for negligent settlement advice, especially where a client cannot establish that the alleged misconduct affected the settlement.

The courts have espoused concern about exposing an attorney to hindsight reflections by a disappointed client about the amount of settlement. Rarely does litigation produce a result that is satisfactory to both sides. Hindsight will show the wisdom of a settlement that was rejected or not pursued. . . . Public policy concerns about the solemnity of the settlement process have been considered in evaluating legal malpractice claims. The hindsight vulnerability of lawyers has been a factor. Whether a case would have or should have achieved a better settlement, in the absence of documented settlement authority, is speculative, concerning how the parties would have negotiated. Thus, courts have said that policy considerations require judicial reluctance to relitigate as legal malpractice suits those cases that have been settled or litigated.

Mallen & Smith, supra at § 33.32, p. 867-68 (emphasis added). Thus, while a client’s acceptance of a settlement does not insulate a lawyer from a subsequent legal malpractice claim, practitioners can take heart that such malpractice cases rarely survive summary judgment absent proof that, but for the attorney’s misconduct, the client would have received a better result.

§ 27.3 • ATTORNEYS’ ETHICAL DUTIES REGARDING SETTLEMENT

Several rules of professional conduct are implicitly implicated in settlement, including competence, diligence, and communication. Other rules of professional conduct expressly address settlement, such as the client’s right to control settlement decisions.

§ 27.3.1—Competence And Diligence

In general, Colo. RPC 1.1 provides that a lawyer “shall provide competent representation to a client.” This general obligation of competence applies to both the conduct of settlement negotiations and the validity of any subsequent settlement agreement. The
lawyer should make sure that he or she is competent to undertake the representation and competent to negotiate a binding, enforceable settlement agreement, incorporating appropriate terms and releases in light of the client’s goals and interests.

Likewise, an attorney owes a duty to “act with reasonable diligence and promptness in representing a client.” Colo. RPC 1.3. “Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed.” Colo. RPC 1.3, cmt. [3].

Failure to discharge an attorney’s duties of competence and diligence frequently results in a subsequent malpractice claim alleging malpractice in the context of settlement, as discussed in § 27.4. Such claimants typically allege that errors in understanding or applying the law, or failing to diligently prosecute or defend the case, adversely affected the value of the case.

§ 27.3.2—Duty To Keep The Client Informed

Keeping the client informed as to the status of the representation is the cornerstone of effective representation and preventing malpractice claims, in particular in the context of settlement. Colo. RPC 1.4(a)(3). Colo. RPC 1.4(b) provides that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The Comments to Rule 1.4(b) specifically note that an attorney must “promptly” convey offers of settlement, stating:

For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.

Colo. RPC 1.4, cmt. [2]. The requirement for communication is especially important in the context of settlement negotiations. Frequently, clients are unsophisticated about the legal process and settlement. Effective communication should include an assessment of the strengths and weaknesses of the case.

§ 27.3.3—Client’s “Unfettered” Right To Make Settlement Decisions

Colo. RPC 1.2 provides that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client’s
decision whether to settle a matter.” Colo. RPC 1.2(a) (emphasis added). Comments to Rule 1.2 state that “[t]he decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client.” Id. at cmt. [1]. “It is for the client to decide whether he will accept a settlement offer.” Jones v. Feiger, Collison & Killmer, 903 P.2d 27, 34 (Colo. App. 1994), rev’d on other grounds, 926 P.2d 1244 (Colo. 1996). A client’s right to control settlement decisions is “absolute” and “unqualified.” Id. Indeed, the right to control settlement cannot be altered via agreement. Colorado courts have held that any provision in a fee agreement that would deprive a client of the right to control settlement is unenforceable as against public policy. Serna v. Kingston Enters., 72 P.3d 376, 383 (Colo. App. 2002).

§ 27.3.4—Advisae Of Alternative Methods Of Dispute Resolution

Although the client controls settlement decisions, an attorney must ensure that the client’s settlement decisions are informed. Colo. RPC 2.1 provides that in matters “involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.” Attorneys should discuss options in light of the client’s goals, the anticipated costs and fees, the emotional impact on the client, the anticipated duration of the case, and the strengths and weaknesses of the case.

Thus, the Rules of Professional Conduct require an attorney to explain alternative forms of dispute resolution. In addition to explaining these options, an attorney should advise the client of the risks and benefits of settlement. In order for the client to make an informed judgment regarding settling the case, an attorney should advise the client regarding the merits and weaknesses of the case, the risk of settling a case prior to trial, and the likely outcome of the case absent settlement.

Practice Pointer

The Rules of Professional Conduct require prompt communication of settlement offers and demands. Attorneys also must explain alternative forms of dispute resolution to the client. Delay can jeopardize settlement discussions and detrimentally affect the client’s position. While the client controls settlement decisions, an attorney must ensure the client’s decisions are informed, by providing an assessment of the strengths and weaknesses of the case and the risks and benefits of settlement.
Frequently, malpractice claimants allege that misconduct prior to settlement caused the client to agree to a reduced settlement or caused the client to lose a settlement opportunity altogether. On one end of the spectrum, clients have prevailed on such claims where they could show an error affected the settlement, such as where an attorney failed to timely file a complaint. Other complaints involve second guessing an attorney’s settlement advice with the benefit of hindsight.

§ 27.4.1—Communicating With The Client

As noted above, an attorney owes ethical duties to keep the client informed regarding the case and to promptly convey settlement offers. Failure to promptly convey settlement offers can also result in malpractice claims. For example, in *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995), malpractice claimants sued defendant attorneys alleging they breached the standard of care by not accepting a settlement offer. In the underlying wrongful death case, the plaintiffs had conveyed an ambiguous $100,000 settlement offer. The defendant attorneys declined the offer because the insurer was only willing to settle for $95,000. The attorneys did not advise their clients of the $100,000 settlement offer until approximately a month later. *Id.* at 570-71. *Miller* arose in the context of the tripartite relationship created by a claim potentially covered by insurance. As explained in CBA Ethics Committee Formal Opinion 91, “Ethical Duties of Attorney Selected by Insurer to Represent Its Insured” (Jan. 16, 1993, addendum issued 2013), even if an insurer has selected the defense attorney and/or is paying for defense costs, the attorney’s primary duties are to the insured client. The underlying matter was eventually settled for $1.2 million. The clients then filed suit against their attorneys for malpractice due to their failure to advise them of the settlement offer.

A jury awarded the clients over $900,000 in damages on their claims against the attorneys for breach of fiduciary duty and against the insurer for bad faith. On appeal, the Colorado Court of Appeals concluded that the trial court correctly instructed the jury that the attorneys had a duty to convey the settlement offer regardless of the ambiguity, reasoning “[a]n attorney representing a client has an obligation to advise the client fully of settlement negotiations and their ramifications. . . . Moreover, this duty to communicate all settlement offers exists even when an insurance company retains the attorney to defend an action against its insured, because the insured is, nevertheless, a client.” *Id.* at 574 (internal quotations and citations omitted). The court of appeals reversed and remanded, reasoning the attorneys were permitted to introduce evidence that, due to ambiguity in the settlement offer, the offer could not have been accepted. *Id.* at 575-76.
Miller demonstrates that delay in conveying settlement offers or demands to the client can result in violation of the Rules of Professional Conduct, as well as malpractice exposure. But to prevent a malpractice claim altogether, the importance of regular communication regarding the case and its value cannot be underestimated. Communication in writing is a best practice that can go a long way to preventing a malpractice claim, by documenting the attorney’s diligence in pursuing the case, outlining the attorney’s strategic judgments, and managing the client’s expectations.

