Consumer Workshop III

Practical and Ethical Issues in Succession Planning

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Dissolution

of a

Law Firm

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Dissolution of a Law Firm

1. Overview

The formation of a law practice is generally friendly and forward-looking. The lawyers are enthusiastic and optimistic. Many time they fail to anticipate or address what happens if the law practice fails for whatever reason. This presentation will focus on one aspect of the breakup and demise of a law practice: dissolution.

Dissolution of a law practice can occur when a lawyer is terminated or decides to leave the firm and practice elsewhere; or the lawyer becomes disabled; or a major rainmaker-lawyer dies. Disability or death of a lawyer are addressed by others today.

Dissolution of a law firm entity is a state-law procedure in contrast to a bankruptcy filing for the law firm entity under federal law. Bankruptcy of a law firm has been discussed at other ABI conferences.[1]

This presentation will also not focus on what is the best choice of entity for a law practice. There are a myriad of factors to consider in deciding what the best choice of entity is. What happens in the event of dissolution is only one factor.

To analyze and understand the consequences of dissolution requires a review and understanding of the interplay between the governing documents of the law firm entity and various statutes. This discussion focuses primarily on Colorado law.

The decision to dissolve a law firm often involves rancor, distrust and anger between and among the shareholders (in a professional corporation) or equity stakeholders (members in a limited liability company or partners in a limited liability partnership or general partnership). Some partners may be blind-sided by other partners' intent to leave the existing practice. Personal

[1] For example, see ABI conference materials from 2013 Rocky Mountain Conference; 2013 ABI 9th Annual Intl. and Insolvency & Restructuring Symposium, available at http://materials.abi.org/materials

friendships between partners can be irreparably destroyed. The disruption to the lives of associates, paralegals, legal assistants, legal secretaries and other support staff can be significant. However, throughout the process of a break up of a law firm, there are legal principles to guide and shape the decision on whether to dissolve or not to dissolve, as examined and discussed below.

2. Dissolution

Black's Law Dictionary (8th edition, 2004) defines dissolution as:

> **1.** The act of bringing to an end; termination. **2.** The cancellation or abrogation of a contract, with the effect of annulling the contract's binding force and restoring the parties to their original positions. See RESCISSION. **3.** The termination of a corporation's legal existence by expiration of its charter, by legislative act, by bankruptcy, or by other means; the event immediately preceding the liquidation or winding-up process.

Voluntary dissolution is defined as:

> A corporation's termination initiated by the board of directors and approved by the shareholders. **4.** The termination of a previously existing partnership upon the occurrence of an event specified in the partnership agreement, such as a partner's withdrawal from the partnership, or as specified by law. Cf. WINDING UP. (*internal citations omitted*).

2.1. Making the Decision to Dissolve or Not to Dissolve

Factors to discuss and consider in deciding whether to dissolve or not, regardless of the type of entity of the law firm, include:

1. What are the risks / benefits of a dissolution compared to a bankruptcy filing for the law firm?
2. What impact will dissolution have on the firm's clients?

   The interests of clients are paramount. Existing clients continue to need ongoing representation. Lawyers are ethically precluded from abandoning clients. See generally, Colo RPC Rules 1.1 (competence); Colo RPC Rule 1.3 (diligence); Colo RPC Rule 1.4 (communications); and Colo RPC Rule 1.16 (declining or terminating

representation). Colorado Ethics Opinion 116, a copy of which is attached as Exhibit 1, also provides guidance in this transition, such as when two departing lawyers have both worked on a client matter, and are going to different firms. Many of the same factors discussed regarding lateral moves apply to lawyers leaving a dissolving law practice.

3. How will the firm's liabilities be paid?

   Are there sufficient assets, likely primarily accounts receivable, to pay taxes, payroll liabilities, secured and unsecured creditors, current and former employees, office and equipment leases, fund any buyouts of former equity holders, contributions to 401(k), flex savings account, other employee benefits that have accrued and are unpaid. Departing shareholders may be entitled to buyouts from remaining shareholders. Departing equity holders who have personally guaranteed office leases or operating lines of credit may demand indemnification from remaining equity holders.

4. Extended coverage under professional liability insurance ("tail insurance") needs to be investigated. This type of coverage can be for a set number of years (three or six years or longer). The premium can also be expensive. Prior to dissolution, the firm may wish to explore D & O insurance for directors and officers. This can also be expensive. Once a firm dissolves, it may not be able to obtain D &O coverage, depending on the questions asked in the application for insurance.

5. Arrangements need to be made for retention of client files and for maintenance of backup server. Departing attorneys will want and need access to client electronic files. These items are typically addressed in a plan of dissolution.

6. There are reasons not to dissolve a firm, as discussed below.

2.2. Dissolution of a Professional Corporation

Colorado law authorizes attorneys to incorporate and practice as a professional corporation, C.R.S. §7-101-101, et seq. provided that the provisions of C.R.C.P. 265 (modified in 2009) are met. C.R.C.P. 265 requires that the entity maintain professional liability insurance.

In deciding what steps need to be taken to dissolve a professional corporation incorporated in Colorado, the practitioner needs to determine in what year the professional corporation was incorporated, and review the organic documents, including the articles and bylaws (and any amendments) of the professional corporation to see what those governing documents provide as far as number of shareholder votes required; what notice needs to be given; what are the time frames; what are the conditions precedent.

2.2.1 Colorado Business Corporation Act. The Colorado Business Corporation Act (CBCA) (C.R.S. §7-101-101 *et seq*.) also needs to be reviewed.

C.R.S. § 7-114-102(1) provides that:

> (1) After shares have been issued, dissolution of a corporation may be authorized in the manner provided in subsection (2) of this section.

Assuming that shares have been issued by the professional corporation, the procedure for dissolution is set forth in C.R.S. § 7-114-102(2).

If shares have not been issued, then the requirements for judicial dissolution in C.R.S. §7-114-301 need to be followed. The attorney general can seek to dissolve a corporation, or a shareholder can do so, for example, if the directors are "deadlocked"

in the management; the shareholders are unable to break the deadlock and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders, or for other statutory reasons. See *Colt v. Mt. Princeton Trout Club, Inc., 78 P.3d 1115 (Colo. App. 2003)*

2.2.2 Board Vote Required

Comment. The shareholders of the Firm cannot vote on a proposal to dissolve the Firm unless proposed initially by the Board of Directors.

Vote Required. A majority of the Board of Directors can adopt a resolution recommending the proposal to dissolve to the shareholders.

Explanation. If the Firm is a Colorado corporation, it is subject to the CBCA. Dissolution of a Colorado corporation must be accomplished pursuant to a resolution adopted by the Board of Directors who must then recommend the proposal to dissolve to the shareholders.[2]

Proposed Resolution. The following suggests a resolution that the Board might adopt to make its recommendation to the shareholders.

RESOLVED, that the Board of Directors of WXYZ P.C. hereby resolve and recommend to the shareholders of the Firm the adoption of the following resolution:

"That WXYZ P.C. dissolve in accordance with the requirements of the Colorado Business Corporation Act."

[2] C.R.S. § 7-114-102(b). The Board may make the proposal to the shareholders without a recommendation if there are "special circumstances," such as a conflict of interest, and communicates the Board's basis for failing to make a recommendation to the shareholders.

2.2.3 Shareholder Vote Required

Vote Required. If the Firm is incorporated prior to the effective date of the Colorado Business Corporation Act of July 1, 1994 (and provided that the Firm's articles or bylaws do not otherwise so provide), a vote of two-thirds of the Firm's outstanding voting shares is required to approve a motion to dissolve at a shareholder meeting called for that purpose.[3]

Explanation. The CBCA provides that the vote must be by "a majority of all the votes entitled to be cast."[4] That, however, is not the end of the analysis. While applicable as adopted to existing corporations, such as the Firm, the transition rules retained the prior default rule of two-thirds vote required for dissolution,[5] unless amended by the corporation's articles. Many articles of incorporation provide that the vote is reduced "to a majority of the shares represented at the meeting at which a quorum is present." This amendment, if it were to apply to a vote on dissolution, is not consistent with the requirements of the CBCA which prohibit any reduction "to less than that which would be required to take the action if the action were to be taken by a corporation formed on or after July 1, 1994."[6]

Proposed Resolutions. The following suggests resolutions that the shareholders might adopt in a vote to dissolve the Firm, under the supervision of the Board, and to be conducted by an existing shareholder of the Firm. If a third party receiver is contemplated to handle the dissolution, other resolutions would be appropriate, and a

[3] Any shareholder meetings that will be noticed need to include dissolution as among the matters to be considered. Notice requirements of C.R.S. § 7-107-105 must be met.
[4] C.R.S. § 7-114-102(5).
[5] C.R.S. § 7-117-101(10).
[6] C.R.S. § 7-117-101(11).

third-party agreement may be required. It is important to note that not all of the resolutions need to be determined initially. These resolutions can also form the parameters of a plan of dissolution.

These are intended to set forth a structure for discussion, identifying certain areas for decision- making:

RESOLVED, that WXYZ P.C. ("Firm") will dissolve in accordance with the requirements of the Colorado Business Corporation Act; and further

RESOLVED, that_____be and hereby is appointed President of the Firm, and the dissolution and winding up process be conducted by the President and overseen by the Board of Directors who shall report from time to time to the shareholders as the Board of Directors determines appropriate; and further

RESOLVED, that the President, upon future authorization by the Board of Directors, shall file articles of dissolution for the Firm in accordance with C.R.S. § 7-114-103, and shall commence to wind up and liquidate the Firm's business and affairs in accordance with C.R.S. § 7-114-105; and further

RESOLVED, that the practice of law through the Firm by all lawyers shall cease not later than__, 2015, and all employees will be given advance notice of such termination; and further

RESOLVED, that if circumstances change materially, the Board of Directors can abandon the dissolution of the Firm;[7] and further

[7] C.R.S. § 7-114-102(3) provides that the Board of Directors may condition the effectiveness of the dissolution on any basis.

