

2008 FAMILY LAW INSTITUTE

AUGUST 9, 2008

SESSION 17: "I DIDN'T DO IT!"

- Update on Ethics opinions and Rules of Professional Conduct
- Fiduciary Duties and Conflicts of Interest
- Avoiding Malpractice Pitfalls

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A. RULES OF PROFESSIONAL CONDUCT:

2007-2008 UPDATE:

Worth reading: *The New Colorado Rules of Professional Conduct: A Survey of the Most Important Changes* by Marcy G. Glenn, Michael H. Berger, *The Colorado Lawyer*, August 2007, Vol. 36, No. 8, Page 71. The New Colorado Rules of Professional Conduct can be found at [www.cobar.org](http://www.cobar.org)

The new rules address:

- definition of zealousness (preamble);
- informed consent of client (Rule 1.0);
- changes in lawyer fees (Rule 1.5);
- confidentiality (Rule 1.6);
- client consent to conflicts (Rule 1.7);
- definition of prospective client (Rule 1.18);
- disclosure of third party neutral (Rule 2.4);
- remedial measures regarding false material evidence and criminal or fraudulent conduct (Rule 3.3);
- definition of false statements (Rule 4.1);
- disclosure of material facts to third persons (Rule 4.1);
- receipt of confidential information (Rule 4.4).

B. SELECTED RULES WITH FAMILY LAW APPLICATIONS:

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter 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.

Rule 2.4. Lawyer Serving As Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When 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.

#### Rule 4.1. Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. 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. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

#### Rule 4.4. Respect For Rights of Third Persons

(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.

C. ETHICS OPINIONS:

2007-2008 UPDATE:

Ethics Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts, 02/24/07. The Colorado Rules of Professional Conduct prohibit a lawyer from participating in Collaborative Law so long as a contractual obligation exists between the lawyer and the opposing party whereby the lawyer agrees to terminate the representation of the client. Absent such a contractual obligation, a lawyer may participate in the process referred to as Cooperative Law provided that the lawyer complies with all of the Rules of Professional Conduct.

Ethics Opinion 118: Handling of Funds Disputed After Proper Withdrawal from Trust Account, 02/12/08. If a lawyer withdraws funds from the lawyer's trust

account in good faith, in payment of a statement in accordance with the lawyers' agreement with the client, the withdrawal is proper under Colo. RCP 1.5 (f). If the client then disputes the lawyer's fee, the question is whether the withdrawn funds can be characterized as property of the client simply because the client subsequently disputes the lawyer's fee.

Ethics Opinion 119: Disclosure, Review, and Use of Metadata, Adopted May 17, 2008. A Sending Lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against the disclosure of metadata containing Confidential Information. What constitutes reasonable care will depend on the facts and circumstances. The duty to provide competent representation requires a Sending Lawyer to ensure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata if necessary. Within a law firm, a supervising lawyer has a duty to ensure that appropriate systems are in place so that the supervising lawyer, any subordinate lawyers, and any nonlawyer assistants are able to control the transmission of metadata.

A Receiving Lawyer who receives electronic documents or files generally may search for and review metadata. If a Receiving Lawyer knows or reasonably should know that the metadata contain or constitute Confidential Information, the Receiving Lawyer should assume that the Confidential Information was transmitted inadvertently, unless the Receiving Lawyer knows that confidentiality has been waived. The Receiving Lawyer must promptly notify the Sending

Lawyer. Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the Sending Lawyer or the Receiving Lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver.

If, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata.

D. SELECTED OPINIONS WITH FAMILY LAW APPLICATIONS:

Ethics Opinion 47: Attorney Representation in Dissolution of Marriage, 02/26/72.

A lawyer may no more ethically represent both parties to an action under the Colorado Uniform Dissolution of Marriage Act than he can in any other matter. In most dissolutions of marriage, the parties, even though they may not then be aware of it, will have conflicting interests on matters such as property, support, custody, or spousal maintenance. In some cases where no interests of the parties are conflicting, a lawyer may represent both parties; however, in the event conflicting interests develop after such dual representation has commenced, the

lawyer must withdraw entirely from the case and thereafter decline to represent either party.

