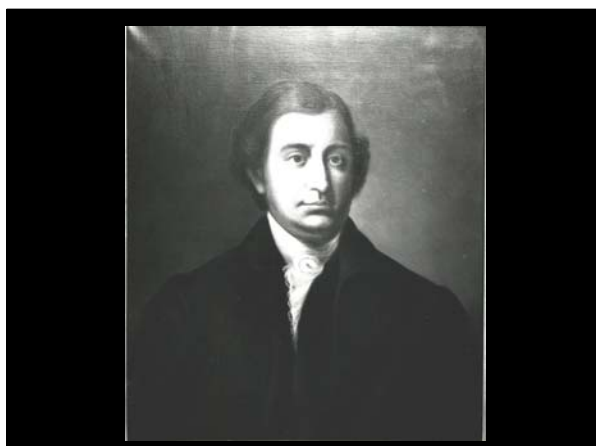
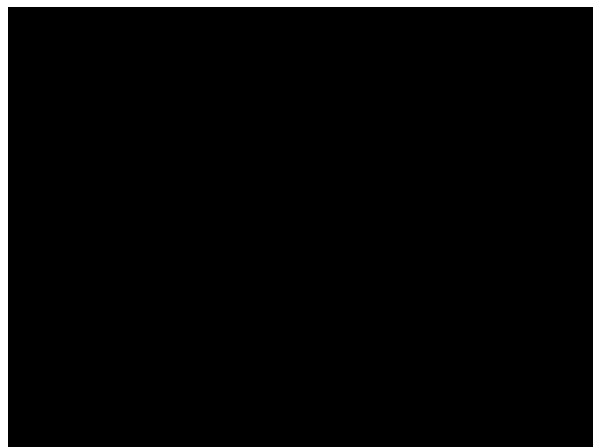


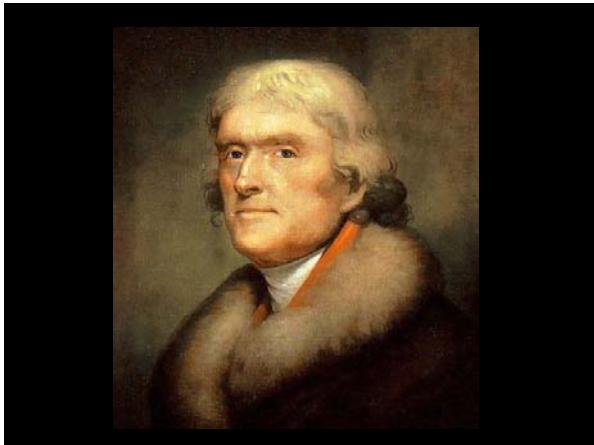
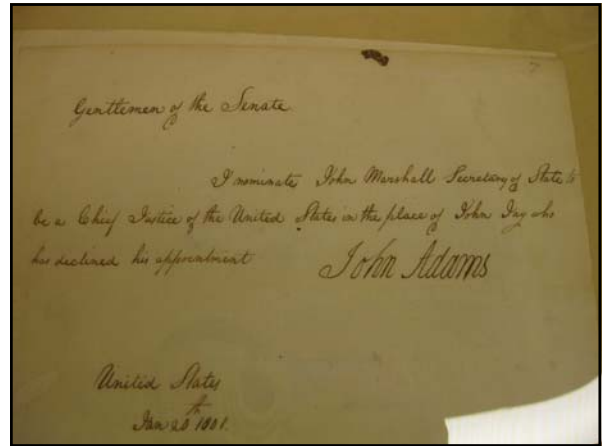
**GUARDING THE GUARDIANS:  
Managing Ethics and Conflicts  
for the Municipal Lawyer**

Troy R. Rackham  
Fennemore Craig, P.C.