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RESOLVED, that the President, under the oversight of the Board of Directors, be and hereby is authorized to manage, retain, and terminate such employees of the Firm as he/she determines appropriate or necessary, but shall seek to retain sufficient accounting staff as he/she determines necessary or appropriate to conduct the winding up and liquidation process, and may offer such people appropriate financial incentives for them to remain available to the Firm during this process; and further

RESOLVED, that the President, under the oversight of the Board of Directors and without the need for further shareholder approval, may wind up and liquidate the business and affairs of the Firm, including such actions as may be necessary or appropriate to:

- Collect the Firm's assets, including the Firm's accounts receivable, and maintain a bookkeeping and accounting staff, bank accounts, and equipment necessary or appropriate for such activities;
- Dispose of the Firm's properties in such manner and on such terms as the President, with the advice and consent of the Board of Directors, determines appropriate in the circumstances, including distribution of assets in kind to the Firm's shareholders;
- Negotiate with creditors and vendors and, with the advice and consent of the Board of Directors, discharge or make provision for discharging of the Firm's liabilities;
- Distribute the Firm's remaining property among its shareholders according to their interests; and

- Do every other act necessary to wind up and liquidate the business and affairs of the Firm.

RESOLVED, that a salary shall be payable to the President in the amount of $_____ per month for a period of not greater than six months from the date of filing the articles of dissolution, and if in the judgment of the Board of Directors such compensation or a lesser amount of compensation should continue to be paid because of the work left to be accomplished, the Board of Directors has the authority to determine the appropriate amount and the appropriate time period (in all cases with the understanding that no such payment reduces the President's entitlement to compensation payable to him or her as a shareholder of the Firm pursuant to the Firm's existing practice of paying shareholder compensation); and further

RESOLVED, that with the understanding of the time and attention that the members of the Board of Directors will be devoting, each member shall be paid compensation of $_ per month for a period of not greater than one year from the date of filing the articles of dissolution; and further

RESOLVED, that the President or the Board of Directors may delegate duties to other persons to act on behalf of the Firm, including its senior employees or consultants, attorneys, accountants, and other trusted advisors; and further

RESOLVED, that if further compensation is appropriate following such periods, the shareholders authorize the Board of Directors to negotiate and determine an appropriate hourly, daily, or other rate for the continuation of such work; and further

RESOLVED, that any and all actions previously taken by the Board of Directors within the terms of the foregoing resolutions be, and the same hereby are, ratified, and confirmed in all respects; and further

RESOLVED, that the Board of Directors as a Board, be and hereby is, authorized, empowered, and directed, in the name of and on behalf of the Firm, from time to time, to execute and deliver all such other and further agreements, certificates, instruments, or documents, to pay or reimburse all such filing fees and other costs and expenses, and to do and perform all such acts and things, as in their discretion or in the discretion of any of them may be necessary or desirable to enable the Firm to accomplish the purposes and to carry out the intent of the foregoing Resolutions.

There will likely be areas of disagreement and discussion, and the directors should commit to work together collegially to a common solution.

2.2.4 The Winding Up and Liquidation Process

Statutory Background. The winding up and liquidation process is initially established by statute with the intention of ensuring that creditors are satisfied before the owners/equity receive anything. C.R.S. § 7-114-105(1) describes the process as follows:

A dissolved corporation continues its corporate existence but may not carry on any business except as is appropriate to wind up and liquidate its business and affairs, including:

(a) collecting its assets;

(b) disposing of its properties that will not be distributed in kind to its shareholders;

(c) discharging or making provision for discharging its liabilities;

(d) distributing its remaining property among its shareholders according to their interests; and

(e) doing every other act necessary to wind up and liquidate its business and affairs.

If creditors are satisfied, the only issues remaining would be contractual relationships among the shareholders. If creditors are not fully paid, significant issues can arise, especially as a result of the dissolution of a personal services corporation such as the Firm. It should be noted that creditors may be known or unknown, and in each case has a statute of limitations by which a creditor (such as vendors, past and present employees) must make a claim for payment. The CBCA has addressed this by reducing the statute of limitations to a maximum of two years following written notice to potential creditors[8] or five years if by publication.[9] These periods do not serve to extend any statute of limitations that expires before the 2-5 year term; it only serves to reduce the statute of limitations for claims by creditors. A sample of a Notice to send to creditors and employees is attached as Exhibit 2.

Commencement of Process. The winding up and liquidation process commences in earnest when the Firm files its articles of dissolution with the Colorado Secretary of State – an event that should be carefully timed since it is a public document and may impact various agreements, such as leases. Other material agreements such as loan documents will have to be reviewed to determine whether filing of articles of dissolution have any effect on the continuation of the agreements.

[8] C.R.S. § 7-90-911
[9] C.R.S. § 7-90-912

Filing articles of dissolution with the Colorado Secretary of State legally dissolves the corporation, but its legal existence does not terminate. [10]

After the P.C. files articles of dissolution with the Colorado Secretary of State, the P.C. is described as "WXYZ P.C., a dissolved corporation as of January 22, 2015."

The dissolved corporation then enters a "winding up" or liquidation phase. Its activities are limited to those that are necessary to wind up and liquidate its affairs and business.

The winding up and liquidation process can best be accomplished by a person familiar with the Firm, its financial condition, assets, and liabilities. A third party would have to learn much of the information that a trusted insider already knows. Generally, however, the liquidation process would follow the outline of the statute and occur as generally described in the resolutions above. In a law firm context, however, there are certain unique issues that should also be considered:

Lawyers are known by their reputation. While law firm dissolution is a common occurrence in Denver and nationally these days, presenting the appropriate public image is important. Consider whether the Firm or (more likely) individual shareholders (so as not to spend Firm assets on something that will not benefit the Firm) should hire a public relations advisor to consult with them and draft the appropriate public notifications and notifications to clients.

Malpractice insurance should be carefully considered. The firm's policy would indicate whether tail coverage is available, and may also indicate the cost. Generally the firm can purchase an unlimited tail or a tail for a lesser term. It is advisable to purchase a tail, because any claims for events that occurred prior to the dissolution of the Firm

[10] C.R.S. §7-114-103; C.R.S. §7-114-105(1)

would, generally, not be covered by any successor law firm's insurance unless it has a broadly-written prior acts coverage. The period of the tail is in the firm's business discretion, but generally, an unlimited tail is usually preferable.

Continuing billing of clients while at the Firm and collection of accounts receivable during the dissolution process is important and requires the assistance and cooperation of all attorneys previously associated with the Firm – especially those who are continuing the Unfinished Business at another locale. (See additional discussion below.) This needs to be considered by all in advance, and provisions (such as the first dollars in at the new firm(s) should be paid to the old Firm until the accounts receivable are paid in full) can be adopted, as necessary. These provisions can be controversial, however, but given that the Unfinished Business doctrine will be used for the benefit of creditors, shareholders should have an incentive to cooperate.[11]

Lease negotiations can be difficult or easy, depending on a number of factors. They should be commenced with the landlord as soon as the shareholders have provided direction, including whether any want the space available. Consideration needs to be given whether the statutory cap on for a landlord's termination damages found in the Bankruptcy Code at 11 U.S.C. Section 502(b)(6)(A) (greater of one year or 15% of the rent reserved for the remaining term, not to exceed three years) weighs in favor of a

[11] The Unfinished Business doctrine has been applied in Colorado to unfinished business that was billed on a contingency fee basis. See *LaFond v. Sweeney*, --- P.3d ----, 2012 WL 503655 (Colo. App. Feb. 16, 2012), *certiorari granted by LaFond v. Sweeney,* 2013 WL 4008757 (Colo. Aug. 05, 2013*),* discussed *supra*. Recent court decisions in other jurisdictions (notably the Second Circuit Court of Appeals, applying New York law) have declined to extend the Unfinished Business doctrine to cases that are billed on an hourly basis. The Colorado courts have not yet ruled on whether the Unfinished Business doctrine applies to cases that are billed on an hourly basis.

bankruptcy filing. If one of the shareholders wants to retain the lease of the Firm's office space, he/she should be tasked with that negotiation. In all cases, the negotiations should be concluded by the time that the Firm files its articles of dissolution.

Employee benefit plans, health savings account, profit sharing or retirement plans also need to be reviewed. Shareholders who are plan trustees need to be mindful of their fiduciary obligations and may wish to resign.

Tax advisors for the Firm need to be consulted; final tax returns filed.

There is a risk that if creditors are unsatisfied at the end of the day, shareholder compensation or distributions can be clawed back. Whether creation of a shareholder compensation agreement or an amendment to existing practice of payment of shareholder compensation on the doorstep of dissolution might beneficially impact that analysis is something to be determined by the courts, but others who have attempted to do so have had some courts reject those attempts as preferential transfers or fraudulent conveyances. Distributions to shareholders can also be at risk of recapture, particularly if there are unpaid creditors, or creditors who surface with liabilities that are recently liquidated. All dividends and distributions to shareholders made post-dissolution are treated as distributions. [12]

A shareholder may be personally liable for a post-dissolution distribution if there is an unpaid claim against the P.C. and assets have been distributed to the shareholder.[13] The shareholder's exposure is the value of the assets distributed, with the value determined as of the date of the distribution.[14] The shareholder is entitled to contribution from the

[12] C.R.S. §7-101-401(13)
[13] C.R.S. §7-90-911 or C.R.S. §7-90-912
[14] C.R.S. §7-90-913(1)(b)

other shareholders, to the extent of the value of the assets distributed.[15]. *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982) (decided under prior Colorado Corporation Code). Last, but certainly not least, it is important to keep in mind the requirements of the Colorado Rules of Professional Conduct that the clients' interests be placed first among lawyers of a dissolving law firm. See Colorado Formal Opinion 116, a copy of which is attached. All actions taken by the Firm and its lawyers (and former lawyers) should keep the interests of clients paramount. Generally see "Clients' Rights During Transitions Between Attorneys", The Colorado Lawyer [Vol. 43 No. 10, Page 397] (October, 2014).

Authority to Proceed. The proposed resolutions give the Board of Directors substantial discretion and authority over the winding up and liquidation process which (as contemplated in the resolutions) will be completed by a person with the title of "President." The goal is to minimize the need for further shareholder action once dissolution has been approved. Where shareholders desire to remain involved, adequate provisions must be made to obtain shareholder decision-making on an expedited basis, perhaps by reducing the notice requirements; by amending the articles of incorporation to reduce the quorum requirements for a meeting to one-third; by reducing the voting requirements at the meeting to the statutory standard; and by providing for majority written consent.

[15] C.R.S. §7-90-913(1)(b)

2.2.5 Dissolution Timetable

The dissolution timetable is uncertain. It commences when the Firm determine it is appropriate to file the articles of dissolution, although negotiations and discussions can commence earlier.

It requires a review of all client arrangements and provision for continuing representation in the best interests of the clients.

It requires a review of material lease and other agreements (such as leases for copiers, telephones, computers, legal research, and other service providers) and a determination whether they are assignable, terminable, or a liability to be paid.