Ethics Opinion 56: Settlement of Lawyer Malpractice, Withdrawal of Grievance Complaint, 03/22/80; Addendum Issued 1995; Addendum Issued 1998. It is unethical for an attorney to condition settlement of a civil action for malpractice against his lawyer-client upon the withdrawal by the plaintiff of a grievance complaint filed against the lawyer-client.

Ethics Opinion 65: Guidelines for Opposing Counsel Contacting Witnesses, 03/17/84. It is unethical conduct for an attorney or his representative to advise or to imply to a potential witness that he should not submit to a pre-trial interview by opposing counsel or his agent. In any communication to potential witnesses concerning their duties and privileges, both prosecutors and defense counsel are required routinely to advise that: (1) It is proper and may be the duty of both parties to attempt to interview all persons who may be witnesses and that it is in the interest of justice that such persons, subject to their voluntary and informed consent, be available for pre-trial interviews, and (2) There is no obligation for the witness to submit to a pre-trial interview by the prosecution or defense and the decision to submit to such an interview belongs to the witness.

Ethics Opinion 66: Imposition of Interest or Finance Charges on Client Accounts, 10/20/84. A lawyer may not unilaterally impose interest upon delinquent fee accounts or charge a finance fee unless there has been prior agreement between

the attorney and the client that interest will be charged if a fee is unpaid for more than a specific period of time.

Ethics Opinion 67: Contingent Fee Arrangement in Child Support and Spousal Maintenance Cases, 03/16/85; Addendum Issued 1995. A lawyer may ethically enter into a contingent fee arrangement to collect past due child support or past due spousal maintenance (support). A lawyer may not ethically enter into a contingent fee arrangement for the collection of future child support or future spousal maintenance.

Ethics Opinion 76: Lawyer Advertising Guidelines, 10/17/87; Addendum Issued 1995. Lawyer advertising engenders responsibilities to the public as well as professional opportunities. Lawyers who advertise must have or develop the competency to handle the representations for which they advertise. Lawyers should not claim to be "experienced" in matters which typically involve litigation in the absence of substantial trial experience. A lawyer may associate with another lawyer to handle a representation obtained through advertising, but must disclose to the public such associations if there is a likelihood the lawyer will associate with more experienced lawyers at the time the advertisement is placed. Referral or forwarding fees are forbidden. Clients obtained through advertising must be given the same attention and zealous advocacy required for any other client. Lawyers cannot hold themselves out as certified specialists except to the extent permitted by the Colorado Supreme Court, although they may advertise their areas of preference.

Ethics Opinion 85: Release and Settlement of Legal Malpractice Claims, 05/19/90; Addendum Issued 1995; Addendum Issued 1998. A lawyer may negotiate and enter into a release and settlement agreement of a client's legal malpractice claim against the lawyer only if the following conditions are met:

- (1) The lawyer must 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 must 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 and release must be fair and reasonable; and
- (4) The settlement and release can relate only to past, and not future, conduct of the lawyer.

In addition, if the attorney-client relationship still exists as of the time the settlement is contemplated, and if both lawyer and client desire that the attorney continue to represent the client thereafter, the lawyer should carefully consider whether, under the specific circumstances, the lawyer can ethically negotiate a settlement and release of a past malpractice claim without first withdrawing from the representation.

A lawyer may not engage in any conduct intended to conceal the facts and circumstances relating to the client's potential malpractice claim against the lawyer. The lawyer may not insist on a release from liability or an agreement to arbitration of a malpractice claim as a prerequisite to the lawyer's returning papers and property the client is entitled to receive, or to the lawyer's completing the employment or providing additional legal services for the client, or to the lawyer's withdrawal from the representation. A lawyer cannot require a client to refrain from filing or to withdraw a grievance as a condition of settling a dispute with the client.

Ethics Opinion 104: Surrender of Papers to the Client Upon Termination of the Representation, 04/17/99. Under Colo. RPC 1.16(d), all papers and property to which the client is entitled must be surrendered upon demand within a reasonable time, regardless of duplication costs. In the event that the lawyer decides to retain a copy of these papers and property for the lawyer's own purposes, the duplication costs for these items are not properly billed to the client. However, in the event that the lawyer voluntarily produces personal attorney-work product, it is appropriate for the attorney to charge the duplication costs of these documents to the client.