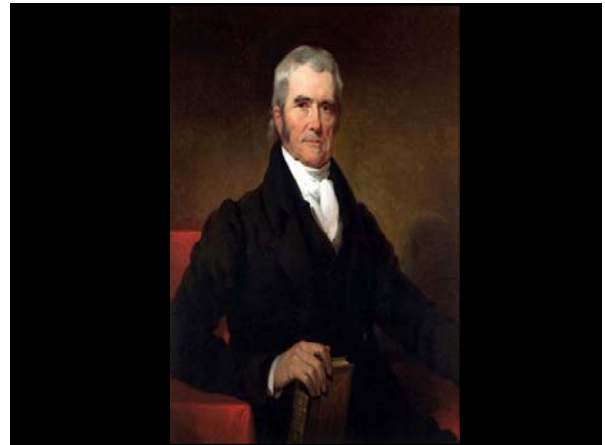
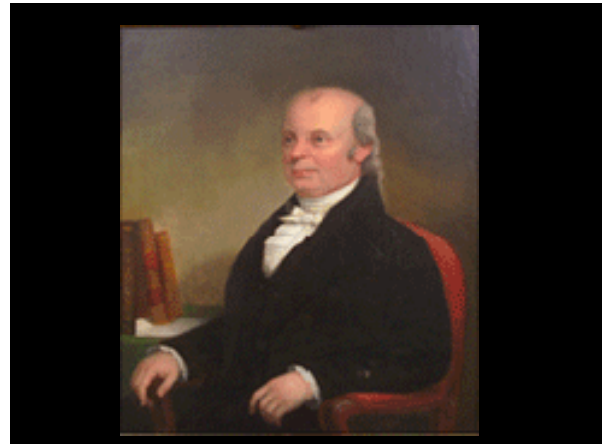
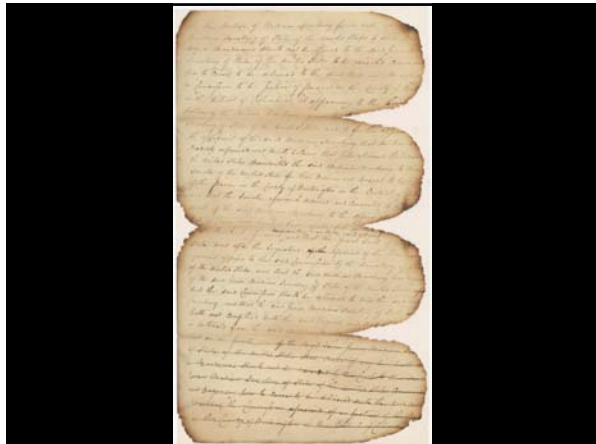
# Hypotheticals



How does this  
government lawyer  
resolve that conflict?



- "Quic quid capit intercludi ab officio"
- "Do whatever it takes to make sure Mr. Marbury does not get to assume office."



- It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.
- So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.



- Gets a job with Adams & Associates, P.C.
- Takes his “files” with him
- Wants to represent clients aggrieved by Jefferson Administration
- Knows what pushes President’s buttons
- Knows who the key players are in the President’s administration
- Lincoln’s clients hire him because of a perceived material advantage

### *Jefferson v. Lincoln*



#### Jefferson’s Claims v. Lincoln:

- Competence (RPC 1.1)
- Confidentiality (RPC 1.6)
- Conflict of interest (RPC 1.7 & 1.9)
- Improperly negotiated employment with opposing party (RPC 1.11(d)(2)(ii))
- Failure to return client files (RPC 1.16 & RPC 1.16A)
- Improperly made statements to press (RPC 3.6)
- Used embarrassing techniques and failed to return inadvertently disclosed documents (RPC 4.4)
- Failed to delineate his legal services from his lobbying or law-related services (RPC 5.7)
- Was dishonest and deceptive (RPC 8.4)

#### Jefferson’s Claims v. Adams:

- Failed to supervise (RPC 5.1)
- Aided and abetted Lincoln’s breaches (RPC 8.4(a))
- Stated or implied an ability to influence the government (RPC 8.4(e))
- Was dishonest and deceptive (RPC 8.4(c))

## CLIENT RULES

### Client Rules

- Who is the client?
  - “The People”
  - Government?
  - Agency?
  - Individual elected official?
  - Appointee?
- Identifying who the client is (and is not) is critical

### Colo. RPC 1.13

- Who is the client?
  - Colo. RPC 1.13(a): “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
  - Suggests client is the “government” or “agency”

### Colo. RPC 1.13

- RPC 1.13 cmnt [9]
- The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules....
- Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule.
- Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.
- In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation.

### Colo. RPC 1.1

- “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- Discipline uncommon.

### Colo. RPC 1.6

- **“(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”**
- **Broader than attorney-client privilege**
- **Includes any information relating to the representation, regardless of the source**

### Colo. RPC 1.6

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to reveal the client’s intention to commit a crime and the information necessary to prevent the crime;
  - (3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
  - (4) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

### Colo. RPC 1.6

- (5) to secure legal advice about the lawyer’s compliance with these Rules, other law or a court order;
- (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
- (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or
- (8) to comply with other law or a court order.

Colo. RPC 1.7

Concurrent conflicts of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Colo. RPC 1.7

- Examples of material limitation conflicts:
  - Multiple clients
  - Lawyer's service as a trustee, executor or corporate director
  - Lawyer obtains information from consultation with colleague that prevents the lawyer from being fully objective or fully cross examining witness (*Liebnow*)
  - Probity of a lawyer's own conduct in a transaction is in serious question
  - When a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent

Colo. RPC 1.7

Clients can waive conflict for "consentable" conflicts:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Colo. RPC 1.9

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a **substantially related** matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Colo. RPC 1.9

- Cmmt [3]:
- "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

Colo. RPC 1.9

- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Colo. RPC 1.11

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a **public officer or employee of the government**:
  - (1) is subject to Rule 1.9(c); and
  - (2) shall not otherwise represent a client in connection with a matter in which the lawyer **participated personally and substantially** as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- Applies to lawyer whether the lawyer is serving as a lawyer or otherwise
- Lawyer must have personally participated in the matter
- Lawyer's participation must be substantial

Colo. RPC 1.11

- Cmnt [3]:
  - Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

Colo. RPC 1.11

- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the government agency to enable the government agency to ascertain compliance with the provisions of this Rule; and
  - (3) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

Colo. RPC 1.11

- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is **confidential government information** about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.
- The term "confidential government information" means "information that has been obtained under governmental authority and which, at the time this Rule is applied, **the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public**. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Colo. RPC 1.11

## Cmnt [5]:

- "When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules."