It requires a determination on how to fairly (from the shareholders' and creditors' perspective) value and dispose of all assets. Where shareholders want to purchase some assets, extra scrutiny may be given to valuation issues. Appraisals of assets should be obtained, usually at liquidation values, and secured creditors need to consent to any asset sales. Sales taxes may need to be collected. "Going out of business" local ordinances may apply.

It requires an analysis of creditors and their rights and expectations, and a determination of appropriate notice under § 7-90-911 or -912, or not at all.

It requires maintenance for a significant period of time of bookkeeping and accounting functions, bank accounts, and people with authority to make decisions.

The bank accounts need to include funds to pay for the ongoing expenses of the winding up process, as well as a reserve for the payment of creditors not paid to date. Ultimately the Board of Directors should determine the amount of the reserves to be retained. New bank accounts may need to be opened and/or authorization for check signing reviewed.

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Attorneys will need to file motions to withdraw, substitution of counsel in accordance with the rules of procedure and /or local rules in pending litigation matters.

It requires notification to the Colorado Supreme Court (including attorney regulation), malpractice carrier, courts, and other bodies that have to be identified and completed timely.

The firm's servers need to be maintained (and backed-up) and reasonable access provided to attorneys and accounting personnel. Emails need to be forwarded for a reasonable time. The firm's website will need to be shut down and domain name(s) relinquished.

Pension and/or profit-sharing plans need to be terminated, in accordance with ERISA regulations. Flex spending or other health savings plan also need to be terminated. COBRA notices given as appropriate. Worker's comp and unemployment need to be reviewed.

It requires that an address, or at least a post office box, be maintained and monitored for a period of years.

Someone will need to forward voice mail messages from the firm's main telephone number.

Ultimately, it may end in a distribution to shareholders, but only after it is determined that no other creditor claims exist, or that the statute of limitations has expired. Interim distributions may be appropriate, and the Board of Directors should have the authority to make that determination.

The dissolution timetable can continue for a number of years. Although the initial work will be somewhat frenetic, it can be expected to reduce in amount after six months or

so, after procedures are in place, and after the initial identification and wind-up and liquidation work has been completed.

2.3 Dissolution of a Partnership

2.3.1. Colorado Uniform Partnership Act

The Colorado Uniform Partnership Act[16] ("CUPA") governs all general partnerships, including limited liability partnerships, formed under Colorado law on or after January 1, 1998. It only governs general partnerships formed prior to that date and limited partnerships before or after that date that elect to be governed by the Colorado Uniform Partnership Act.

A partnership is treated as an entity and does not automatically dissolve when a partner is dissociated. Dissociation of a partner is an important concept.

2.3.2 Partner's Dissociation Does Not Automatically Dissolve the Partnership

C.R.S. §7-64-601, sets forth events causing a partner's dissociation. A partner's dissociation does not always dissolve a partnership under CUPA because a partnership is an entity under CUPA. Thus, the only grounds for dissolution are those expressly set forth in the statute. The Partnership Agreement may modify these grounds except that the Partnership Agreement may not vary or eliminate automatic dissolution if the partnership is carrying on an illegal business or modify the right to a judicial dissolution upon the application of a partner or the holder of a transferable interest. The Partnership Agreement can provide that the partnership will not dissolve, for instance, if a partner files bankruptcy. The remaining partners can elect to continue the partnership and buyout the dissociated partner's interest.

[16] C.R.S. §7-64-101 et seq.

Although dissociation of a partner under certain circumstances does cause dissolution of the partnership under C.R.S § 7-64-801(a) or (b), if at least half of the partners affirmatively vote to dissolve, in all other situations, the dissociation results in a buyout of the partner's interest.

If the partner is an individual, the partner's death causes her dissociation from the partnership. C.R.S §7-64-601(1)(g)(I). An individual partner is also dissociated if a guardian or general conservator has been appointed for the partner or if there has been a judicial determination that the partner has otherwise become incapable of performing his/her duties under the Partnership Agreement.

C.R.S. §7-64-602 addresses a partner's wrongful dissociation. A partner is dissociated from a partnership when the partnership has notice of the partner's express will to withdraw as a partner. The Partnership Agreement may have other events for dissociation (or expulsion of a partner), where the partner does not meet a capital call or if the partner fails to maintain a law license.

The Partnership Agreement should be drafted to address what the partners intend and want to happen in these circumstances.

2.3.2 Winding Up and Liquidation of a Partnership

C.R.S. §7-64-603 addresses the effect of a partner's dissociation. If the partner's dissociation results in a dissolution and winding up of the business, refer to C.R.S. § 7-64-801(a) or (b), if at least one half of the partners affirmatively vote to dissolve. Otherwise, part 7 of the article applies.

If the partner's dissociation does not cause a dissolution and winding up of the partnership, generally the partner does not have a right to participate in the management

of the partnership, except the dissociated partner may participate in the winding up of the business if the dissociation was not wrongful. C.R.S. §7-64-603(2)(a).

The dissociating partner no longer has a duty not to compete with the partnership. C.R.S. §7-64-603(2)(b). Other duties similar to the duty of loyalty and due care, set forth in C.R.S. §7-64-404(1)(a) and (b), continue regarding matters arising before the dissociation, unless the partner participates in winding up the partnership. C.R.S. §7-64-603(2)(c).

The buyout of the dissociating partner's interest is mandatory and the terms and process for buyout is set forth in C.R.S. §7-64-701(1), unless otherwise provided for in the Partnership Agreement.

2.4 Dissolution of a Limited Liability Company

A Limited liability company ("LLC") is a creature of statute. C.R.S. §§ 7–80–101 to –1101, (Colorado Limited Liability Company Act). *See Water, Waste & Land, Inc. v. Lanham,* 955 P.2d 997, 1000 (Colo.1998).

Most states have based their LLC statutes on the model code promulgated by the National Conference of Commissioners on Uniform State Laws. *Water, Waste & Land,* 955 P.2d at 1000. Colorado, however, created its LLC statute by combining features of its existing limited partnership and corporation statutes. *Id.* Still, the Colorado Limited Liability Company Act includes the basic features of the uniform code adopted by other states. *Id.*

There are different provisions for the operation, winding up and dissolution of an LLC than those that for a corporation, including the enforcement of claims against a dissolved entity. *See Weinstein v. Colborne Foodbotics, LLC*, 302 P3d 263 (Colo., 2013)

In *Weinstein*, the court concluded that "under section 7–80–606, only the LLC may assert a claim against its members for an unlawful distribution and that the holding in *Ficor* does not apply to LLCs set up under the LLC Act. Hence, we hold that absent express statutory authority, an LLC's creditor may not assert a claim against the members of the LLC for unlawful distribution." The court also held that the manager of an insolvent LLC does not the LLC's creditors the same fiduciary duty that the directors of an insolvent corporation owe the corporation's creditors, declining to apply *Alexander v. Anstine*, 152 P3d 497 (Colo. 2007) to the managers of an insolvent LLC.

However, principles of partnership law also apply to LLC's, as discussed below.

2.4.1. Unfinished Business and Division of Contingency Fees

The Unfinished Business Rule was first articulated in *Jewel v. Boxer*, 156 Cal. App. 3d 171 (Cal. App. 1984). When partners leave a dissolved firm and bring open cases and matters to a new firm, the profits generated by those ongoing cases belong to the original dissolved firm, in the absence of a written agreement providing otherwise. This rule was predicated on traditional partnership law that no compensation could be paid for work post-dissolution and that as long as the partnership continues to exist, the partners owed fiduciary duties to the partnership and one another. It has evolved through the years to apply to professional corporations.

Written agreements may alter this result, with what are called "Jewel Waivers", but these can be subject to scrutiny and attack as fraudulent transfers when executed on the eve of bankruptcy.

In Colorado, the courts have addressed Unfinished Business in the context of a

dissolution of a LLC and a contingency fee case.

In *LaFond v. Sweeney*, --- P.3d ----, 2012 WL 503655 (Colo. App. Feb. 16, 2012), *certiorari granted by LaFond v. Sweeney,* 2013 WL 4008757 (Colo. Aug. 05, 2013*)*, the court addressed the distribution of a contingency fee award of a dissolved LLC. The court based its decision on three principles: (1) cases belong to clients, not lawyers or law firms; (2) where lawyers obtain successful resolution to cases, the lawyers have enforceable rights to the agreed upon contingent fee; and (3) a contingent fee is an asset of a dissolved law firm organized as an LLC.

In *LaFond*, two lawyers were members of an LLC where they "orally agreed to share equally in all the firm's profits, without regard to who brought the cases in the office or who did the work on them." *Id* at Para.8. When the LLC dissolved, the two member-lawyers could not agree on how to divide the contingent fee. Mr. LaFond had a qui tam whistleblower suit which was commenced before the dissolution, and continued to represent the client after dissolution.

The Court of Appeals held that the distribution of the entire contingency fee earned must be distributed according to the LLC's agreement, regardless of whether the work was done before or after dissolution.

The Court looked, to a large extent, to partnership law, as LLC's share many characteristics of partnership, particularly regarding dissolution. The Court also observed that dissolution does not terminate an LLC, but rather "the firm continues to exist as a legal entity for purposes of winding up unfinished business—such as completing its representation of a client as specified in an existing agreement." The Court drew a distinction between a "pending contingent fee *case* as unfinished business

to be completed in winding up a firm, and the *fee* generated by that case as property of the firm." *Id.* at Para. 56.

The Court stated that clients do not "belong" to law firms or to attorneys, citing Colorado Bar Ass'n, Formal Ethics Op. 116, *Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure from a Law Firm* (2007) (Formal Ethics Op. 116)(Exhibit 1attached). "[A] client represented by a particular lawyer or law firm will have to choose counsel again if the firm breaks up or the responsible lawyer departs from the firm during the course of the representation." *Id.* This authority means that a client's case "belongs" to the client, not to the attorney.

The fee remains as property of the firm. The Court also stated that this position is supported by the language of the LLC statutes, which does not provide for compensation for "services rendered" in winding up the business of the LLC, while the partnership code does. *Id*.at Para. 64-70.

Colorado courts have not addressed whether the Unfinished Business Rule applies to fees generated from cases which are billed on an hourly basis. California courts have found that it does, *Rothman v. Dolin*, 20 Cal. App. 4th 755, 24 Cal. Rptr. 2d 571(Cal. Ct. App. 1993).