Attorneys representing large institutional clients or insurers regularly report their assessment of the case and the status as required by the client. This practice is one that attorneys should consider implementing in all cases from the outset of the case, outlining the goals of the representation, assessing the merits and weaknesses with the client’s case, and providing a frank assessment of the value of the case. The attorney’s assessment of the case, the case status, and recent developments can be updated in periodic status reports. Of course the nature, detail, and timing of communications with the client will vary based on the sophistication of the client, case needs, and the client’s concerns regarding billing. Even where reporting in writing to the client is inappropriate or impracticable, simply forwarding pleadings or papers to the client will provide some measure of communication and update the client regarding the status. Frequently, in subsequent malpractice cases, the fact that a client received pleadings or papers and did not read them or inquire further of the attorney regarding the case status can provide a defense. Depending on the sophistication of the client, an attorney should consider explaining that documents, such as motions, correspondence to opposing counsel, or mediation statements, include the attorney’s advocacy and may not necessarily reflect the weaknesses of the case.

In certain circumstances, an attorney owes an ethical obligation to report material adverse developments in the case, including those resulting from the lawyer’s own errors. See CBA Ethics Comm., Formal Op. 113, “Ethical Duty of Attorney to Disclose Errors to Client” (Nov. 19, 2005). “Material developments include matters adverse to the client’s interests and those resulting from the lawyer’s own actions, if the lawyer’s actions are likely to result in prejudice to a client’s rights or claim.” Id. The type of material developments requiring disclosure will vary based on the facts and circumstances of the case. Developments falling within the clear disclosure requirement include failing to timely file a case before expiration of the statute of limitations or failure to timely file an appeal. Id.

Ultimately, client communication is the key to managing the client’s expectations. It is human nature to adopt the theory that providing only good news to the client will keep the client happy and the relationship on good terms. Unfortunately, the opposite is frequently true. If a client is unaware of the blemishes of the case and then blind-sided by a lower-than-expected settlement, the client will be more likely to blame the attorney for the
low settlement. Frank communication regarding the merits of the case will serve to manage the client’s expectations and fulfill an attorney’s ethical obligations to keep the client informed and may prevent future malpractice claims. Once settlement negotiations begin, counsel must be sure to fully discuss with and explain to the client the terms and implications of a settlement and to create a record of that discussion. Regular communication regarding the merits and blemishes of the case is a best practice that will assist in managing a client’s expectations and preventing malpractice claims.

§ 27.4.2—Inadequate Preparation Of The Case

Frequently, a “settle and sue” malpractice claim arises when the client alleges that the attorney failed to adequately prepare the case, which devalued the case. Such claims run the gamut from the “clear error” claims, i.e., allegations that the attorney failed to timely file a lawsuit before expiration of the statute of limitations, to a claim the attorney conducted inadequate discovery.

For example, in *Nielson v. Eisenhower & Carlson*, 999 P.2d 42 (Wash. App. 2000), an attorney represented the client in a medical malpractice lawsuit and the defendant asserted the claim was time barred. The client prevailed at trial, but then settled for 85 percent of the judgment due to a risk the judgment would be overturned on appeal based on the statute of limitations defense. The client then sued the attorney for malpractice for the lost settlement value. Similarly, in *White v. Jungbauer*, a client settled an underlying case during trial and subsequently claimed the attorney committed malpractice in failing to prepare him adequately for his testimony and failing to subpoena medical expert witnesses. *White*, 128 P.3d at 265. Plaintiffs in other malpractice lawsuits have alleged an attorney failed to properly discover assets, failed to discover the existence of insurance, and failed to discover third party liability. See, e.g., *Blackwell v. Eckman*, 410 N.W.2d 390 (Minn. App. 1987) (alleging attorney failed to discover the defendant’s insurance); *Baldridge v. Lacks*, 883 S.W.2d 947 (Mo. App. 1994) (failure to investigate marital estate).

The case law in this area is problematic and arguably in conflict with the Rules of Professional Conduct that require an attorney to “advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.” Colo. RPC 2.1. On the one hand an attorney has a duty to advise a client of settlement as an alternative dispute resolution mechanism and explore early settlement opportunities, but, on the other hand, an attorney may be exposed to a malpractice claim for failing to complete discovery. That conflict can be resolved by advising the client not only of the potential benefits of an early settlement, but also the risks of engaging in settlement with incomplete information as to the strengths and weaknesses of the case because discovery is not yet complete. Preferably, this communication should be in writing, explaining that discovery could reveal additional evidence that would
increase or decrease the value of the case and that the client is entering into a settlement due to other considerations, such as the uncertainty of a positive outcome, the costs of continued litigation, and the risks of discovery of adverse facts.

§ 27.4.3—Negligent Settlement Advice

Another common complaint is that an attorney provided negligent settlement advice. Such claims include allegations that an attorney failed to properly value the case, that the attorney’s interest in settlement conflicted with the client’s, or that the attorney failed to advise the client of the consequences of settlement.

In McCafferty v. Musat, 817 P.2d 1039 (Colo. App. 1990), the attorney represented the client related to injuries sustained while employed as a miner against the company that manufactured explosives used at the mine. Initially, the attorney advised the client the case was strong and the client would probably receive $60,000 per year for life. *Id.* at 1041. During the representation, the attorney sought employment with the firm representing the explosives manufacturer. After accepting employment with the firm, the attorney advised the client and the client signed an acknowledgement and waiver of the conflict of interest. While discovery was still ongoing, the attorney recommended the client agree to a nominal $5,000 settlement because the client’s case “had no reasonable likelihood of success on the merits.” *Id.* at 1042.

Subsequently, the client sued the attorney for malpractice, claiming the attorney was negligent in providing settlement advice without adequately conducting discovery and the attorney had a nonwaivable conflict of interest. At trial, the client presented testimony that the attorney did not meet the standard of care in conducting discovery and further discovery would have revealed a meritorious claim. *Id.* at 1045. The jury awarded the client over $800,000 in damages, which was affirmed on appeal. *Id.* at 1042.

Clients have also asserted malpractice claims alleging the attorneys encouraged settlement based on the attorneys’ interest in receiving a contingent fee and did not adequately pursue discovery or provide the client with impartial advice. See Crowe v. Tull, 126 P.3d 196 (Colo. 2006). Claims alleging an improper settlement amount have also been asserted against defense counsel. See, e.g., Scognamillo v. Olsen, 795 P.2d 1357 (Colo. App. 1990); Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir. 1992); Home Ins. Co. v. Liebman, Adolfe & Charme, 257 A.D.2d 424 (N.Y. 1999). In Scognamillo, the attorney defendants represented several defendants in an underlying lawsuit for fraud and civil conspiracy. During the underlying case, the clients had the opportunity to settle. Two of the clients agreed to settle but the third refused and, therefore, no settlement was consummated. Ultimately, judgment was entered against the clients in an amount far in excess of the proposed settlement. In a subsequent legal malpractice action, the clients asserted the attorneys
negligently evaluated the case and presented expert testimony regarding what the outcome should have been had the clients retained separate counsel. *Scognamillo*, 795 P.2d at 1361-62. The jury found in favor of the client and the verdict was affirmed on appeal. *Id.*

While *McCafferty* involved complicated conflict of interest issues, the foregoing cases underscore that an attorney’s settlement advice can result in a malpractice claim. As discussed above, preventing such malpractice claims can best be accomplished by conducting a reasoned and reasonable assessment of the value of the case, the likely outcome, and the risks of an adverse verdict, documented in writing. In addition, plaintiffs’ lawyers should be careful to comply with the Colorado Rules Governing Contingent Fees, Chapter 23.3 of the Colorado Rules of Civil Procedure.

**§ 27.4.4—Judgmental Immunity**

Documenting discovery and an attorney’s assessment of the case may also provide a defense in the event a malpractice lawsuit is filed. Judgmental immunity is a defense that has been raised and recognized in a number of jurisdictions. Under the doctrine of judgmental immunity,

> there can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.

*Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980). The rule of immunity for the honest exercise of professional judgment has become the majority rule. Mallen & Smith, *supra*, § 33.4, 889-891. Courts have held that where “the alleged acts and omissions were trial tactics based on good faith and reasonable professional judgment no amount of factual development could reveal a case of malpractice.” *Simko v. Blake*, 532 N.W.2d 842, 847 (Mich. 1995).

No Colorado decision has specifically applied the judgmental immunity rule. A case from the Tenth Circuit Court of Appeals and a case from the United States District Court for the District of Colorado, however, have addressed the issue. *Frank v. Bloom*, 634 F.2d 1245 (10th Cir. 1980); *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300 (D. Colo. 1995).