Colo. RPC 1.11

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
  - (1) is subject to Rules 1.7 and 1.9; and
  - (2) shall not:
    - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
    - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b)....

# CLIENT FILES

## Colo. RPC 1.16

- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.
- The lawyer may retain papers relating to the client to the extent permitted by other law.
- 

## Colo. RPC 1.16

- Whose files?
  - RPC 1.0(c) "Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
  - Cmnt [3]: With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

## Colo. RPC 1.16

- What files must be surrendered?
  - "[T]he papers and property to which the client is entitled are not necessarily defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access to the files related to the representation as a means to enable continuing protection of the client's interests." *CBA Ethics Op. 104*.
  - Originals and copies of other documents possessed by the lawyer relating to the representation that the client reasonably needs to protect the client's interests
  - "Personal Attorney Work-Product"?
    - Drafts and research generally not personal attorney work product
    - Notes and administrative documents
    - Generally not required to surrender to client
    - Err on the side of surrendering

## Colo. RPC 1.16

- What about CORA?
  - All public records shall be open for inspection unless specifically excepted by law. C.R.S. § 24-72-201.
  - A public official has no authority to deny any person access to public records absent a specific statute permitting the withholding of the information requested. *Denver Publ'g Co. v. Dreyfus*, 184 Colo. 288, 520 P.2d 104 (1974).
  - Attorney-client privileged records not subject to CORA. *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 467 (Colo. App. 2003).
  - Common interest privilege may also bar disclosure of documents otherwise subject to CORA. *Id.*
  - Calling the documents "confidential" is not enough. See *Land Owners United, LLC v. Waters*, 293 P.3d 86, 97 (Colo. App. 2011); *International Brotherhood of Electrical Workers v. Denver Metropolitan Major League Baseball Stadium District*, 880 P.2d 160, 167 (Colo. App. 1994).

# PUBLICITY



### Colo. RPC 3.6

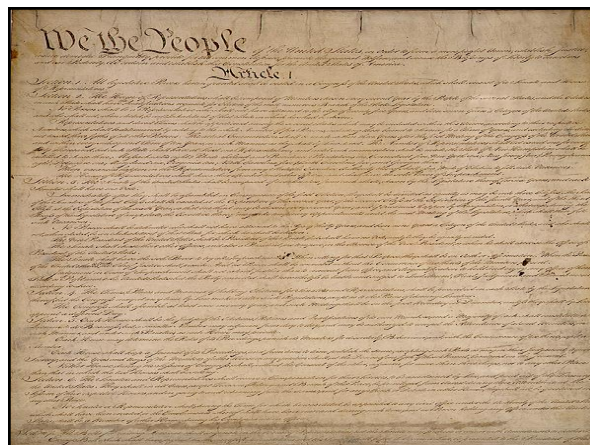
- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

### Colo. RPC 3.6

- (b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:
  - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
  - (2) information contained in a public record;
  - (3) that an investigation of a matter is in progress;
  - (4) the scheduling or result of any step in litigation;
  - (5) a request for assistance in obtaining evidence and information necessary thereto;
  - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest

### Colo. RPC 3.6

- (c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).



## RESPECTING RIGHTS OF OTHERS

### Colo. RPC 4.4

- (a) **In representing a client**, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
- (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

## LAW RELATED SERVICES

### Colo. RPC 5.7

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
  - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
  - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

### Colo. RPC 5.7

- What is a law related service?
- “[S]ervices that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”
- Lobbying
- Title insurance
- Financial planning
- Trust services
- Counseling
- CBA Ethics Op. 98

## SUPERVISION

### Colo. RPC 5.1

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- Includes supervisors in government law offices

### Colo. RPC 5.1

- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
  - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### Colo. RPC 5.2

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

# CATCH ALL

### Colo. RPC 8.4

- It is professional misconduct for a lawyer to:
  - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
  - (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
  - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice;

### Colo. RPC 8.4

- It is professional misconduct for a lawyer to:
  - (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
  - (g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or
  - (h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.

### Colo. RPC 8.4

- RPC 8.4 applies regardless of whether lawyer is practicing law or providing legal services
- RPC 8.4 violations can lead to significant discipline