But, in New York, it does not. In *Geron v. Seyfarth Shaw LLP (In re Thelen),* 762 P.3d 157 (2d Cir. 2014), the Court of Appeals, applying New York partnership law, held that the "unfinished business waiver" included in the partnership agreement for the Chapter 7 debtor law firm, insofar as it allowed the former members of firm, upon the firm's dissolution, to take hourly fee matters with them for no consideration, did not effect a transfer of any "interest of the debtor in property."

The court had certified questions of New York partnership law to the New York Court of Appeals, 2014 WL 2931526.

3. Decision Not To Dissolve

In *U.S. v. Holmes*, 2012 WL 602652 (D. Colo., 2012), the court applied § C.R.S. 7-90-913(1) in a dispute between the sole shareholder of a dissolved Colorado corporation who had received transfers from his corporation, which, after an audit, owed the Internal Revenue Service significant taxes. C.R.S. §7-90-913(1) provides that a claim against a dissolved Colorado corporation may be enforced (a) against the corporation "to the extent of its undistributed assets" and (b) "[i]f assets have been distributed in liquidation," against a shareholder of the dissolved corporation. In the latter case, "an owner's total liability for all claims under this section shall not exceed the total value of assets distributed to the owner, as such value is determined at the time of distribution."

The Court found that the shareholder was personally liable for the $3,671,110.00 that had been distributed to him in liquidation. The issue of the amount of interest was left to be resolved, in light of the Court's decision on the manner in which the interest would be calculated.

The corporation had been administratively dissolved by the Colorado Secretary of State for failing to file its annual reports, which essentially is an involuntary dissolution (which procedure no longer applies; now a corporation is deemed to be non- compliant).

Commentators have questioned whether a lawyer should ever advise a corporation to voluntarily dissolve in light of this decision. If a corporation makes a decision to

voluntarily dissolve, certainly the notification provisions of C.R.S. §§ 7-90-911 or 7- 90-912 should be followed. Any distributions to shareholders should be made after the statute of limitations in the notice have run and all creditors satisfied. This may be unrealistic.

WXYZ P.C.
(dissolved, January 23, 2015)
RETURN ADDRESS
EMAIL ADDRESS
Date

Ladies and Gentlemen:

Re: Notice Pursuant to Colorado Revised Statutes §7-90-911

As you may know, WXYZ P.C. recently dissolved, disposed of substantially all of its assets, closed its doors, and filed articles of dissolution on January 23, 2015. The remaining activities of WXYZ P.C. will consist of winding up its affairs, a process that has commenced.

This letter constitutes notice to you pursuant to Colorado Revised Statutes §7-90-911. Pursuant to that section, and unless sooner barred by any other statute limiting actions, any claim that you may have against WXYZ P.C. will be barred if an action to enforce that claim is not commenced by a date that is two years after the date of this letter.

If you believe that WXYZ P.C. owes you money or if you believe you may have a claim against WXYZ, P.C., please contact WXYZ P.C., Attn. President at the above address or email address. Any communication should be in writing and should be as specific as possible.

Sincerely yours,

WXYZ P.C.
By:
Its President

ABI Rocky Mountain Bankruptcy Conference, January 23, 2015

Consumer Workshop III: Practical and Ethical Issues in Succession Planning

Barbara E. Cashman

As an estate and elder law attorney, I am familiar with detour, dissolution, disability and death. I am one of a small number (as far as I can tell) of attorneys who has a plan of some sort in place. Fact is, most people put off thinking about these things and making plans. I think it proves that lawyers are people too. What are the barriers to making a plan? Well, there are many. There is the first hurdle of the emotional issues we face in coming to terms with uncertain certainties (death) and certain uncertainties (some catastrophe or a disability of a physical or cognitive variety). This freezes many of us right in our tracks. It may be the biggest reason that most people die without any estate plan in place. Perhaps you have heard the estate planners' adage about the people most in need of estate planning (people with young children and small business owners) being the least likely to have it? Many of us, especially the solo and small firm types, have kids or family members who depend on us and our law practice as a source of income. We need to make our own plans.

I would like to offer some help and not just scare you! I have an appendix with (Colorado) forms you can use to get started on this important project.

Aside from getting into a different CLE topic about how to run your solo or small law firm, I will just say that taking stock of the planning and documents you need to be adequately prepared for your own disability and death is what needs to get done. So, let's begin with the end in mind – yes, the plan itself, and a few documents that are *must haves*. Where to start? Well, I recommend Rudyard Kipling's six honest serving men to help overcome that most potent physical and psychological force - inertia:

> *I keep six honest serving-men*
>
> *(They taught me all I knew);*
>
> *Their names are What and Why and When*
>
> *And How and Where and Who.*
>
> *. . .*
>
> THE ELEPHANT'S CHILD, by Rudyard Kipling.

Let's start at the beginning with WHAT. . . this is the most important part to begin with. What do you want to happen in the event of your disability, incapacity or death? You as the person making the plan will sometimes be referred to as the planning attorney or the affected lawyer. I know, the second moniker doesn't sound so nice. The person you have selected to help you will be known as the assisting lawyer. Here are a few questions to get the ball rolling.

- What will happen if you become disabled? Begin with a conversation with another lawyer or perhaps a staff member about how to make arrangements for you, a/k/a your

law firm, as an affected lawyer or law firm to continue, close, or transfer your practice on your behalf.

- What can you put in place to cover your disability? Have appropriate powers of attorney in place so that your assisting lawyer(s) can step in if needed to run your practice. They will need to be able to sign checks, handle the COLTAF accounts, manage employees, and generally conduct your law practice business on your behalf.
- What will happen to your law practice upon your death? Consider naming at least one personal representative in your will who is a lawyer to be charged with the responsibility of selling or closing the practice.
- What can you do now that could help your assisting attorney? Maintain an easily understandable system of client records to help the assisting or successor lawyer to carry out his or her responsibilities.

Sure, there's the detail of how your assisting attorney will get paid, but don't let that detail hold you back!

The second serving man is WHY.

Think of this planning as putting in place a management plan. Even if you don't have a business plan, let alone a management plan for your current practice, it is imperative that you get one for these "if" and the "when" scenarios. Think of the plan as putting together a management team. They will manage according to the plan you have put in place.

Whether you have a plan [or not] should be a conscious choice. I know this sounds familiar to all of you reading this because, well . . . many of us do this planning for a living and some of us do litigation when there wasn't a plan or a badly constructed plan. So, at the risk of singling you out as your own cautionary tale, wouldn't you rather make a conscious and deliberate decision? It doesn't have to be perfect and it can be changed and updated as needed. What it is that fits your goals, personality, your business plan and your longevity and estate planning goals? Most of us would rather be in charge of deciding this and not leaving it to be a burden on someone else. Here are a few "why" things to consider – just in case you forgot that you have to think about the same things as your clients:

- Longevity planning (for incapacity or disability to avoid guardianship, conservatorship or OARC appointment of inventory counsel)
- Making a will or trust that addresses or has provision relating to your law practice
- Tax issues
- Providing for some financial management in the event the firm can go on without you
- Caring for and protecting beneficiaries with a stream of income or other benefit they might be depending on
- Considering carefully and choosing your key people: agents, assisting lawyers, personal representatives, trustees, etc.

- Maintaining privacy and confidentiality during times of uncertainty or transition
- Ensuring there is no breach of fiduciary duty owed to clients by the lawyer or law firm

Kipling's third serving man is WHEN.

There is no time like the present. Some would argue that there is no other time besides the present, the rest of it is . . . theoretical. So get busy and start now.

Here's the fourth man, HOW . . .

Well, you can always start with a simple plan, which involves another person (the sixth man is "who"). It's best to start with a person in mind to help you (known in the appendix as the "assisting attorney") because it's often easier to get going with this plan if there are two of you who are holding each others' feet to the fire, so to speak. If you can't think of another attorney with whom you can get started, try a request on the BR listserv or ask on the SSF listserv.

Don't let the fear of confidentiality and conflicts (as in the CRPC variety) stop you in your tracks. Any arrangement to manage or take over the lawyer's practice must include appropriate protections for client confidentiality. The assisting lawyer taking over must beware of conflicts and must safeguard confidential information. The assisting lawyer should be introduced to or familiar with office staff. Staff or family members of an affected lawyer need to know how to contact the assisting lawyer in the event of disability or death. They need to know where any agreements, powers of attorney, or other planning documents are located. Family members and the PRs should be advised of the arrangements so they know of their existence and any important provisions. Instruction letters could prove invaluable and of course an office procedure manual would be ideal to help locate and decode the affected lawyer's system.

A more advanced plan and even the *super deluxe* plan aren't rocket science as such (unless you have an engineering background). Lloyd Cohen's ABA book *Being Prepared* is very useful in this regard AND it's available from the CBA's lending library.

Enter Kipling's fifth, WHERE.

This one is up to you! Meet somewhere with your law partner, a trusted colleague, a family member or office staff at a place and time where you can get started on the difficult conversation that leads to . . . the documents. The documents need to be kept in a safe place where your assisting attorney can have access to the documents in the event they must be used or held by a third person like an escrow holder. At a minimum you will need an easily understood and complete filing system with access by someone who has some familiarity with the system.

And last but not least, there is WHO.

This can be a very challenging detail – on whom can you rely for this type of assistance? Will it be asking too much of the person? These are not easy questions to answer, but many of us deal with these questions regularly in representing our clients. The arrangement you make with the assisting attorney should establish the scope of the assisting attorney's duty. Will the assisting attorney be

the personal attorney for the deceased or incapacitated lawyer? This can be an important distinction. If the assisting attorney personally represents the deceased or incapacitated lawyer, in the event he or she discovered malpractice or ethical violations in any matters, the assisting attorney would not be able to inform the clients and also the assisting attorney could not represent the clients. If it is intended that the assisting attorney take over representation, then he or she would not be the personal counsel for the deceased or incapacitated attorney and must obtain each client's consent to representation.

The compensation of the assisting attorney should be addressed, as should the matter of staff support to assist the assisting attorney in performing his or her duties and arrangements to pay for these services.

Okay, we're finished with Kipling's serving men, and I hope they have helped demonstrate how simple this process can be (note: I did not say it was easy). Just in case you need a little extra ethics ammo to get you motivated, take a look at the American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 92-369, December 7, 1992, Disposition of Deceased Sole Practitioners' Client Files and Property, which provides:

> *To fulfill the obligation to protect clients' files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who should notify the clients of their lawyer's death.*

Many state bars require such plans of solos (our neighbor Wyoming, for example). Colorado does not – let's not give OARC a reason to require this of us – plan now! If you are looking for more ideas by way of checklists, LDPOAs, casualty letters, and other documents associated with this planning, feel free to get in touch via email: barb@DenverElderLaw.org

PS If you do use my forms, please let me know how they work out for you.