Ethics Opinion 113: Ethical Duty of Attorney to Disclose Errors to Clients, 11/19/05. As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of material developments. Colo. RPC 1.4. This includes the ethical duty to inform

the client of material adverse developments, including those resulting from the lawyer's own errors. As part of this broad duty to report material developments, a lawyer has an ethical duty to make prompt and specific disclosure to a client of the lawyer's error if the error is material, meaning that it will likely result in prejudice to a client's right or claim. In these circumstances, the lawyer should inform the client that it may be advisable for the client to consult with independent counsel regarding the error. The lawyer need not and should not inform the client of the existence or merit of a legal malpractice claim against the lawyer, or of the desirability of terminating the lawyer's representation. The lawyer may advise the client to seek independent advice regarding the statute of limitations on a claim for legal malpractice.

A lawyer may continue to represent the client in these circumstances only in compliance with Colo. RPC 1.7(b). In many if not most circumstances, the interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation. Continued representation may not be permissible if the lawyer's interest in avoiding liability might influence the lawyer to pursue a strategy that would avoid liability for the lawyer at the expense of the success of the representation. Finally, the lawyer may not obtain a release of liability except in compliance with Colo. RPC 1.8(h).

Ethics Opinion 114: Responsibilities of Respondent Parents' Attorneys in Dependency and Neglect Proceedings, 10/14/06. Court-appointed attorneys must

assure that there is a written communication to each new client that the attorney has been appointed to provide representation without cost to the client.

The attorney should communicate in writing the nature of the representation. That writing may outline what happens if the client doesn't come to court and doesn't communicate with the attorney. However, the attorney may not decline to advocate for the client simply because the client does not come to hearings or provide direction.

The attorney may agree to, or not object to, presentation of evidence by offers of proof if the client does not attend a hearing.

The attorney must file a notice of appeal from termination of parental rights upon request of the client even if the attorney believes the merits of the appeal are groundless or frivolous. However, once the notice of appeal has been filed, the attorney may seek leave of the appellate court to withdraw.

E. SELECTED DISCIPLINARY OPINIONS:

*People v. Sparkman*, 2006 WL 2045941 (Colo. O.P.D.J.,2006). Neglecting to draft QDRO.

*People v. Preblud*, 2005 WL 906493 (Colo. O.P.D.J. 2005). Romantic involvement with a "vulnerable" domestic relations client.

*People v. Scruggs*, 52 P.3d 237 (Colo. O.P.D.J. 2002). Conversion of unearned retainer.

*People v. Weisbard*, 2001 WL 1161658 (Colo. O.P.D.J. 2001). Respondent violated Colo. RPC 1.3 by failing to prepare a written stipulation and order after having been ordered to do so by the court, and by neglecting to take timely action on a motion to modify child support. Respondent also violated Colo. RPC 3.4(c) and Colo. RPC 8.4(d) by repeatedly disobeying orders of the court. Respondent violated Colo. RPC 1.16(a)(3) by failing to move to withdraw from representing his client after being requested to do so. Respondent violated Colo. RPC 1.4(a) by failing to communicate with the client. In a separate matter, Respondent violated Colo. RPC 1.3 by failing to prepare financial information disclosure documents and failing to timely prepare and follow through on a Qualified Domestic Relations Order, and violated Colo. RPC 1.4(a) by failing to inform his client of an order requiring exchange of financial information, and not informing the client of his failure to prepare the required disclosure document.

F. PROPOSED CHANGES TO C.R.C.P. 227:

Every attorney engaged in the private practice of law is required to disclose on their annual attorney registration statement whether the attorney is covered by professional liability insurance and is required to affirm their intention to maintain insurance while engaged in the private practice of law.

## G. FIDUCIARY DUTIES AND CONFLICTS OF INTEREST:

### Definition:

As fiduciaries, attorneys have the two-fold legal duty of undivided loyalty and confidentiality. A breach of the duty of undivided loyalty occurs when an attorney obtains a personal advantage in dealing with a client, or when the attorney creates circumstances that adversely affect the client's interests. A breach of confidentiality may occur as an independent wrong or as part of the breach of loyalty. *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000).