This defense was successfully invoked by an attorney in the Georgia case of *Hud- son v. Windholz*, 416 S.E.2d 120 (Ga. App. 1992), in defending a claim alleging negligent settlement advice. In that case, the clients hired the attorney to stop the wife’s former hus-
band from distributing explicit photographs of the wife. After assessing the strengths and weaknesses of the case, the attorney advised the clients a lawsuit against a magazine would be unsuccessful. The court applied the judgmental immunity doctrine, concluding the evidence “clearly indicates that defendant assessed the relative strengths and weaknesses of the plaintiffs’ claims . . . and exercised his best, informed judgment.” Id. at 124.

The judgmental immunity doctrine provides a defense for an attorney’s good faith exercise of professional judgment. Documenting this professional judgment in writing and communicating it to the client, could also potentially prevent a malpractice claim by managing the client’s expectations.

**Practice Pointers**

Communicate frequently with the client, assessing the case at the commencement and updating that assessment. Explain the strengths and weaknesses to the client, preferably in writing, so the client has a clear understanding of the case. Manage the client’s expectations by disclosing weaknesses or material adverse developments as they arise. If settlement is reached prior to the close of discovery, explain to the client the case status and the risks of not completing discovery. Again, preferably, this communication should be in writing. If written assessments are impracticable given the client’s direction, the value of the case, or other factors, regularly provide the client with pleadings, papers, and other correspondence that will keep the client apprised regarding the case. Finally, make sure you understand your client’s goals and expectations prior to settlement.

**§ 27.5 • ATTORNEY RETAINED BY INSURER**

A number of ethical issues arise when an attorney is retained by an insurer to defend an insured. Under Colo. RPC 1.8(f), such an arrangement is ethically permissible provided that: (1) the client gives informed consent, (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship, and (3) the confidentiality of information related to the representation is maintained as required by Colo. RPC 1.6. See also Colo. RPC 5.4(c) (the lawyer may not permit the insurer to direct or regulate the lawyer’s professional judgment in representing the insured).

It is settled Colorado law that in such circumstances, the attorney’s client is the insured, not the insurance company. CBA Ethics Committee Formal Op. 91, “Ethical Duties of Attorney Selected by Insurer to Represent Its Insured” (Jan. 16, 1993; addendum May 2013), § I; State Farm Fire & Cas. Co. v. Weiss, 194 P.3d 1063 (Colo. App. 2008)
§ 27.5 Lawyers’ Professional Liability in Colorado

(attorney-client relationship is between the attorney and the insured); Essex Ins. Co. v. Tyler, 309 F. Supp. 2d 1270, 1272 (D. Colo. 2004) (“In Colorado, an attorney retained by the insurance carrier owes a duty to the insured only; there is no attorney-client relationship between an insurance carrier and the attorney it hires to represent the insured.”). This is true even where the attorney is on retainer to the insurer or is paid by the insurer on a flat fee basis. See CBA Ethics Comm. Formal Op. 91, § II(A)(2).

At times, the insurer’s interests may diverge from those of the insured. In that situation, the lawyer’s ethical duty of loyalty is owed only to the insured. CBA Ethics Comm. Formal Op. 91, § I. Because the attorney owes a duty only to the insured, the insurer may not bring a legal malpractice claim against the attorney hired to represent the insured, even where the insurer claims that the attorney’s malpractice caused it to pay more in settlement than it otherwise would have. Weiss, 194 P.3d 1063.

Under the typical insurance contract, the insurer retains the exclusive right to control defense decisions and settlement negotiations, subject to the insurer’s duty to act reasonably and in good faith. Farmers Group, Inc. v. Trimble, 691 P.2d 1138, 1141 (Colo. 1984). The respective rights of the insurer and the insured are defined primarily by the terms of the insurance policy. Thus, the defense attorney appointed by the insurer must be mindful to meet the attorney’s ethical obligations to the insured within the context of the insurance contract. CBA Ethics Comm. Formal Op. 91. “The attorney’s ethical duty is to assure that the interests of the insured are protected, while at the same time fulfilling the insured’s contractual obligations to the carrier . . . .” Id.

The duties owed to the insured include not only the duty of unqualified loyalty, but also the duties to maintain the confidentiality of client information and to inform and advise the insured concerning the client’s legal interests. CBA Ethics Comm. Formal Op. 91, § II. These general duties, described above, come into play throughout the settlement process. Some of the issues that arise in that context are addressed in the following subsections.

§ 27.5.1—Advising The Client Of The Terms Of The Insurance Contract

Colo. RPC 1.4(b) requires the lawyer to explain a matter sufficiently to enable the client to make informed decisions regarding the representation. This concept of “informed consent” permeates the lawyer’s obligations to the insured throughout the representation, including in the context of settlement and potential conflicting interests between the insurer and the insured. See May 2013 addendum to CBA Ethics Comm. Formal Op. 91. For a client to give informed consent, the lawyer must communicate “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Id.; Colo. RPC 1.0(e).
To meet the lawyer’s duty to advise and inform, it may be important to discuss with the client some of the key terms of the insurance policy, such as eroding policy limits and cooperation or no voluntary payment clauses.

**Eroding Policy Limits**

Professional liability insurance policies, in particular, frequently contain so-called “Pac-Man” provisions, whereby defense fees and expenses reduce the amount of coverage available under the policy. Those provisions can directly impact settlement decisions. For example, the client should be made aware that whatever the insurance company pays in litigation costs before settlement will be subtracted from the policy limits available to fund the settlement. Thus, the client may refrain from insisting on a “scorched earth” litigation approach and instead seek to have the insurer agree to early settlement negotiations.

Where the amount of the claim nears or exceeds policy limits, the attorney should periodically inform the insured as to defense costs incurred. This is particularly important where the insured may incur unexpected personal liability exposure because of depletion of indemnity coverage through expenditure of defense costs. CBA Ethics Comm. Formal Op. 91, § II(C)(3).

**Cooperation or No Voluntary Payment Clauses**

Insurance policies typically contain a “cooperation” clause, which obligates the insured to cooperate with the insurer in not admitting liability or settling claims without the insurer’s consent. Similarly, policies routinely contain a “no voluntary payment” clause, which prohibits the insured from incurring costs or making payments related to the claim without the insurer’s consent except at the insured’s own expense. Recovery under an insurance policy can be forfeited if the insured violates these clauses in a material and substantial respect, particularly if the insurer is prejudiced by such action. See, e.g., *Stresscon Corp. v. Travelers Prop. Cas. Co. of America*, 2013 COA 131; *American Manuf. Mut. Ins. Co. v. Seco/Warwick Corp.*, 266 F. Supp. 2d 1259 (D. Colo. 2003).

**§ 27.5.2—Insurer’s Reservation Of Rights**

An insurance company has a duty to defend its insured so long as the claims for liability allege any facts that fall within the policy. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089-90 (Colo. 1991). However, if the insurer believes that it has no indemnification obligation, such as where the insured’s acts were intentional and outside policy coverage, the insurer may defend under a reservation of rights. “A reservation of rights permits the insurer to fulfill its duty to defend, while also allowing it to dispute its duty to indemnify in a later declaratory action, if a court finds the insured liable.” *Shelter Mut. Ins. Co. v. Vaughn*, 300 P.3d 998, 1001 (Colo. App. 2013).
If the insured receives a reservation of rights letter, the lawyer will want to explain to the client the meaning and effect of a reservation of rights, both when coverage is questioned in its entirety and where the lawsuit includes covered and potentially non-covered claims. The insured should be made aware that while the insurer is advancing defense costs, the insurer may recoup from the insured the expenses incurred if there is ultimately no coverage. Hecla Mining Co., 811 P.2d 1083. Moreover, if the case is not settled and judgment enters against the insured, the insurer may be able to obtain subsequent declaratory relief from any obligation to pay the judgment. A case in point is Vaughn, 300 P.3d 998, in which the plaintiff tried and won its negligence claim against the insured. After that jury verdict, the insurance company, which had paid defense costs under a reservation of rights, obtained a declaratory judgment that, in fact, the insured’s wrongful conduct had been intentional — not merely negligent. Accordingly, the insurer had no obligation to indemnify the insured.