1. Checklist for An Assisting Lawyer to Protect the Interests of an Affected Attorney's Clients

This is especially important if the disability is of a temporary or short term nature, with the Affected Attorney being able to resume his or her practice. This is where the attorney's or firm's procedures will need to be communicated to another or transparent is some basic ways. These might include an Assisting Attorney becoming familiar with:

- the calendaring or practice management system used by the affected attorney
- whether the practice management system is automated or cloud-based and whether it requires a password;
- how open/active files and how they are organized and maintained;
- computer passwords for entering the client database and other information sources;
- the style of client coding on a case file jacket, including case set up on both paper form and electronic form;
- how original client documents are stored;
- client ledgers and trust account information and access;
- how to generate a list of active client files, including clients' name, address, phone numbers;
- the office timekeeping method and the client's billing database;
- the clients' engagement letters and other fee documents;
- the affected attorney's engagement letters or other documents spelling out any arrangements made regarding the assisting lawyer's authority to manage or close the affected attorney's practice in the event of impairment, incapacity, disability, or death;
- the method used to contact clients and what information needs to be given to the clients in the event of an emergency;
- preparation for cases in litigation including decisions, hearings, deadlines, and appointments;
- the method used and organization of the affected attorney's clients' files;
- the affected attorney's arrangements for the returning of active client files and original documents;
- the affected attorney's procedures for appointment of the substituting, helping, or successor lawyer(s);
- the procedures set out by the affected attorney for the transfer of active/inactive client cases;
- how the affected attorney's clients' files are closed, organized, and assigned identifying/reference numbering system;
- how the closed clients' files are stored and managed, and how to access them;
- the affected attorney's office policy and procedures on keeping original

documents of clients;
- the policy and procedures of the affected attorney's client file retention and destruction;
- the affected attorney's procedures for the returning of inactive client file information;
- the affected attorney's procedures for accessing the lawyer's safe and safe deposit box;
- the affected attorney's procedures for gaining access to the client trust or escrow accounts;
- the affected attorney's contracts and communication forms. The planning lawyer should provide and attach as many forms, letters, and documents as possible to aid designated helpers. These might include : fee agreement forms, engagement and non-engagement letters, client intake forms, mail and fax log forms, subsequent appointment confirmation, monthly bill sample forms and letters, monthly status letters, deposition scheduling letters, court appearance or hearing letters, file closing letters, confidentiality agreements, client consent forms, and electronic communication authorization forms.

The exact checklist will vary depending on who the person is that is assuming the role – the agent under a limited power of attorney or an attorney hired by the Personal Representative of a deceased lawyer. Also of relevance is whether there will be a transfer or sale of the practice to the assisting lawyer if one is possible or desirable.

2. How will an Assisting Lawyer Close an Office of an Affected Attorney?

Regardless of whether the closing is planned or not, it requires preparation and organization. Keep in mind that the reasons for closing an office can affect the steps necessary to close it. Consider whether a closure will be partial, temporary or complete and this will be based on whether the lawyer:

- dies;
- is physically or mentally unable to practice law;
- wants to retire;
- is disbarred, suspended or disciplined;
- is elected or appointed to public office, or accepts position requiring closure of the law practice;
- is drafted or activated into military service, or is leaving the state;
- is merging practice with another firm and must get out of certain types of cases;
- wants to sell all or part of the practice;

- suffers temporary or permanent problems that are addiction related or is under extreme emotional stress.

3. Who Performs the Work of Managing, Winding Down or Closing the Practice?

This can be done by different persons under different circumstances. The lawyer may do this if he or she is alive, available and competent. If the lawyer is a protected person, the conservator or guardian, or if the lawyer is deceased, the widow, widower or other family member or Personal Representative of the estate. If prior arrangements have been made, the Assisting Lawyer can perform this task. There is also Inventory Counsel.

What Has to be Done to Close a Law Practice?

1. Office space needs to be accessed to secure and protect information. Contact should be made with any staff, and their assistance may be helpful. Mail must be opened at all offices belonging to the law practice, and the landlord should be contacted to make new rental arrangement if necessary.
2. Information Gathering is crucial to this process. It includes determining whether there is insurance, and what type of insurance; also information about and access to bank account and tax information; computer and electronically stored information (this is typically a huge undertaking); examination of client files; disposal of office furnishings and books; determination of who can sign checks on the trust account (maybe freeze the account while determining who is entitled to money?); notification and forwarding of mail and other deliveries, and online services; and determine exactly what is considered to belong to the client in the client's file. Finally, protect any staff who may be suffering the effects of employment interruption.

Some Other General Considerations:

What is the Form of Entity - is there a Board of Directors? Does a Plan for Dissolution need to be put in place?

Announcements and Notifications:

• Contact clients. Clients should not be contacted by attorneys prior to the official announcement date. Post-announcement, all clients should receive the same information. Need to obtain client's permission to withdraw from active cases, if necessary.
• Formal announcement in *The Colorado Lawyer, The Docket,* or press releases.

• Ensure that the receptionist knows how to field phone calls after the announcement.
• Prospective clients - have a plan for referring the phone calls if a potential client calls.
• Contact Attorney Registration if appropriate.
• Notify Courts and opposing counsel. Notify judges and file appropriate documents to withdraw from active cases, if necessary.

In addition to these considerations, there are a number of practice management issues, along with human resources (where staff is involved), and a number of other concerns.

4. Trust and Bank Account Considerations

Note: This information should be kept in a secure location because it contains sensitive information. The information is needed so that the Assisting Lawyer will have access to important information for client and business matters, therefore once it is created, it should be updated regularly – maybe along with an attorney's or a law firm's emergency casualty plan. Some of the information includes:

Name of attorney_____

Name of COLTAF account_____

Name of other bank account(s)_____

(Attach voided deposit tickets to ensure accuracy.)

Bank name and address_____

Tel # and contact person_____

Signatory name(s)_____

Signatory address and email_____

Any procedures or instructions?_____

Information re: POA or corporate resolution?_____

Description of how deposits/transfers transacted for each account_____

Location of bank statements_____

Safe Deposit Box?_____ Location?_____

Attorney/Firm Name_____

Signatories on card_____ Key # _____

Description of items stored in box_____

Names of holders of key(s)_____

Monthly or annual billing to keep box?_____

Used for office backup disks, drives or records?_____

5. Business Access Considerations

Do You Need a Letter Of Understanding With an Assisting Attorney or with the Custodian of Emergency Casualty Plan?

Who's got your back? You need a support network! To whom would you send this type of letter? Make sure at least a couple of your key people are familiar with each other and their roles. Review your checklists to help determine what you will need to share here (how much or how little). An attorney is not needed for most of this type of work – just a staff person who can assist. The plan should be kept in a safe place and it must be available to be updated from time to time. The bottom line is that someone else must be able to retrieve and use it!

Helen A. Handbasket, Esq.
Letterhead

Date
Client Name/Address
RE:
Dear _____:

This letter announces my emergency casualty plan. My plan is to be used in the event of my disability, impairment, incapacity, or death. Please be assured that I have not prepared this plan out of any immediate fear or anticipation of doom, but out of a sense that lawyers should set an ethical and a personal example of careful planning. Toward that end, I have nominated the following persons to assist me to protect your interests:

Custodian of my Emergency Information: _(Name)_____ _____

Business/Office manager Manager:_____

Personal Representative (if different from above):_____

Primary Caretaker (Assisting) Lawyer:_____

Other Proposed Possible Substituting or Successor Lawyer(s): _____

Other Key Persons (if any; if different from above):

Sincerely,

NB – And yes, if you have read this far, you will want to know that the clients will be contacted by your assisting attorney or agent under your POA, and there may be some conflict matters to be resolved. . . . Don't let that freeze you in your tracks or prevent you from proceeding further!

Sincerely
Helen A. Handbasket
Attorney at Law

6. Limited Power of Attorney for Assisting Lawyer

This is a Sample Letter to the Escrow Holder of a Standing POA

Helen A. Handbasket, Esq
Letterhead

Date

Escrow Holder to Deliver POA

Dear _____:

I am enclosing a Power of Attorney in which I have named _____ as my agent. You and I have agreed that you will do the following:

1. Upon my written request, you will deliver the Power of Attorney to me or to any person that I designate.

2. You will deliver the Power of Attorney to the person named as my agent if you determine, using your best judgment, that I am unable to conduct my business affairs due to disability, impairment, incapacity, illness, or absence. If you act in good faith, you will not be liable for any acts or omissions on your part in reliance upon your belief. However, you do not have any duty to check with me from time to time to determine if I am able to conduct my business affairs.

3. If you incur expenses in assessing whether you should deliver this Power of Attorney, I will compensate you for the expenses incurred.

Sincerely,

Helen A. Handbasket, Esq
Attorney at Law

Draft Form of Colorado Limited POA

LIMITED (DURABLE) POWER OF ATTORNEY
OF

Helen A. Handbasket, Esq.

Purpose of This Limited Power of Attorney

The purpose of this limited power of attorney is to allow Elmo Bacaroni, Esq. and Claire Enpressant-Danger, Esq., the capability of acting in ways consistent with those stated in my Transition Plan, and/or Letter of Understanding, and in the event no Transition Plan is found, to take action to maintain my law practice to the extent possible so that it may be sold or closed.

Designation of Co-Agents

I, Helen A. Handbasket**,** as principal and as the sole member of Helen A. Handbasket, LLC, appoint Elmo Bacaroni and Claire Enpressant-Danger as co-Agents to serve as my co-Agents to exercise limited powers regarding my law practice as set forth below. My co-Agents are entitled to reasonable compensation as set forth in the Letter of Understanding. Either of my co-agents has the authority to act alone.

Grant of Limited Authority

Powers Given to co-Agents

(1) I hereby appoint my co-Agents, to act in my name and stead, for the limited purpose of ascertaining the status of my life insurance (if any), including: name of company, account number of policy, owner of policy, disclosure of beneficiaries, amount of insurance, death value and whose life pay-out is conditioned upon; plus, current value, surrender value, and status of any outstanding loans.