### Not malpractice:

Legal malpractice actions based on negligence concern violations of a standard of care, whereas legal malpractice actions based on breach of fiduciary duty concern violations of a standard of conduct. *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000). A fiduciary relationship exists as a matter of law between an attorney and his client. Thus, in effect any alleged malpractice by an attorney also evidences a simultaneous breach of trust; however, that does not mean every cause of action for professional negligence also sets forth a separate and independent cause of action for breach of fiduciary duty. A duplicative count may be properly dismissed. *Moguls of Aspen, Inc. v. Faegre & Benson*, 956 P.2d 618, 621 (Colo.App.1997)

### Third parties:

A third party may recover damages from an attorney for the attorney's acts in his client's behalf only on a showing of fraud or malice. *Weigel v. Hardesty*, 549 P.2d 1335 (1976)

However, an attorney can also be liable to a third party under a negligent misrepresentation claim. The third party must prove that the attorney supplied false information to others in a business transaction, and failed to exercise reasonable care or competence in obtaining or communicating information on which other parties justifiably relied. *Mehaffy, Rider, Windholz & Wilcon v. Central Bank Denver*, 892 P.2d 230 (Colo. 1995).

### Capacity:

*In re Marriage of Sorensen*, 166 P.3d 254 (Colo. App. 2007). Rule 1.14 of the Rules of Professional Conduct permits an attorney to seek the appointment of a guardian ad litem when the attorney reasonably believes the client is unable to act in his or her own interests. The lawyer may seek guidance from an appropriate diagnostician.

### Liens:

§ 12-5-119. Attorney's lien--notice of claim filed. All attorneys- and counselors-at-law shall have a lien on any money, property, choses in action, or claims and demands in their hands, on any judgment they may have obtained or assisted in obtaining, in whole or in part, and on any and all claims and demands in suit for

any fees or balance of fees due or to become due from any client. In the case of demands in suit and in the case of judgments obtained in whole or in part by any attorney, such attorney may file, with the clerk of the court wherein such cause is pending, notice of his claim as lienor, setting forth specifically the agreement of compensation between such attorney and his client, which notice, duly entered of record, shall be notice to all persons and to all parties, including the judgment creditor, to all persons in the case against whom a demand exists, and to all persons claiming by, through, or under any person having a demand in suit or having obtained a judgment that the attorney whose appearance is thus entered has a first lien on such demand in suit or on such judgment for the amount of his fees. Such notice of lien shall not be presented in any manner to the jury in the case in which the same is filed. Such lien may be enforced by the proper civil action.

*Gold v. Duncan Ostrander & Dingess, P.C.*, 143 P.3d 1192 (Colo. App. 2006). Statute providing for enforcement of attorney's lien pursuant to a "proper civil action" allows an attorney to bring an independent action or file a motion to reduce the lien to judgment in the civil action that gave rise to the lien claim.

*In re Marriage of Etcheverry*, 921 P.2d 82 (Colo. App. 1996). Charging lien does not attach to child support payments.

*People v. Smith*, 830 P.2d 1003 (Colo. 1992). An attorney's recordation of a lien prior to obtaining a judgment and subsequent failure to release the lien violated DR 1-102(A)(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice), DR 1-102(A)(6) (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law), and DR 5-103(A)(1) (a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may acquire a lien granted by law to secure the lawyer's fees or expenses).

§ 12-5-120. Other property to which lien attaches. An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment and upon money due to his client in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law. Colorado Rule of Professional Conduct 1.16(d).

Consistent with recognition that the file must be surrendered to the client, absent agreement to the contrary, it is the lawyer's responsibility to bear duplication costs if the lawyer believes that the lawyer should retain a copy. Ethics Opinion 104.

#### H. AVOIDING MALPRACTICE PITFALLS:

Evidence:

*In re Marriage of Rodrick* 176 P.3d 806 (Colo. App. 2007). If property is omitted from permanent orders without explanation, the property division cannot stand, citing *In re Marriage of Footit*, 903 P.2d 1209, 1213 (Colo.App.1995). However, if the court has no evidence before it of the classification or value of an asset, it does not err in omitting it from the property division citing *In re Marriage of Page*, 70 P.3d 579, 582 (Colo.App.2003). It is the parties' duty to present the trial court with the data needed to allow it to value the marital property, and any failure by the parties in that regard does not provide them with grounds for review, citing *In re Marriage of Zappanti*, 80 P.3d 889, 892 (Colo.App.2003).