At the same time, retained defense counsel must advise the insured that such counsel cannot advise the insured in regard to coverage issues between the insurer and the insured. The insured should also be told of the right to retain separate counsel to advise the insured in regard to coverage issues and to communicate with the insurer regarding settlement decisions.

§ 27.5.3—Preserving Confidentiality

Colo. RPC 1.6 generally prohibits the attorney from revealing information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized. This rule extends beyond information protected by the attorney-client privilege; it “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Colo. RPC 1.6, cmt. [3]. The duty to maintain confidentiality requires the attorney retained to represent the insured to refuse to disclose information related to the representation to the insurance company absent the insured’s consent. CBA Ethics Comm. Formal Op. 91, § II(B).

This prohibition can be problematic, however, since the insurance company usually requires periodic status reports regarding the litigation. The carrier also needs an accurate summary of the factual and legal strength of the claims against the insured so that it can determine an appropriate settlement value.

If the information to be disclosed is not detrimental to the insured’s coverage, disclosure to the carrier may be impliedly authorized by the terms of the insurance policy and therefore permitted under Rule 1.6. CBA Ethics Comm. Formal Op. 91, § II(B)(3)(b). Nonetheless, the safer course is to advise the client of the intent to disclose the information to the carrier, along with any potential ramifications of the disclosure, and give the insured
a reasonable time to object to the disclosure. *Id.* This can be accomplished by providing the insured with a draft of any status report or case evaluation before sending it to the insurer.

The process is more difficult when the information that the attorney is considering disclosing to the carrier may eliminate or reduce the insured’s coverage. Absent client consent, the attorney cannot disclose that information to the carrier. CBA Ethics Comm. Formal Op. 91, § II(B)(1). However, if the failure to disclose that information may jeopardize coverage because of the insured’s duty to cooperate in the defense of the lawsuit, the attorney must so advise the insured. *Id.* at § II(B)(3)(a). If the insured consents, the attorney should report the information to the insurer without advising the carrier of the potential effect on coverage. *Id.* If the insured does not consent, the attorney may not disclose the information but should advise the insured to seek separate coverage counsel. *Id.*

§ 27.5.4—Disagreements Over Defense Strategy

Because the insured is the client, the lawyer has a duty to communicate with the insured on the matters listed in Colo. RPC 1.4 despite the fact that the insurer is paying the bills and controlling the defense. Those matters include, among others, the means by which the insured’s objectives are to be accomplished, the status of the case, and any relevant limitations on the lawyer’s conduct. Colo. RPC 1.4(a).

At times, defense counsel may disagree with the insurer regarding case strategy in ways that impact settlement. For example, because of its interest in containing costs, the carrier may be reluctant to fund discovery or authorize the retention of expert witnesses that the lawyer believes necessary to prepare for trial and maximize the strength of the client’s settlement position.

In such cases, the lawyer’s duty is to request authority from the insurer to take the requested action and incur the related fees and costs. If the insurer declines, the attorney should explain the situation to the insured, consistent with the lawyer’s obligations under Rule 1.4. If the insured nonetheless requests the attorney to take such action, the attorney may ask the insured to fund the recommended work and should advise the insured to seek independent counsel. If the insurer and insured cannot resolve the issue, the attorney must consider whether to withdraw. CBA Ethics Comm. Formal Op. 91, § II(A)(1).

§ 27.5.5—Informing The Insured Of Settlement Offers

In the settlement context, the attorney has the ethical duty to fully advise the insured of settlement negotiations and their ramifications. *Miller,* 916 P.2d 566; CBA Ethics Comm. Formal Op. 91, § II(C)(1). The insured should be advised of all settlement offers so that the insured can protect the insured’s own interests, including “whatever rights or reputational interests may exist.” *Id.* A settlement offer should be communicated to the
client even if it is ambiguous or may not be bona fide. Failure to do so may result in suit for malpractice for the insured’s damages. See, e.g., the discussion of Miller in § 27.4.1.

The attorney’s duty to advise the client regarding settlement offers is especially important when there is uninsured exposure, such as damages sought in excess of policy limits or uncovered claims. In that situation, the insured has a direct economic interest in the success of settlement negotiations. If such issues are involved, defense counsel should so advise the insured and inform the insured that he or she has the right to retain independent counsel. If the issues of uninsured exposure are significant enough, counsel should recommend hiring independent counsel. CBA Ethics Comm. Formal Op. 91, § II(C)(1).

Similarly, a policy limit settlement demand can make the potential divergence of interests between the insured and the insurer a reality. The insured wants to avoid excess exposure; the insurer wants to minimize the settlement amount but also avoid a bad faith claim by the insured. The attorney retained to represent the insured, in the exercise of independent judgment, may advise the insured and the insurer (preferably in writing) of the attorney’s evaluation of the exposure and settlement value of the case. Id. If the insured wants the attorney to make a demand on the insurance company to pay policy limits and the attorney believes there is no basis to do so, the attorney should so advise the insured and advise the insured to seek independent counsel on that issue. Id.

27.5.6—Obtaining The Insured’s Consent To Settlement

Because there may be other ramifications to settlement of a claim, such as a medical malpractice claim against a physician, the insured may object to settlement even within policy limits. If the insurance policy gives the insured the right to refuse or approve settlement, which may be the case in professional liability policies, the attorney must obtain specific authority from the insured to make, accept, or refuse any settlement offer or demand. Id.

Defense counsel retained by the insurer is in a difficult position if the insurer wants to accept a settlement offer within policy limits but the insured objects. In that case, defense counsel must abide by the insured’s instructions, even if the insurance policy does not require the insured’s consent. Colo. RPC 1.2(a) states unequivocally: “A lawyer shall abide by a client’s decision whether to settle a matter.” See also Cross v. District Court, 643 P.2d 39, 41 (Colo. 1982) (an attorney does not have the authority to compromise and settle the claim of his or her client without the knowledge or consent of the client). Thus, since the client is the insured, it seems likely that defense counsel must respect the direction of the insured not to settle in these circumstances. See Mallen & Smith, supra at § 30.25; Jones v. Feiger, Collison & Killmer, 903 P.2d 27, 34 (Colo. App. 1994), rev’d on other grounds, 926 P.2d 1244 (Colo. 1996) (a client’s right to control settlement decisions is “absolute”
and “unqualified.”). However, the ABA has opined that even if defense counsel in these circumstances may be precluded from acting on behalf of the insurer, the carrier may exercise its contractual right to settle through either a claims person or another lawyer. ABA Formal Op. 96-403 (Aug. 2, 1996).

§ 27.6 • ATTORNEYS’ ETHICAL DUTIES REGARDING MEDIATION

In addition to the general duties outlined in § 27.3, an attorney’s ethical duties regarding mediation include continued duties of communication with the client and a modified duty of candor to the mediator. The Rules of Professional Conduct also govern an attorney acting as a mediator, including a mediator’s communications with unrepresented parties and conflicts of interest.

§ 27.6.1 — Ethical Duties Of Lawyers Representing Clients In Mediation

In the litigation context, mediation is a particular form of settlement negotiation in which negotiations are conducted through or with the assistance of a third-party neutral. An attorney representing a client in mediation is subject to the Rules of Professional Conduct. Colo. RPC 2.4, cmt. [5]. The ethical rules and best practices discussed above in regard to settlements in general apply equally in the mediation setting. The client must be adequately informed about the mediation process and the rules that apply (including confidentiality). As in other settlement contexts, the client retains the sole decision-making power regarding settlement.