(2) I hereby appoint my co-Agents, to act in my name and stead, for the limited purpose of taking any actions that I might do with respect to my law firm, along with actions taken regarding my COLTAF trust account, business operating and any other related business bank accounts. With this grant of authority I authorize my banking institutions to transact my account(s) as directed by my Co-Agents and to afford my Co-Agents all rights and privileges that I would otherwise have with respect to those bank accounts and any safe deposit box maintained for my legal services business purposes. This authority shall include the ability to access, modify, delete, control, and transfer my digital financial accounts relating to such business bank accounts. [*If agent is not an attorney, cannot maintain law practice.*]

Specifically, I authorize my Co-Agents to sign my name on checks, notes, drafts, orders, or instruments for deposit; withdraw or transfer money to or from my account(s); and to do anything with respect to the account(s) that I would be able to do.

(3) With regard to my digital assets and information pertaining to my law practice, my agents shall have: (i) the power to access, use, and control my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, and (ii) the power to access, modify, delete, control, and transfer my digital assets, including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, practice management software or other SaaS account, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, and (iii) the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets described above.

(4) To institute, prosecute, defend, compromise, arbitrate and settle legal or administrative proceedings, or otherwise engage in litigation on my behalf which concerns my acting as attorney or mediator and also any matter to which my professional liability insurance would apply. I also give my agents authority to hire and dismiss agents, counsel and other employees, upon such terms as my agent determines to be appropriate as consistent with the first sentence of this paragraph..

(5) This Limited Power of Attorney will continue until any insurance company or banking institution receives my written revocation of the Power of Attorney or

written instructions from my Co-Agents to stop honoring the signatures of my Co-Agents.

HIPAA Release to My Agents (Including Successor Agents or Sub-Agents)

This Authorization is for the release of my medical records and information to the individuals named above as my Agent, Successor Agent, or Sub-Agent (referred to collectively as "my Agents").

I hereby authorize my medical care provider(s) to release to the above-named individuals, as my Agents, any and all information and medical records data as permitted under the Health Insurance Portability and Accountability Act of 1996, or HIPAA, and the laws of the State of Colorado, or any other state where this Authorization form may be presented. I further authorize my health care provider(s) to discuss this information with the above-named individual and to provide prognosis and discuss possible courses of medical actions with this individual. This Authorization applies to all medical, dental, psychiatric and other protected health information in the health care provider(s) possession, as provided by law.

My agents and any one of them individually is to be considered a "personal representative" as that term is defined under HIPAA and associated laws of the State of Colorado or any other state where this Authorization may be presented. This Authorization is provided and executed for the purpose of providing health care input to the above-named individual, in consideration of my future health care, and for their providing to my health care provider(s) information concerning my health needs and wishes. This Authorization shall remain valid indefinitely, until revoked by me in writing. A copy of this release shall be as effective as the original.

This power of attorney is limited to the purposes described here. It shall be legally unaffected by reason of lapse of time or staleness. This instrument shall be governed by the laws of the State of Colorado, in all respects. If this instrument

has been executed in multiple counterpart originals, each such counterpart original shall have equal force and effect. My Co-agents are authorized to make photocopies of this instrument as frequently and in such quantity as my Co-Agents shall deem appropriate.

Each photocopy shall have the same force and effect as any original.

Nomination of Co-Agents as Inventory Counsel

In the event it becomes necessary for the Colorado Supreme Court Office of Attorney Regulation Counsel to appoint inventory counsel, I nominate either or both of my Co-Agents to serve in that capacity.

Effective Date

This Power of Attorney is effective immediately.

Reliance on This Power of Attorney

Any person, including my Co-Agents, may rely upon the validity of this Power of Attorney or a copy of it unless that person knows it has terminated or is invalid.

Signature and Acknowledgment

_____, 2014
Date

_____
Helen A. Handbasket, Principal

STATE OF COLORADO)
) ss.
COUNTY OF _____)

This document was acknowledged before me on _____2014, by _____.

Witness my hand and official seal.

My commission expires_____.

_____

Signature of Notary Public

7. Casualty Clause for Engagement Letter

Client understands that in order to protect Client's interests in the event of disability or death of Lawyer, it may be necessary or appropriate for a staff member, a personal representative (including someone acting under a power of attorney), or another lawyer who is retained by any such person or by Lawyer to have access to Client's files and records in order to contact Client, to determine appropriate handling of Client's matters and of Client's files, and to make referrals with Client's subsequent approval to counsel for future handling. Client grants permission and waives all privileges to the extent necessary or appropriate for such purposes. Furthermore, in the event of Lawyer's death or disability, if further services are required in connection with Client's representation and another lawyer is subsequently engaged by Client, Client expressly authorizes a division of fees based on the proportion of work done or the responsibilities assumed by each. Such division specifically authorizes the payment of fees and expenses to Lawyer's estate, personal representatives, and heirs.

Lawyer shall return all documents provided by Client as well as all original documents generated in connection with the representation. Lawyer may retain copies of all such documents as well as all other materials. Lawyer may destroy any of Client's files at any time with Client's written consent and in any event, after five years from the conclusion of the representation. During that five-year period, Lawyer shall make such files available to Client for copying. No further notice to client will be required prior to such destruction.

Conclude Representation

Upon conclusion of the lawyer's responsibility with respect to a particular matter, it is a good idea to send a "termination letter." Sending this letter may have the effect of identifying the commencement of an applicable limitations period. The general rule is that in some jurisdictions malpractice claims must be brought not later than two years after the day the cause of action accrues.

The letter should state that the lawyer's services have been completed and should specify any actions to be taken by the client. Original documents and other materials furnished by the client should be returned. This is a good time to review the file to determine if there are any items that should be disposed of. The following text provides suggested language for the letter:

During our representation of you, we have created one or more files containing notes and documents relating to this matter. All original documents and other materials furnished by you have been returned to you previously, sent to other appropriate parties, or are enclosed with this letter. It is our firm policy to destroy files when we no longer need them. We invite you to examine your files during our normal office hours to determine if you would like copies of any of their contents. Please consider doing so as soon as possible while this is fresh in our minds. We remind you that it is our policy to destroy most files after five years following the conclusion of our services and that our initial agreement confirmed this procedure. No further notice will be given to you prior to such destruction.

8. LOU with Assisting Lawyer

Helen A. Handbasket, Esq
Letterhead

Date

Assisting Lawyer Name/Address

RE:

Dear _____:

In the event of my disability, impairment, incapacity or death, relevant parts of my Emergency Casualty Manual will be made available to you. The manual contains various durable powers of attorney and other authorizations and instructions needed to keep my company functioning in the event of my temporary absence or to enable its winding-down, transfer, or sale in the event that I am not able to return to practice. We have agreed that in this event, you are retained to represent my law firm. This also includes representation of me in my role of lawyer at that law firm because even if I operate under an entity or business name, since I am a sole practitioner, there may be some overlapping of identities. Of course, if I am dead, further instructions would need to be made by my Personal Representative, who would have the right to alter or supersede these instructions, but otherwise, you will need to exercise judgment as to what needs to be done and as to whether my absence is temporary or permanent.

You may concurrently render legal services to my clients provided that you have no conflict of interest, and you obtain the consent of my clients, and the conduct does not violate our state rules of Professional Responsibility. If my clients engage you to perform legal services, you shall have the right to payment for such services from such clients. *If you represent any of my clients, you will have dual representation*. That is, you will be representing both my law firm with me and my client. Should this be impossible to do or continue because of a conflict of interest, I would expect you to withdraw from representation of the client and continue to represent me and my law firm. Also, your representation of me, my law firm, my client(s), my Personal Representative, or my estate shall not prevent you from purchasing my law practice.

Information derived from my client files or from my law office is deemed to be confidential and proprietary. Client files should only be examined to the extent necessary to protect client rights or to determine that a conflict exists and/or to arrange for a successor lawyer or to the extent necessary as part of representing me and my law firm in accordance with rules of professional responsibility.

Since our understanding is contingent, I would not consider it to be a conflict of interest if you represented clients adverse to mine or represented interests adverse to me prior to the time that you become aware that your representation of my law firm is effective pursuant to this letter. Further, *in the event of your death, disability, impairment, or incapacity, I agree that another lawyer(s) may take immediate action necessary to protect my rights, including the review of my file or case information, and a substitute or successor lawyer may be appointed subject to my ratification*.

Our understanding may be amended or modified by either of us any time prior to when it becomes effective. However, unless amended or modified prior to the time that

representation becomes effective, your compensation for the services described (if any) shall be as follows: _____

_____

_____

Sincerely,

Helen A. Handbasket, Esq.

9. Sample Will Provisions Relating to Law Practice

Sample Clauses: Will Provision Re: Disposition of Legal Business and Files

OPTIONS:

If you have not modified your own will to ease transition after you are gone, you might consider updating it by including some variation of the following text:

2.3 DISPOSITION OF LAW PRACTICE:

2.3.1 Disposition of Legal Business and Files:

If I am still practicing law at the time of my death, I have left separate instructions regarding the disposition of my Legal Business Files which I hereby authorize and direct my Personal Representative to follow. It is unlikely that my Legal Business will have any sale value; however, if it does, the proceeds of such sale shall be added to my residuary estate and disposed of pursuant to the terms of Article 3 of this Will.

In the event no such memorandum is found, my Personal Representative is instructed to use the following section, 2.3.2 to help guide or govern his or her actions:

2.3.2 Alternative Disposition of Legal Business and Files:

I currently practice law as a solo practitioner and my practice entity is in the form of a (single member) limited liability company (LLC). In order to provide a smooth transition for my clients and to assist my family, I am providing these

guidelines to my Personal Representative and any attorney(s) representing my Personal Representative and beneficiaries under this Will. If my practice can be sold to a competent lawyer, I authorize my Personal Representative to make such sale for such price and upon such terms as my Personal Representative may negotiate, subject, however, to compliance with the Colorado Rules of Professional Conduct and other applicable provisions of law. If such sale is possible, I believe that it will provide maximum benefits for my clients as well as for my employees and family. If my practice cannot be sold and I have client files, I recommend that, subject to consent of my clients, all of my files (the bulk of which are estate planning and probate files) be referred to John Doe, Esq and Jane Roe, Esq. or another attorney or attorneys of their selection. I recognize that my practice has developed because of personal relationships with my clients and that they are free to disregard my suggestions. Regardless of the method of disposing of my practice, I authorize my Personal Representative to take all actions necessary to close my law practice and dispose of its assets. In doing so and without limiting the foregoing, my Personal Representative may do each of the following:

(a) Enter my office and utilize my equipment and supplies as helpful in closing my practice.

(b) Obtain access to my computer and its files and obtain possession of items belonging to clients.

(c) Take possession and control of all assets of my law practice including client files and records. This includes any and all digital or online assets, including files, passwords, websites and all manner of virtual communication or transaction which is related to my law and mediation practice.