*Gavrilis v. Gavrilis*, 116 P.3d 1272 (Colo. App. 2005). Arguments about hidden and/or improperly valued assets will not be considered by the Appellate Court if they were not presented to the trial court.

Recognizing malpractice:

*Morris v. Geer*, 720 P.2d 994 (Colo. App. 1986). The statute of limitations for an action against an attorney for legal malpractice commences to run at the time the client discovers, or through the use of reasonable diligence should have discovered, the negligent act of the attorney.

*Palisades National Bank v. Williams*, 816 P.2d 961 (Colo.App.1991). Once a plaintiff becomes aware of her attorney's negligence, and damage in the form of legal fees is incurred to ameliorate the impact of that negligence, she has suffered injury for purposes of the accrual of a legal claim.

*Stone v. Satriana*, 41 P.3d 705 (Colo. 2002). There is no obligation to mitigate damages by pursuing an appeal.

*Morrison v Goff*, 74 P.3d 409 (Colo. App. 2003). The statute of limitations on a legal malpractice action is not tolled pending appeal.

*Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992). Legal malpractice can be based whether a reasonably prudent attorney should have foreseen that litigation was likely to result and whether other attorneys, in similar circumstances, would have taken steps to prevent such a result.

*Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 1993). Client is entitled to be reimbursed, or not pay for, negligently performed work by attorney.

Motions:

C.R.C.P. 121, Section 1-15, Subsection 1. Except motions during trial or where the court deems an oral motion to be appropriate, any motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion except for a motion pursuant to C.R.C.P. 56.

C.R.C.P. 121, Section 1-15, Subsection 8. Moving counsel shall confer with opposing counsel before filing a motion. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel about the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference has occurred, the reason why shall be stated.

Hearings:

C.R.C.P. 121, Section 1-15, Subsection 4. If possible, motions shall be determined promptly upon the written motion and briefs submitted. However, the court may order oral argument or an evidentiary hearing, or if the request for oral argument or an evidentiary hearing is requested in a motion, or any brief, oral argument may be allowed by the court at its discretion.

I. ADVISE YOUR CLIENT ABOUT...

Paternity:

Senate bill 183 – Reduces from six to two years the time needed to file a motion to modify or set aside an order determining parentage, effective August 15, 2008.

Modification:

Section 14-10-122(1)(a). The provisions of any decree respecting child support or maintenance may be modified only as to installments accruing subsequent to the motion for modification, unless specific exceptions apply.

*In re Marriage of Burke*, 39 P.3d 1226 (Colo. App. 2001). A Separation Agreement which provided that the court specifically retained jurisdiction “as provided by law” and labeled support as “contractual maintenance” did not constitute an express preclusion or limitation of the statutory right to modify maintenance.

*In re Marriage of Schmedeman*, 06CA0550. --- P.3d ----, 2008 WL 451743 Colo.App., 2008, February 21, 2008. Must file motion for modification of child support upon emancipation, except as to last child.

Section 14-10-129, C.R.S; Section 14-10-131, C.R.S. Modification of parental responsibilities based on best interests v. endangerment.

Relocation:

*In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005); *Spahmer v. Gullette*, 113 P.3d 158,(Colo. 2005) regarding post decree and pre-decree relocation.

*In re Marriage of DeZalia*, 151 P.3d 647 (Colo.App) 2006. Motion to modify to allow relocation by a party who shares parenting time equally with the other parent based on the best interests of the child.

*In re Marriage of Rozzi*, --- P.3d ----, 2008 WL 2372227, Colo. App. 2008, June 12, 2008. Relocation only applicable to the extent the relocation "substantially changes the geographic ties between the child and the other party."

Attorney's fees:

§ 14-10-119. Attorney's fees. The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

*In re Marriage of LeBlanc*, 944 P.2d 686 (Colo. App.1997).The purpose of an award of attorney fees in actions for dissolution of marriage is to apportion the

costs of the dissolution equitably based on the resources of the parties. *In re Marriage of Renier*, 854 P.2d 1382 (Colo.App.1993). An award of attorney fees pursuant to § 14-10-119, C.R.S is discretionary with the trial court, and its ruling thereon will not be disturbed on review if supported by the evidence.