The lawyer’s duties of candor to the mediator, however, differ from the lawyer’s duties to a presiding judge or arbitrator. In the course of mediation, both in the pre-mediation statement and in discussions during the mediation conference, the attorney will be communicating facts about the case to the mediator. The question may arise as to whether the attorney must disclose all known facts about the case to the mediator, whether such facts are favorable or unfavorable. The duty of candor toward the tribunal does not strictly apply in the mediation setting, since mediation, unlike binding arbitration, does not fall within the Rules’ definition of “tribunal.” Colo. RPC 3.3 and 1.0(m). An attorney’s obligation to disclose facts in mediation thus is not as extensive as in court. In the mediation setting, the lawyer’s duty of candor toward both the mediator and other parties is governed by Colo. RPC 4.1, which provides that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact to a third person or fail to disclose material information necessary to avoid assisting a client’s criminal or fraudulent act. See also Colo. RPC 2.4, cmt. [5]; Colo. RPC 4.1, cmt. [1] (“A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to in-
form an opposing party of relevant facts.”); ABA Formal Op. 06-439 (2006) (in negotiation, including mediation, “statement[s] regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation ‘puffing,’ are ordinarily not considered ‘false statements of material fact’ within the meaning of the Model Rules.”).

However, the comments to Colo. RPC 4.1 also stress that in deciding what statements to make, lawyers should be mindful to avoid criminal and tortious misrepresentation. Colo. RPC 4.1, cmt. [2]. See ABA Formal Op. 93-370 (a party’s actual bottom line or the lawyer’s settlement authority is a material fact). So while a lawyer may, in some circumstances, ethically decline to answer questions seeking information as to the client’s bottom line settlement number, for example, a lawyer may not lie in response to such an inquiry. Id.

In addition, as Colo. RPC 4.1, cmt. [1] cautions: “Omissions or partially true but misleading statements can be the equivalent of affirmative false statements.” An example is found in Kath v. Western Media, Inc., 684 P.2d 98 (Wyo. 1984). In that case, plaintiffs’ counsel learned of a “smoking gun” letter that proved the defense case. Knowing that the defendants and their lawyer were unaware of the letter, plaintiffs’ counsel rushed to accept the defendants’ settlement offer without disclosing the letter. When defense counsel learned of the letter, the defendants revoked the offer of settlement. The trial court upheld the settlement, but the Wyoming Supreme Court reversed, stating that plaintiffs’ counsel had a duty to advise the court and defense counsel of the letter. Id. at 100.

Another duty that comes into play in mediation is the lawyer’s duty under Colo. RPC 1.6 not to reveal information relating to the representation unless the client gives informed consent or the disclosure is impliedly authorized. This duty to maintain confidentiality may prevent the lawyer from disclosing certain information to either the mediator or opposing counsel if the client objects to disclosure. Thus, the best practice is to have the client review the confidential mediation statement before it is filed and to further discuss with the client in advance what information will be given to the mediator and what positions will be taken at each stage of the negotiations.

Finally, the lawyer representing clients in mediation is not bound by the ethical rules prohibiting ex parte communications with a tribunal. In fact, an effective mediation generally requires ex parte contact between the lawyer and the mediator.

§ 27.6.2—Ethical Duties Of Lawyers Acting As Mediators

Although non-attorneys may serve as mediators, attorneys who serve as mediators are bound by the Colorado Rules of Professional Conduct when acting in such capacity.
Colo. RPC 2.4 applies specifically to a lawyer serving as a third-party neutral, which is defined in Rule 2.4(b) to include service as a mediator. When the mediation involves unrepresented parties, the lawyer-mediator must inform unrepresented parties that the lawyer is not representing them. Colo. RPC 2.4(b); see also Colo. RPC 4.3 (“When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”). In addition, “[w]hen the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.” Colo. RPC 2.4(b). The explanation should include the inapplicability of the attorney-client privilege, and may require more detailed information depending upon the parties’ experience and sophistication and the subject matter involved. Colo. RPC 2.4, cmt. [3].

The attorney-mediator should also be aware of Colo. RPC 1.12, which becomes operative if a lawyer who served as mediator wants to represent one of the parties to the mediation or seek employment with a lawyer or law firm that represented a party in the mediation. Rule 1.12(b) prohibits a mediator from negotiating for employment with any person involved as a party or lawyer for a party in the mediation. In addition, under Rule 1.12(a), the lawyer may not represent a party in connection with the matter in which the lawyer served as mediator unless all parties give informed consent, confirmed in writing. If the lawyer-mediator is personally disqualified from such representation, the lawyer’s law firm is also disqualified unless the lawyer-mediator is timely and effectively screened from participation in the matter and receives no portion of the law firm’s fees from such representation (although the lawyer can receive salary or partnership share by prior independent agreement). Colo. RPC 1.12(c)(1), (3), and cmt. [4]. The personally disqualified lawyer must give prompt written notice to the parties, including a general description of the personally disqualified lawyer’s prior participation in the matter and the screening procedures to be employed, such that the parties can ascertain compliance with Rule 1.12. Colo. RPC 1.12(c)(2). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. Colo. RPC 1.12, cmt. [2].

Finally, a lawyer who serves as a mediator is subject to court rules, statutes, or other law applicable to mediators generally, and to codes of ethics governing mediators. See Colo. RPC 2.4, cmt. [2]. In Colorado, mediations are subject to the Colorado Dispute Resolution Act, C.R.S. § 13-22-301, et seq. See also S. Choquette, “Colorado Law on Mediation: A Primer,” 35 Colo. Law. 21 (March 2006). Certain codes of conduct and ethics also become applicable if the mediator voluntarily agrees to follow such codes by virtue of membership in certain professional organizations. See, e.g., Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution; the Colorado Model
Standards of Conduct for Mediators (voluntary standards endorsed by the Colorado Bar Association and other Colorado state and professional organizations); Code of Professional Conduct for Mediators — the Colorado Council of Mediators (Revised).

§ 27.7 • AVOIDING MALPRACTICE DUE TO CONDUCT DURING MEDIATION

An often heard complaint after mediation is that “it all happened so fast” or “I didn’t understand what was happening.” These concerns can result in litigation to enforce the settlement agreement and in malpractice lawsuits against the attorney. Best practices to avoid malpractice claims in this context include effective communication with the client prior to and during mediation, as well as reducing the substantive terms of a mediated agreement to writing.

§ 27.7.1—Communication With The Client Before And During Mediation

Mediation can be fast-paced, with large departures from the opening demands and offers. Likewise, terms of art such as “brackets,” “mediator numbers,” and “high-low” may be commonplace to attorneys, but sound foreign to an unsophisticated client. Another concern in mediation is that a client may claim the settlement was coerced when the mediator communicates the weaknesses of the case. Often times, these types of malpractice claims can be categorized as “buyer’s remorse.” Many lawsuits stem from the client regretting the decision to settle, believing a more favorable settlement could have been achieved had the attorney more aggressively prosecuted (or defended) the case.

As noted above, under ethical rules, lawyers owe their clients a duty to competently and diligently represent the client and keep the client informed. Substantively, during settlement and mediation, lawyers are required to provide their clients with appropriate and accurate information so that they may make an informed decision. This includes a thorough explanation of the law and how that law might be applied to the facts of the particular case so that the client is able to make an informed decision. From the outset, providing the client with realistic evaluations of the case’s merits and weaknesses, as well as a value range, will help the client to have realistic expectations.

In addition to pre-mediation communications, attorneys should consider implementing a mediation checklist. It is not feasible for an attorney to provide clients with written advice during mediation, but a checklist can remind the attorney of communications that should be given to the client, as well as provide further evidence to defend a malpractice claim. For example, a checklist might list various issues discussed, including:
• The status of discovery;
• The risks and benefits of settling the case prior to the close of discovery;
• The risks and benefits of settling prior to trial;
• The strengths and weaknesses of the case;
• The client’s right to proceed to trial;
• Estimated costs and fees should the case proceed; and
• Potential recovery and potential adverse outcome.

§ 27.7.2—Importance Of Written Agreement

If the mediation results in a resolution of the parties’ dispute, a final written document, signed by all parties and approved by the attorneys, should be prepared. Under C.R.S. § 13-22-308, such an agreement may be filed as a stipulation and entered as an order of the court if the agreement is “reduced to writing and signed by the parties and their attorneys.” In many cases, however, the parties contemplate the preparation and execution of a more formal settlement agreement and release and plan to file with the court only a bare-bones stipulation of dismissal. Nonetheless, to ensure the enforceability of the mediated settlement, the best practice is for the parties and attorneys to sign a written document at the conclusion of the mediation setting forth the material terms of the settlement and specifying that it is intended to be a binding and enforceable agreement.