(d) Open and process my mail and read my email.

(e) Examine my calendar, files, and records to obtain information about pending matters that may require attention, and these actions require access to my practice management software (which is SaaS at the time of this writing, but which may be modified at any time), which I specifically grant to my Personal Representative to exercise dominion and control over such to the extent necessary.

(f) Notify clients and those who appear to be clients of my death and that it is in their best interests to obtain other counsel.

(g) Obtain client consent to transfer client property and assets to other counsel.

(h) Provide clients with their property and assets and copies of material in their files and return unearned retainers and deposits.

(i) Notify courts, agencies, opposing counsel, and other appropriate entities of my death and, with client consent, seek and obtain extensions of time.

(j) File notices, motions, and pleadings on behalf of clients who cannot be contacted prior to immediately required action.

(k) Contact my malpractice carrier concerning claims or potential claims, to notify of my death, and to obtain extended reporting period endorsement or "tail" coverage.

(l) Dispose of closed and inactive files by delivery to clients, storage, and arranging for destruction, remembering that records of my trust account are to be preserved for at least five years after my death as required by local rules of professional conduct or other provisions of law, and files relating to minors should be kept for five years after the minor's eighteenth birthday.

(m) Engage one or more attorneys to wind up my law practice, make arrangements to complete work on active files and to allocate compensation for past and future services.

(n) Send statements for unbilled services and expenses and assist in collecting receivables (this may require access to my practice management software, which I grant) .

(o) Continue employment of staff members to assist in closing my practice and arrange for their payment.

(p) Pay current liabilities and expenses of my practice, terminate leases, and discontinue subscriptions, listings, and memberships.

(q) Determine if I was serving as registered agent for any corporations and, if so, notify the corporation of the need to designate a new registered agent (and perhaps registered address).

(r) Determine if I was a notary public at the time and, if so, deliver any notarial record books to the county clerk of Denver county (where I was so appointed) or take other appropriate or necessary action.

(s) Rent or lease alternative space if a smaller office would serve as well as my present office for such activities.

(t) Access to any files stored on my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices (external hard drives), mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops. I will leave a list of accounts, usernames, passwords and other relevant information relating to digital or virtual assets or interests which may be consulted to facilitate such access. In the event no such document is found, I specifically authorize my Personal Representative to take appropriate and necessary steps regarding these assets or interests, including access to usernames, passwords and other required or relevant information pertaining to such account or asset, regarding access to those devices and files used in my law practice.

In performing the foregoing, my Personal Representative is to preserve client confidences and secrets and the attorney-client privilege and to make disclosure only to the extent necessary for such purposes. My Personal Representative shall be indemnified against claims of loss or damage arising out of any omission where such acts or omissions were in good faith and reasonably believed to be in the best interest of my estate and were not the result of gross negligence or willful misconduct, or, if my Personal Representative is an attorney licensed to practice in Colorado, such acts or omissions did not relate to my Personal Representative's representation of clients as an attorney retained by those clients. Any such indemnity shall be satisfied first from assets of my law practice, including my malpractice insurance coverage.

Rocky Mountain Bankruptcy Conference
American Bankruptcy Institute
January 23rd, 2015

Practical and Ethical Issues in Succession Planning

Accounting and Tax Perspective

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A. ABSTRACT

This paper focuses on accounting and tax issues to consider upon the dissociation of a law firm partner/member due to death/retirement, or the dissolution of a law firm itself. It addresses important accounting issues to consider during the winding-up process, and tax-related procedural requirements.

It also discusses the tax consequences of liquidation for various different entity types, including corporations, partnerships and LLCs.

B. ACCOUNTING CONSIDERATIONS

i. A Balance Sheet of the firm is required as of date of dissolution / dissociation, containing:

- Assets

a. Cash balances in all bank accounts.
b. Accounts Receivable outstanding – Invoices issued as of end date.
c. Unbilled Work in Process outstanding – Work performed prior to the end date which has not yet been invoiced.
d. Contingent Fee cases – Assign "value" based on work performed prior to end date, in accordance with operating agreement terms.
e. Notes receivable from Partners / Shareholders.
f. Prepaid rent / insurance, etc.
g. Assets owned, together with associated depreciation schedules.
h. COLTAF fund balances, with ledger breakdown by client.

- Liabilities

    a. Accounts Payable.
    b. Lines of Credit.
    c. Mortgages / Notes Payable - third parties.
    d. Notes Payable - Partners / Shareholders.
    e. Deferred compensation payable – Partners / Shareholders.
    f. Consider cash hold-back for payment of legal / accounting fees to facilitate the winding-up / liquidation process.

ii. An accounting for the Capital Accounts is required as of date of dissolution / dissociation, containing:

- Increases as a result of capital contributions to the firm, plus share of income generated over time.
- Decreases as a result of distributions taken, and losses realized over time.

iii. A final accounting in line with applicable terms of the operating agreement in force is required:

- A Balance Sheet approach is typical:

    a. Calculate total assets.
    b. Use assets to satisfy all liabilities.
    c. Remaining balance available for distribution to Partners / Shareholders in accordance with capital accounts, or operating agreement terms.

C. TAX RETURN FILING REQUIREMENTS

i. Payroll Tax Returns

- Forms W-2 and 1099 for all employees.
- Quarterly Employer Payroll Tax Return (Form 941).
- Unemployment tax returns (Form 940, State equivalents).
- Ensure “trust funds” withheld from employee paychecks have been paid to the authorities, or remain available to satisfy associated liabilities.

ii. Income Tax Returns

- “Final” corporate / partnership / LLC income tax returns need to be filed.
- May elect a short-year fiscal year-end if tax return is final.

D. TAX CONSEQUENCES – DISSOLUTION / DISSOCIATION

Law firms are frequently organized as Limited Liability Companies. LLCs are most often treated for tax purposes as partnerships (required to file Form 1065), however they may make an election to be taxed as a Corporation (with or without an S-election, Forms 1120 or 1120S). The tax consequences are examined below from both Corporation and Partnership perspectives.

CORPORATIONS

i. Formation / Characteristics

- Articles of Incorporation, Board appointed.
- C-Corporation is taxed at the entity level (Form 1120).
- Shares issued to shareholders in exchange for cash or property.
- Shareholder has basis in shares equal to FMV of cash / property contributed.

ii. Liquidation – Effect on Corporation

- Corporation recognizes gain or loss upon distribution of assets in liquidation.
- Basis in property distributed is FMV on date of distribution (cannot be less than the amount of liability associated with the property).
- Liquidation costs (legal, accounting) are fully deductible by the Corporation.
- Some types of distributions cannot create losses (related parties, built-in loss property, distributions to parent company, etc.).
- Any tax liability incurred by a C-Corporation will reduce distributions to shareholders.

iii. Liquidation – Effect on Shareholder

- Distributions of cash or property treated as a sale / exchange, results in capital gain or loss based on FMV relative to tax basis.
- FMV of property received is reduced by the amount of associated liability assumed.
- Basis is equal to the value of cash and/or property contributed to the corporation, increased by any gain recognized and decreased by boot (cash) received.
- Burden of proof is on the shareholder to calculate / substantiate their own basis. No proof? Basis is assumed to be 0.

iv. Tax Planning

- Consider giving stock to family member in lower tax bracket (however must be mindful of IRS gifting rules).
- Structure as an installment sale to spread out proceeds over time.

PARTNERSHIPS

i. Formation / Characteristics

- Partnerships may be General (full liability) or Limited (limited liability).
- Partners may also be General or Limited Partners.
- Tax attributes flow through to Partners' personal tax returns (from a Form 1065).
- Partnership Agreement governs.
- Each partner has the responsibility to maintain his/her basis and capital account.
- Basis equals cash and property contributed, plus share of gain or loss over time, plus share of recourse partnership liabilities, less distributions.
- Capital account calculations are similar; however they exclude a partner's share of partnership recourse liabilities.
- Partnership automatically terminates if more than 50% of the capital/profit ownership changes hands in a 12-month period.

ii. Liquidation – Effect on Partnership

- Non-taxable to the Partnership.
- All tax attributes flow through to Partners.

iii. Liquidation – Effect on Partners

- A Proportionate Liquidating Distribution is allocated amongst the Partners according to their capital accounts, or partnership agreement.
- Ordering rules used to assign Partners' basis to assets received:
  - Cash.
  - Accounts Receivable & Unbilled Work-in-Process.
  - Other.
- A loss may be realized only if basis > FMV of cash / A/R / UWIP received.
- No loss may be realized by the partner if other (non-cash) property is received.

iv. Death or Retirement of Partner

- Partnership tax year with respect to departing Partner ends for that Partner as of the date of death / retirement.
- Buy-out package must be negotiated, possibly equal to the Partner's share of the FMV of Assets plus the Partner's share of "Going Concern Value."
- All cash received from service-oriented partnership (i.e. law firm) is considered ordinary income to the recipient, and deductible by the partnership.
- Final K-1 issued to departing Partner, and reported on final Form 1040 of the deceased.
- Successor (i.e. the decedent's estate) not permitted to assume partnership responsibilities under local / state law (must be a lawyer to be a law firm partner)… would trigger an automatic buy/sell provision relative to other partners.

v. Tax Planning

- If a loss is desired, ensure only cash received. If non-cash property is received in the distribution, no loss can be realized by the partner.
- IRS will respect "Liquidating Distribution" provisions of Partnership agreement … clearly defined provisions will save time and money for all.
- Distributions can be structured on an installment basis to spread out income over multiple tax years.

E. CONCLUSION

A number of complex accounting issues arise when a law firm dissolves, or when a law partner dissociates from the practice. One of the biggest accounting challenges is to arrive at accurate balance sheet calculations. For example, when calculating total assets, the accountant must not only take accounts receivable into account, but also unbilled work in process, contingent fee revenue outstanding and any assets due from COLTAF accounts. Disputes may also arise in relation to employee benefits paid, deferred compensation and/or bonus arrangements and responsibility for lines of credit utilized.

Departures can be acrimonious, and disputed issues can lead to costly litigation that may outweigh amounts eventually determined to be due to the departing member(s). It is therefore highly advisable to spend the time and money to ensure detailed operating agreements are negotiated and signed at the outset of the relationship to minimize disputes and facilitate the final accounting.

Dennis, Mark D

LEGAL ETHICS AND PRACTICE TRANSITION – SELLING YOUR PRACTICE OR MOVING LATERALLY

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I. Overarching Concerns

Regardless of the changes you are going through, you owe duties to your clients, to the court, to third parties and to the profession. These duties include competence, diligence, communication, loyalty, confidentiality, candor, and fiduciary duties.