*In re Marriage of Seely*, 689 P.2d 1154 (Colo. App.1984). A trial court is authorized to apportion attorney's fees between the parties but is without statutory authority to determine the amount of fees to which an attorney is entitled.

*In re Marriage of Ward and Baker*, 183 P.3d 707 (Colo. App. 2008). C.R.C.P. 11 provides that the signature of an attorney on a pleading constitutes certification by the attorney that to the best of the attorney's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose. C.R.C.P. 11(a). If the court finds that a pleading was signed in violation of the rule, the court shall impose upon the party, the attorney, or both an appropriate sanction, which may include an order to pay the other party's reasonable expenses incurred because of the filing of the pleading, including attorney fees.

#### Continuances:

C.R.C.P. 121, Section 1-11. Motions for continuances of hearings or trials shall be determined in accordance with Practice Standard 1-15 and shall be granted only

for good cause. Stipulations for continuance shall not be effective unless and until approved by the court. A motion for continuance or request for extension of time will not be considered without a certificate that a copy of the motion has also been served upon the moving attorney's client.

J. FIXES:

Motions to modify pursuant to Sections 14-10-122, 14-10-129 and 14-10-131, C.R.S.

C.R.C.P. 16.2(e)(10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities. The provisions of C.R.C.P. 60 shall not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph shall not limit other remedies that may be available to a party by law.

C.R.C.P. 54. Pre-Trial motions for reconsideration. An order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

C.R.C.P. 58. Entry of Judgment.

(a) Subject to the provisions of C.R.C.P. 54(b), upon a general or special verdict of a jury, or upon a decision by the court, the court shall promptly prepare, date, and sign a written judgment and the clerk shall enter it on the register of actions as provided in C.R.C.P. 79(a). The term "judgment" includes an appealable decree or order as set forth in C.R.C.P. 54(a). The effective date of entry of judgment shall be the actual date of the signing of the written judgment. The notation in the register of actions shall show the effective date of the judgment. Entry of the judgment shall not be delayed for the taxing of costs. Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared.

C.R.C.P. 59(a). Post-Trial Motions. Within 15 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow, a party may move for post-trial relief including:

- (1) A new trial of all or part of the issues;
- (2) Judgment notwithstanding the verdict;
- (3) Amendment of findings; or
- (4) Amendment of judgment.

C.R.C.P. 59(f). Scope of Relief in Trials to Court. On motion for post-trial relief in an action tried without a jury, the court may, if a ground exists, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

C.R.C.P. 59(j). Time for Determination of Post-Trial Motions. The court shall determine any post-trial motion within 60 days of the date of the filing of the motion. Where there are multiple motions for post-trial relief, the time for determination shall commence on the date of filing of the last of such motions. Any post-trial motion that has not been decided within the 60-day determination period shall, without further action by the court, be deemed denied for all purposes including Rule 4(a) of the Colorado Appellate Rules and time for appeal shall commence as of that date.

C.R.C.P. 60. Relief from Judgment or Order.

(a). Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b). Mistakes; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this section (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court: (1) To entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside a judgment for fraud upon the court; or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action. Writs of coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by

motion as prescribed in these rules or by an independent action.

C.R.C.P. 60(b)(2) expressly includes claims based on both intrinsic and extrinsic fraud, but contains a six-month time limitation. See *In re Marriage of Gance*, 36 P.3d 114 (Colo. App. 2001), below.

C.R.C.P. 62. Stay of proceedings to enforce a judgment.

(a) Automatic Stay; Exceptions; Injunctions; Receiverships. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of fifteen days after its entry; provided that an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. Unless otherwise ordered by the court, the provisions of section (c) of this Rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Discretionary stay. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment: (1) pending the disposition of a motion for post-trial relief made pursuant to C.R.C.P. 59; (2) pending a motion for relief from a judgment or order made pursuant to C.R.C.P. 60; (3) during the time

permitted for filing of a notice of appeal; or (4) during the pendency of a motion for approval of a supersedeas bond.