The Colorado Supreme Court case of Yaekle v. Andrews, 195 P.3d 1101 (Colo. 2008), illustrates the importance of such a signed agreement. In Yaekle, the Colorado Supreme Court addressed the enforceability and admissibility of writings prepared at the conclusion of a mediation in the context of two consolidated cases. In the first case, at the conclusion of mediation the parties had signed a document entitled “Basic Terms of Settlement,” which included an acknowledgement that the parties understood the document to be “a binding enforceable agreement.” The document contemplated the preparation of further, formal settlement documents that the parties never executed. In the second case, at the end of a 13-hour mediation session, the mediator outlined the apparent terms of settlement but neither party signed the agreement.

The court first addressed § 13-22-308(1) of the Colorado Dispute Resolution Act, entitled “Settlement of Disputes,” which provides:

If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.
The court concluded that while that section provides a means by which an agreement reached in mediation may be presented to a court and made an enforceable court order, it is not the exclusive means by which an agreement reached in mediation may be enforced. Instead, the court found that the common law of contracts, including the principles allowing for the formation of contracts without the signatures of the parties bound by them, remained intact and was not abrogated in the mediation context by C.R.S. § 13-22-308. Id. at 1107-08.

Nonetheless, the presence of a written agreement signed by the parties in the first case and the absence of such an agreement in the second case was significant in Yaekle, primarily because of the statutory confidentiality protection afforded to mediation communications. As the court explained:

[C.R.S. § 13-22-307] protects all mediation communications as confidential. “Mediation communications” are in turn defined as “any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding.” Explicitly excepted from this definition are written agreements to enter into mediation and any “final written agreement . . . which has been fully executed.” Importantly, protected mediation communications are generally inadmissible as evidence in later judicial proceedings. Id. at 1106.

Because the agreement in the first case had been signed by the parties as a binding, enforceable agreement, the court found that it was not a confidential mediation communication within the meaning of these statutory provisions. While the document had not been presented to and made an order of the court under § 13-22-308, it could be considered as competent evidence that the parties had in fact reached a settlement. Combined with other post-mediation communications, the document supported the court’s finding of a binding settlement contract. Id. at 1110-11.

In the second case, however, the mediator’s list of settlement terms, which was not signed by the parties and attorney, was not a final executed writing; it remained a confidential mediation communication and could not be considered by the court as evidence of settlement. Accordingly, and in the absence of other evidence of contract formation, the court found that no settlement agreement had been reached. Id. at 1112; see also GSL of ILL, LLC v. Kroskob, 2012 U.S. Dist. LEXIS 266 (D. Colo. Jan. 3, 2012) (finding that parties came to a full and complete meeting of the minds over the essential terms of their contract despite absence of signed written agreement following mediation where counsel read
Thus, if the parties reach an agreement in mediation, the substantive terms of the resolution should be recorded in a final written agreement, signed by the parties and approved by the attorneys before the mediation session is adjourned.

Practice Pointer

Educate the client about the legal issues involved in the dispute and about the mediation process in general. Understand the client’s goals prior to mediation and provide candid advice to manage the client’s expectations. Consider using a mediation checklist to document advice given to the client during mediation regarding the risks, benefits, and alternatives to the settlement. Prepare the client to speak with the mediator and explain your negotiation strategy. If an agreement is reached, be sure to get it in writing and signed by all parties and their attorneys before they leave the room.

§ 27.8 • SPECIAL ISSUES INVOLVED IN SETTLEMENT

Certain particular situations arise with some frequency in the settlement context and are addressed briefly below.

§ 27.8.1—Agreements Limiting Attorney’s Right To Practice

In settlement of mass tort or other actions, a corporate defendant may want to ensure that counsel for the plaintiff will not bring further lawsuits on behalf of other clients against the same defendant or its affiliates. However, under Colo. RPC 5.6(b), a lawyer may not “participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.” As stated in Rule 5.6, comment [2], that rule “prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.” Thus Rule 5.6 not only bars defense counsel from proposing such a settlement term, but it also prohibits plaintiff’s counsel...
from agreeing to such a term. According to CBA Ethics Committee Formal Opinion 92, the prohibition also extends to other restrictions that impede the lawyer’s ability to represent effectively other claimants against the settling defendant, such as an agreement not to subpoena specified documents or not to use certain expert witnesses in future cases; an agreement imposing forum or venue limitations in future cases brought by the settling lawyer; or an agreement prohibiting the lawyer’s referral of potential clients to other counsel. CBA Ethics Comm., Formal Op. 92, “Practice Restrictions in Settlement Agreements” (June 19, 1993). “[T]he test of the propriety of a settlement provision under Rule 5.69(b) is whether it would restrain a lawyer’s exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation.” Id.

However, other settlement provisions affecting a lawyer’s conduct may be permissible. Id. Accordingly, in appropriate circumstances a lawyer may enter into a settlement agreement conditioned upon nondisclosure of the terms and amount of the settlement, may ask plaintiffs’ counsel to state that he or she has no present intention of filing suit against the defendant in similar cases, and may require a lawyer to return documents obtained in discovery as a condition of settlement. Id. See also ABA Formal Op. 00-417, “Settlement Terms Limiting a Lawyer’s Use of Information” (April 7, 2000) (barring settlement term that would prohibit lawyer from using information learned in the current representation in any future representation against the same or a related opposing party, but permitting term that limits or prohibits disclosure of information obtained during the representation).

§ 27.8.2—Aggregate Settlements

Colo. RPC 1.8(g), which supplements the more general conflict of interest rule, Colo. RPC 1.7, sets forth the lawyer’s obligation when settling the claims of two or more clients. Colo. RPC 1.8(g) provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 1.8, cmt. [13] expands upon the reasoning behind the rule:

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed.
before undertaking the representation, as part of the process of obtaining the clients’ informed consent. In addition, Rule 1.2(a) protects each client’s right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Rule 1.8 and comment 13, taken together, emphasize not only the importance of informed consent at the time the lawyer-client relationship is formed, but also the nature of disclosure and consent required at the time of settlement.

Before representing multiple clients in the same case or against the same defendants, the lawyer should discuss the risks of common representation with the clients, including the potential for differences among the clients in their willingness to make or accept an offer of settlement and the manner in which such differences will be resolved. The clients’ understanding of such risks and the method of resolving such conflicts should be confirmed in a signed fee agreement. In addition, the lawyer should be careful to comply with the Colorado Rules Governing Contingent Fees, Chapter 23.3 of the Colorado Rules of Civil Procedure, if the representation of multiple clients will involve a contingent fee.

When considering an aggregate settlement, the ABA Standing Committee on Ethics and Professional Responsibility has stated that Rule 1.8(g) requires a lawyer to disclose, at a minimum, the following information to the clients for whom or to whom the settlement proposal is made at the time of the proposal:

- The total amount of the aggregate settlement or the result of the aggregated agreement.
- The existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement.
- The details of every other client’s participation in the aggregate settlement or aggregated agreement, whether it be their settlement contribu-
tions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).

- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer’s fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.
- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

ABA Formal Op. 06-438, “Lawyer Proposing to Make or Accept an Aggregate Settlement or Aggregated Agreement” (Feb. 10, 2006).

Under Rule 1.8(g), each client must give informed consent to the aggregate settlement in a writing signed by the client. The extent to which the disclosure required for such informed consent can be made in advance of the settlement offer is not clear. In a case decided before the adoption of the Model Rules, the United States Court of Appeals for the Tenth Circuit held that a fee agreement that allowed the majority of clients to govern the rights of the minority and approve a settlement without the minority’s consent was “viological of the basic tenets of the attorney-client relationship in that it delegate[d] to the attorney powers which allow[ed] him to act not only contrary to the wishes of his client, but to act in a manner disloyal to his client and to his client’s interest.” *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894-95 (10th Cir. 1975); accord *Abbott v. Kidder Peabody & Co., Inc.*, 42 F. Supp. 2d 1046, 1051 (D. Colo. 1999). The court found it “essential that the final settlement be subject to the client’s ratification,” particularly in a non-class action case. *Id.* at 895. The safest practice, therefore, is to discuss these arrangements with the client in advance, set them forth in the signed fee agreement, disclose them again at the time of the settlement offer, and have the client consent to the settlement in writing.

§ 27.8.3—Settlement Involving Medicare Or Medicaid Liens

Counsel representing plaintiffs, defendants, and liability insurers alike should be aware that Medicare’s and Medicaid’s right to reimbursement may pose a risk of future liability to clients and malpractice exposure to attorneys. Broadly speaking, the two separate statutes — the Medicare Secondary Payer and Medicaid Secondary Payer acts (42 U.S.C. § 1395y; 42 U.S.C. §1396a(a)(25)) — provide that Medicare and Medicaid are entitled to reimbursement if another party is liable for a beneficiaries’ medical bills (such as a tortfeasor, insurer, or another third party). These agencies “conditionally” pay medical bills
and are entitled to reimbursement if a third party is liable for the injuries. The right to reimbursement poses a risk that settling parties will be exposed to future liability after settlement if they do not reserve settlement proceeds to cover the Medicare/Medicaid medical payments. Moreover, Medicare’s and Medicaid’s lengthy approval process of settlements and inconsistent enforcement of reimbursement rights can cause excessive delays and higher costs. For practitioners, settlement with Medicare or Medicaid beneficiaries raises concerns regarding: (1) reporting requirements; (2) reimbursing Medicare or Medicaid; and (3) exposure to fines for noncompliance.

The Medicare Secondary Payer Act (MSP) provides that Medicare must be reimbursed when a Medicare beneficiary receives payment for injuries covered by Medicare and also covered by a “primary” insurance plan. “The MSP assigns primary responsibility for medical bills of Medicare recipients to private health plans when a Medicare recipient is also covered by private insurance. These private plans are considered ‘primary’ under the MSP and Medicare acts as the ‘secondary’ payer responsible only for paying amounts not covered by the primary plan.” Fanning v. United States, 346 F.3d 386, 389 (3rd Cir. 2003). Medicare’s reimbursement right accrues when a tortfeasor pays for an expense that Medicare initially paid, whether by settlement, judgment, or “other means.” 42 U.S.C. § 1395y(b)(2)(B)(ii).

First, the MSP includes reporting requirements. Section 111 of the MSP mandates that no fault, liability, and workers’ compensation insurers register as a Responsible Reporting Entity (RRE) with the Centers for Medicare & Medicaid Services when the insurer first anticipates making payment to a Medicare beneficiary that will trigger reporting. Thereafter, the MSP requires RREs to report resolution of Medicare beneficiary claims. 42 U.S.C. § 1395y(b)(8).

Second, the MSP requires that settling parties reimburse Medicare within 60 days of payment. Under the MSP Act, any Medicare beneficiary/claimant who receives payment from a “primary plan” must reimburse Medicare within 60 days from the beneficiary’s receipt of payment from that primary plan. 42 C.F.R. § 411.24 (h); 42 U.S.C. § 1395y(b)(2)(A). Notably, any payment by a tortfeasor (with the exception of payment under a no-fault clause in a non-automobile policy) constitutes a payment to which Medicare may have an entitlement, regardless of whether there has been a determination of liability. 42 U.S.C. § 1395y(b)(2)(B)(ii). If the beneficiary does not repay Medicare within 60 days, the tortfeasor “must” reimburse Medicare “even though it has already reimbursed the beneficiary or other party.” 42 C.F.R. § 411.24 (i).

Third and finally, the MSP imposes significant fines for failure to report or reimburse, including double the amount initially paid by Medicare. If Medicare is forced to
initiate suit to recoup its conditional payment, then tortfeasors and beneficiaries may be liable for interest as well as damages up to double the amount of Medicare’s conditional payments. 42 U.S.C. §§ 1395y(b)(2)(B)(i) and (iii); 42 C.F.R. §§ 411.24(c)(2) and (h).

The Medicaid Secondary Payer Act works substantially similarly to the MSP, with the exception that the Medicaid Act provides a remedy for state recovery of medical payments to Medicaid beneficiaries. See 42 U.S.C. § 1396a(a)(25); C.R.S. § 25.5-4-301. One added caveat, under a yet-to-be-enacted provision of the Bipartisan Budget Act of 2013: state agencies have the right to recover their costs from a Medicaid beneficiary’s entire liability settlement, rather than only those settlement proceeds designated as compensation for medical expenses. See § 202(b) of the Bipartisan Budget Act of 2013 (H.J. Res. 59). In 2014, Congress delayed implementation of this provision until October 1, 2016. See § 211 of the Protecting Access to Medicare Act of 2014 (H.R. 4302).

Practice Pointer
Medicare’s/Medicaid’s reimbursement rights may pose obstacles to settlement as well as potential liability to the client, which, if not carefully navigated, can expose an attorney to liability for lost settlement opportunity or due to the imposition of fees. If a defendant pays a settlement and assumes that the beneficiary will satisfy the lien, the defense practitioner takes the risk of exposing his or her client to having to repay Medicare at double the reimbursement amount, with interest, if the Medicare beneficiary fails to repay the agency. For a settling plaintiff, failure to involve Medicare promptly could result in lost settlement opportunity and less bargaining power in settlement negotiations. If a settlement involves a Medicare or Medicaid beneficiary, counsel should take care to familiarize themselves and their clients with the reporting and reimbursement requirements early in the case.

§ 27.8.4—Settlement Of Legal Malpractice Claims
Particular safeguards are ethically required when a lawyer seeks to negotiate and enter into a release and settlement of a legal malpractice claim against the lawyer. Colo. RPC 1.8(h)(1) prohibits a lawyer from making an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement. In regard to malpractice claims that arise during or after the representation, Rule 1.8(h)(2) provides that a lawyer may not settle an actual or potential claim for malpractice liability with an unrepresented or former client unless the client is “advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.” Such restrictions apply to all lawyers associated in the settling lawyer’s firm. Colo. RPC 1.8(k). See also CBA Ethics Committee Formal Opinion 85, outlining that such a settlement requires that: (1) the lawyer
disclose to the client the facts and circumstances underlying the client’s potential malpractice claim against the lawyer and the nature and extent of the claim; (2) the lawyer advise the client, preferably in writing, to retain independent counsel to represent the client in the negotiation and consummation of the settlement and release; (3) the terms of the settlement be fair and reasonable; and (4) the settlement and release relate only to past, and not future, conduct of the lawyer. CBA Ethics Comm., Formal Op. 85, “Release and Settlement of Legal Malpractice Claims” (May 19, 1990, addenda issued 1995 and 1998).

§ 27.8.5—Linking Settlement To Other Proceedings

Under Colo. RPC 4.5(a), “A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.” Under this rule, the lawyer also may not threaten to bring such charges to coerce a settlement. See Colo. RPC 4.5, cmt. [2] (“Threatening to use, or using the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process . . . ”).

The Ethics Committee of the Colorado Bar Association has also opined that it is unethical for an attorney to condition settlement of a civil action for malpractice against his or her lawyer-client upon the withdrawal by the plaintiff of a grievance complaint. CBA Ethics Comm., Formal Op. 56, “Settlement of Lawyer Malpractice, Withdrawal of Grievance Complaint” (March 22, 1980, addenda issued 1995 and 1998). An exception is allowed where a grievance is resolved pursuant to the grievance mediation process established under C.R.C.P. 251.13, as “the resolution of threatened or pending civil disputes between lawyer and former client is appropriate and encouraged as part of the mediation process.” Id. In that situation, an attorney may seek and obtain the resolution of all pending or contemplated civil disputes, including legal fee and malpractice disputes, as part of a settlement reached in a mediation conducted pursuant to C.R.C.P. 251.13.