K. INDEPENDENT EQUITABLE ACTION:

*Foxley v Foxley*, 939 P.2d 455 (Colo. App. 1996). Equitable relief from a judgment is permitted if based on extrinsic fraud upon the court. In *Foxley*, plaintiff alleged the appraiser, client and attorney actively participated in a conspiracy to commit extrinsic fraud upon the dissolution court by offering in evidence an expert appraisal that was a sham. The Court held that perjury by a witness does not constitute extrinsic fraud. However, the Court held that conduct considered to be extrinsic fraud against a court generally are bribery or other corruption of the court or where an attorney is complicitous in perpetrating the fraud” citing *Southeastern Colorado Water Conservancy District v. Cache Creek Mining Trust*, 854 P.2d 167 (Colo.1993).

*In re Marriage of Gance*, 36 P.3d 114 (Colo. App. 2001). A claimant seeking relief through an independent equitable action based on fraud must establish extrinsic fraud as opposed to mere intrinsic fraud. Extrinsic fraud goes to the jurisdiction of the court to hear a case and amounts to a subversion of the legal process itself. *In re Estate of Bonfils, supra*. Extrinsic fraud operates to deprive the person against whom the judgment was rendered of an opportunity to fully or fairly defend, such as where a party was deceived into signing a waiver of summons, and jurisdiction was thereby fraudulently obtained.

Intrinsic fraud, on the other hand, occurs where the fraud pertains to an issue in the original action or where the acts constituting the fraud were or could have been litigated in the original action. The rule in Colorado is that a party bringing an independent equitable action based upon fraud must assert more than intrinsic fraud such as perjury or nondisclosure by a party to the litigation.

A party seeking relief in an independent equitable action based upon fraud must show more than mere perjury or nondisclosure between the litigants concerning the subject matter of the original action. Examples of fraud upon the court are bribery or other corruption of the court or of a jury, or where an attorney is an accomplice to the fraud, upholding *Foxley v Foxley*, 939 P.2d 455 (Colo. App. 1996). Perjury and other fraud merely between the parties to the litigation, however, do not constitute fraud upon the court.

A civil action against a former spouse for fraud and exemplary damages is permitted, but see *Gavrilis v. Gavrilis*, 116 P.3d 1272 (Colo. App. 2005), below.

*Gavrilis v. Gavrilis*, 116 P.3d 1272 (Colo. App. 2005). Claim preclusion (otherwise known as res judicata) bars litigation of matters that were decided, as well as matters that could have been raised but were not, in a prior proceeding. Wife asserted husband misrepresented his income and the value of marital assets. Because achieving a fair and equitable division of property is one of the primary objectives of a dissolution proceeding wife's claims were integrally tied to those she asserted, or could have asserted, in the dissolution proceeding. Therefore, those claims were barred.

With regard to a civil action for fraud, the Court stated that in *Gance* it was not asked to address, nor did it address, the application of res judicata principles to the separate damages action. Moreover, there, damages were permitted for acts that, although directly related to the dissolution proceeding, were not discovered, and presumably could not have been discovered through the exercise of reasonable diligence, within the six-month period under C.R.C.P. 60(b)(2) for seeking relief from judgment.

Because these matters in *Gavrilis* could have been discovered with reasonable diligence and litigated within the dissolution proceeding or the applicable six-month period thereafter for seeking relief from judgment, wife was barred from pursuing the damages action against husband.

L. APPEALS:

C.A.R. 4(a) The notice of appeal required by C.A.R. 3 shall be filed with the appellate court with an advisory copy served on the clerk of the trial court within forty-five days of the date of the entry of the judgment, decree, or order from which the party appeals...The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the trial court by any party pursuant to the Colorado Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this section (a) commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) Granting or denying a motion under C.R.C.P. 59 for judgment notwithstanding verdict; (2) granting or denying a motion under

C.R.C.P. 59, to amend findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under C. R.C.P. 59, to alter or amend the judgment; (4) denying a motion for a new trial under C.R.C.P. 59; (5) expiration of a court granted extension of time to file motion(s) for post-trial relief under C.R.C.P. 59, where no motion is filed. The trial court shall continue to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and determined within the time specified in C.R.C.P. 59(j). During such time, all proceedings in the appellate court shall be stayed. A judgment or order is entered within the meaning of this section (a) when it is entered pursuant to C.R.C.P. 58. If notice of the entry of judgment, decree, or order is transmitted to the parties by mail or E-Service, the time for the filing of the notice of appeal shall commence from the date of the mailing or E-Service of the notice.