§ 27.8.6—Client’s Consent To Settlement On The Record

In certain circumstances, particularly in family law, the terms of the settlement and the client’s acknowledgement that the terms of the settlement are fair, reasonable, and voluntary may be made a part of the court record. Indeed, in some circumstances, unless a client avows under oath that a settlement is fair, reasonable, and voluntary, the settlement will be rejected.

Where a client’s voluntary acceptance of settlement has been acknowledged on the record, some courts have concluded such consent bars a subsequent malpractice action claiming the terms of the settlement was unfair. For example, in Puder v. Buechel, 874 A.2d 534 (N.J. 2005), the attorney represented the client regarding a marital settlement.
After the settlement was entered, the client terminated her first attorney and retained a second attorney to vacate the settlement. A hearing was held regarding the settlement and the client accepted the settlement with minor modifications. During the hearing, the client testified that the agreement was acceptable and voluntarily. Id. at 538. The client then filed a malpractice lawsuit against her first attorney, claiming she had no choice but to accept the settlement because the underlying court would have enforced the agreement against her. The New Jersey Supreme Court affirmed the trial court’s dismissal of the lawsuit, concluding that the client was “bound by her representation to the trial court that the divorce settlement agreement was ‘acceptable’ and ‘fair.’ Those statements clearly reflect [the client’s] satisfaction with the resolution of her divorce, and, therefore, preclude her malpractice claim against her former counsel.” Id. at 539.

The Pruder case illustrates that a client’s acknowledgement on the record to the terms of a settlement agreement as fair and knowingly made could protect an attorney from a subsequent malpractice case or, at a minimum, provide a strong defense in such a case. Certainly, in many circumstances, it will not be practicable to place the client’s acknowledgement on the record. Practitioners should consider, if appropriate, having a client’s consent to settlement as part of the court record.

§ 27.8.7—Attorney Agreeing To Hold Funds Or Act As Escrow Agent

Sometimes a settlement agreement contemplates that one of the attorneys will hold the settlement funds in the attorney’s trust account, for example, until the occurrence of specified conditions. In that circumstance, the attorney can unwittingly assume the role of an escrow agent. In such a case, a California court cautioned that the attorney who agrees to act as escrow agent has duties that supersede the attorney’s duties to zealously represent the client. The court stated:

Indeed, it is both useful and commonplace for attorneys to act as escrow holders with respect to closing documents, settlement agreements, releases, funds and other items. However, we caution that an attorney should be aware of the duties of an escrow holder before agreeing to act as one. When an attorney faces conflicting demands from his or her own client and another party to the escrow, the attorney cannot favor his or her own client and completely disregard the rights of the other party, to whom he or she owes a duty as an escrow holder. If the competing demands are not resolved, the law provides the attorney with a mechanism to avoid both the area between the rock and the hard place and tort liability, i.e., an interpleader action.
Thus the attorney who agrees to hold settlement funds in escrow should ensure that the terms of escrow and the conditions upon which the funds are to be released are clear and agreed to in writing by all parties, particularly the lawyer’s client.

§ 27.8.8—Disbursement Of Settlement Funds

An attorney must hold “property of clients or third persons that is in the lawyer’s possession . . . separate from the lawyer’s own property.” Colo. RPC 1.15(a). Upon receipt of settlement funds, an attorney should: (1) deposit funds in a trust account; (2) promptly distribute funds to the client and third parties, where there is an undisputed interest in the funds; and (3) preserve any disputed portions of the settlement funds until the dispute is resolved. If an attorney’s fee is undisputed, an attorney may distribute payment of fees from the trust account to the operating account. Id.

When entitlement to the settlement funds is disputed, an attorney must maintain the settlement funds separately in his or her trust account until the dispute is resolved. In 2014, the Colorado Rules of Professional Conduct regarding safeguarding client property and maintaining client funds in trust accounts were substantially revised. See generally Colo. RPC 1.15A through E (June 17, 2014). Notably, with respect to disbursement of settlement funds, Rule 1.15A now specifies that where there is a dispute regarding entitlement to the settlement funds, “the property shall be kept separate by the lawyer until there is a resolution of the claims.” Colo. RPC 1.15A(c) (emphasis added). Previously, the Rule specified that disputed property must be maintained separately only until “an accounting and severance of their interests.” Colo. RPC 1.15(c) (2013).

In addition to promptly disbursing the proceeds to the client, an attorney may have an obligation to distribute proceeds to third parties. This issue most frequently arising in the context of a personal injury settlement where the settlement proceeds are subject to a Medicare or Medicaid lien. See CBA Ethics Comm., Formal Op. 94, “Ethical Duties Relating to a Client’s Property Held by a Lawyer in Which a Third Party Has an Interest” (Nov. 20, 1993; addendum issued 2006). The CBA Ethics Committee has concluded that if a third party has an undisputed interest in the proceeds based upon a statutory lien, contract, or court order, the lawyer should distribute the funds to the third party in accordance with the terms of the lien, contract, or court order. Id. However, if the amount or the validity of the third-party interest is disputed, then the lawyer should distribute the undisputed portion of the proceeds to the client and hold the disputed portion in the trust account, pending resolution of the dispute. Id. Even where a client directs an attorney not to disclose the existence of settlement funds to the third party, Colo. RPC 1.15(b) requires the lawyer to distribute the funds in accordance with the statutory lien or court order, notwithstanding the client’s wishes. Id.; Colo. RPC 1.15(b). If the client and third party are unable to resolve
the dispute regarding the amount or validity of the interest in the proceeds, then the attorney should interplead the disputed funds for court resolution.

§ 27.8.9—Tax Consequences Of Settlement

While a detailed discussion of the tax consequences of a settlement are beyond the scope of this chapter, a practitioner should understand generally the tax consequences of a settlement or refer the client to a tax attorney or accountant, if appropriate. Broadly speaking, the tax consequences of a tort settlement are governed by two general rules of the Internal Revenue Code (I.R.C.). First, § 61(a) states that a taxpayer’s gross income includes all income, from any source, except where otherwise stated in the IRC. I.R.C. § 61(a). Second, the Internal Revenue Code excludes certain proceeds from gross income. The most common exclusions from gross income are:

- Workers’ compensation disbursements;
- Settlement proceeds related to personal physical injuries; and
- Settlement proceeds related to accident or health insurance for personal injuries or sickness.

I.R.C. § 104(a)(2). In addition, it may be advisable to recite in the settlement documents that each party has had the opportunity to consult with tax advisors and is assuming no responsibility for the tax consequences of the settlement to the other parties.

§ 27.8.10—Practice-Specific Settlement Concerns

Other sections of this treatise address some practice area-specific settlement considerations. For further practice-specific analysis, see:

- Class action settlements (see §§ 33.6 through 33.6.3);
- Employment litigation settlements (see §§ 36.9.1 through 36.9.2); and
- Workers’ compensation cases (see § 42.4.4).

§ 27.9 • CONCLUSION

Practitioners should take heart that malpractice cases alleging inadequate settlement are difficult cases to prosecute successfully because the plaintiff must prove that the alleged misconduct affected the outcome of the case. The Rules of Professional Conduct provide some guidance on what is expected of members of the bar. Attorneys are expected to have and apply the requisite knowledge, skill, thoroughness, and preparation for the matter. Reasonable diligence is required, which would include preparing for and providing
advice regarding a settlement. Great emphasis is placed on keeping the client reasonably informed of the progress and status of his or her matter. To avoid malpractice claims, reasonable efforts should be made to advise the client of the advantages and disadvantages of the settlement. Preferably, this communication should be in writing.

1. Colorado Rules 1.15B through E have no counterpart in the Model Rules of Professional Conduct. These Rules contain extensive provisions addressing operating, trust, and fiduciary accounts, accounting, records retention, and firm dissolution. With the 2014 amendments, structurally the former Rule 1.15 was divided into five separate rules. See Colo. RPC 1.15A through E (June 17, 2014). In addition, newly adopted Rule 1.15E provides for interest rate comparability for Colorado Lawyers Trust Account Foundation (COLTAF) accounts. Colo. RPC 1.15E(c)(6) through (12).