Pursuant to Colo. RPC 1.6, "A lawyer shall not reveal information relating to the representation of a client unless..." No exception applies to the lawyer's desire to sell a practice or to move laterally. If confidential information must be disclosed to comply with another duty, only necessary information should be disclosed, the timing of the disclosure should be considered, and clients should be notified.

Colo. RPC 1.15D(c) requires attorneys to make appropriate arrangements for the maintenance or disposition of client files and financial records when a law firm is dissolved or lawyers depart.

You may not charge your clients for costs relating to the sale of a law practice or your transition between firms.

II. Selling a Law Practice

Colo. RPC 1.17 addresses sale of a law practice.

- The seller must cease to engage in the private practice of law in Colorado, or in the area of practice in Colorado that has been sold.
- The entire practice, or the entire area of practice, must be sold to one or more lawyers or law firms.
- The seller must give written notice to each of the seller's clients regarding:
  1. The proposed sale;
  2. The client's right to retain other counsel or to take possession of the file; and
  3. The fact that the client's consent to the transfer of the client's files would be presumed if the client does not take any action or does not otherwise object within 60 days of mailing of the notice to the client at the client's last known address.

- The fees charged clients shall not be increased by reason of the sale.

Similarly, ABA Formal Ethics Opinion 468 (October 8, 2014) addresses professional responsibilities accompanying the sale of a law practice.

Colo. RPC 5.4 allows division of fees with a non-lawyer under limited circumstances. A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

Colo. RPC 7.2(b) allows referral to a lawyer who purchases a law practice.

III. Moving Laterally

Colo. RPC 5.6 prohibits a lawyer from participating in offering, or making "a partnership, shareholders, operating, employment or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship except an agreement concerning benefits upon retirement or an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy."

CBA Formal Ethics Opinion 116 addresses the professional responsibilities of a lawyer upon her departure from a law firm. In turn, the CBA Formal Opinion incorporates ABA Formal Opinion 99-414.

Lawyers must scrupulously avoid conflicts of interest. Colo. RPC 1.10 addresses the imputation of conflicts of interests among lawyers in a firm.

Colo. RPC 1.11 addresses conflicts of interest and the avoidance of conflicts of interest when lawyers move to and from government employment.

LaFond v. Sweeney 2012 COA 27. No. 10CA2005 (February 16, 2012) addresses the distribution of contingent fees upon the dissolution of a law firm LLC. The Colorado Supreme Court took Cert. and the case was argued November 6, 2014. We are awaiting the decision. The issues are attached.

The Court of Appeals held:

- When the law firm dissolved, the client had sole authority to determine who should represent him.

- The departing partners handled the client's case to its resolution, giving him rights in the contingent fee.

- Because the contingent fee case was brought into the law firm before the firm dissolved, and because the partner continued to handle the

case until it was resolved, the contingent fee allocated to the partner as a result of the settlement is the firm's asset. Therefore, the other partner also has rights in the contingent fee.

- The departing partner who represented the client owed the firm fiduciary duties, including a duty to divide the firm's assets (the contingent fee), pursuant to a fee-sharing arrangement in place when the firm dissolved.

IV. The Extreme Case

In *People v. Osborne* 09PDJ049 (March 18, 2010), an attorney was suspended for three years, with all but one year and one day stayed upon successful completion of a two-year period of probation, when a lawyer worked as a partner at one law firm while also working with another law firm without disclosing to either his status at the other firm. The lawyer unilaterally transferred client matters between firms and adjusted billing at one firm based upon services performed at the other.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 468 **October 8, 2014**
Facilitating the Sale of a Law Practice

When a lawyer or law firm sells a law practice or an area of law practice under Rule 1.17, the seller must cease to engage in the private practice of law, or in the area of practice that has been sold, in the relevant jurisdiction or geographic area. But the selling lawyer or law firm may assist the buyer or buyers in the orderly transition of active client matters for a reasonable period after the closing of the sale. Neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters.

Until 1990, lawyers were unable to sell any part of a law practice except for the physical assets such as furniture, office equipment, and books. Rule 1.17, first adopted in 1990, rejected the traditional prohibition on the sale of a law practice and permitted such transactions under certain conditions, including the condition that the selling lawyer or law firm "ceases to engage in the private practice of law, or in the area of practice" that was sold, in the relevant jurisdiction or geographic area. A question has arisen as to whether a selling lawyer or law firm may nevertheless continue to "practice" to assist the buyer or buyers in the orderly transition of active client matters.

Traditional Prohibition on Sale of a Law Practice

Various reasons were typically given for the traditional prohibition on the sale of a law practice. First, the uniform position of the courts and bar associations was that there was no legally or ethically recognized "good will" in a law practice that a lawyer might sell, pledge, assign, or even give away.[1] This position was reflected in ABA Formal Opinion 266 (June 2, 1945), which stated that the "good will," or intangible going-concern value, of a lawyer's practice was not an asset that either the lawyer or the lawyer's estate could sell because "... clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status."

A second reason was concern that the sale of a law practice, whether by the estate or the survivor of a deceased sole practitioner to a lawyer or by a lawyer or law firm to another lawyer or law firm, would constitute an impermissible sharing or division of legal fees. With regard to a sale of a practice by the estate or survivor of a deceased sole practitioner, the pre-1990 provisions of Rule 5.4(a), as well as DR 3-102(A) of the 1969 Model Code of Professional Responsibility, generally prohibited lawyers or law firms from sharing legal fees with nonlawyers, with certain limited exceptions including payments made to the survivors or estates of deceased law firm partners and law firm compensation and retirement plans. Thus, compensation for the "good will" of a sole

1. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.2, at 879 (1986).

practitioner's law practice, paid by the purchasing lawyer or law firm to the estate or survivor of the sole practitioner and derived from fees paid by the clients of that practice, was considered an improper sharing of a legal fee with a nonlawyer.[2] With regard to a sale of a practice by a lawyer or law firm to another lawyer or firm, both Rule 1.5(e) and DR 2-107(A) of the Code prohibited the division of legal fees between lawyers who are not in the same firm, with limited exceptions not applicable to the sale of the "good will" of a law practice.

A third reason was the long-established ban on payments by a lawyer to anyone for recommending the lawyer's services, as expressed in DR 2-103(B) of the Code and Rule 7.2(b). When a lawyer sells a practice, the lawyer presumably recommends the buyer to the clients of the practice, and thereby receives payment for those recommendations.

A fourth reason was concern that confidential client information might be disclosed as the result of the sale of a law practice. The 1983 version of the Model Rules did not address this issue. However, EC 4-6 of the Code explained: "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets."

Whatever the reason or reasons given in any particular situation, it was generally held prior to 1990 that a law practice could not be sold, either by a sole practitioner or a law firm or by the survivor or the estate of a deceased sole practitioner.

New Model Rule 1.17

In 1990, the ABA House of Delegates adopted new Model Rule 1.17 that permits the sale of a law practice, including the "good will" of the practice, if the detailed requirements of the rule are followed. According to its sponsors, the new rule was designed to accomplish two goals. The first was to address the disparity of treatment of clients of sole practitioners and clients of law firms when a lawyer responsible for a client matter leaves the practice, by ensuring that client matters handled by sole practitioners are attended to when the sole practitioner leaves practice. Formerly, clients of sole practitioners were left to fend for themselves after their lawyer left the practice because the lawyer had no legal way to sell the practice. Second, the new rule put sole practitioners in a financial position equal to partners of law firms regarding the value of the "good will" of their practice because most jurisdictions had limited a sole practitioner's ability to value his or her practice upon retirement or other cessation of practice to physical assets.[3]

Comment [1] to Rule 1.17 reaffirms the traditional notion that the "... practice of law is a profession, not merely a business. Clients are not commodities that can be

2. *See, e.g.*, O'Hara v. Ahlgren, Blumenfield & Kempster, 537 N.E.2d 730 (Ill. 1989) (contract with widow to sell practice of deceased sole practitioner violated public policy against fee sharing and would not be enforced).

3. *See* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 383 (Art Garwin ed., 2013).

purchased and sold at will." However, the black letter of the rule and the remaining comments outline and explain the conditions for the sale of a practice or area of practice, including requirements that the entire practice or an entire area of practice must be sold;[4] that the seller give written notice of the proposed sale to each client;[5] and that the fees charged to the client shall not be increased by reason of the sale.[6]

Another key requirement of Rule 1.17, expressed in paragraph (a) of the black letter and Comments [2] and [3], is that the seller must cease to engage in the private practice of law, or in the area of practice that has been sold, in the relevant geographic area or jurisdiction. Comment [5] explains that if an area of practice is sold and the lawyer otherwise remains in the active practice of law, then "the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e)."

Comment [11] notes that lawyers participating in the sale of a practice or practice area remain subject to the ethical standards applicable to the involvement of another lawyer in the representation of a client, including, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently;[7] the obligation to avoid disqualifying conflicts of interest and to secure informed consent where appropriate;[8] and the obligation to protect information relating to the representation.[9] Comment [12] also explains if approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of a tribunal, that approval must be obtained before the matter can be included in the sale.

Other provisions of the Model Rules have been amended to reflect the changes made by Rule 1.17. For example, with respect to the prohibition of the sharing of legal fees with a nonlawyer, Rule 5.4(a)(2) now permits a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer to pay, pursuant to the provisions of Rule 1.17, the agreed-upon purchase price to the estate or other representative of that lawyer. An exception to the general ban expressed in Rule 7.2(b) on payments for recommending a lawyer to clients was adopted that permits a lawyer to "pay for a law practice in accordance with Rule 1.17." Comment [13] to Rule 1.6 now recognizes that lawyers may need to disclose limited information to each other to detect and resolve conflicts of interest in various situations, including when considering the purchase of a law practice. And Comment [3] to Rule 5.6, which generally prohibits agreements that restrict the right of a lawyer to practice, explains that the rule does not apply to "restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17."

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4. ABA MODEL R. 1.17(b) & cmt. [6] (2014).
5. ABA MODEL R. 1.17(c) & cmt. [7] (2014).
6. ABA MODEL R. 1.17(d) & cmt. [10] (2014).
7. ABA MODEL R. 1.1 (2014).
8. ABA MODEL R. 1.7 & 1.0(e) (2014).
9. ABA MODEL R. 1.6 & 1.9 (2014).

Transition of Client Matters

Neither the black letter nor the comments to Rule 1.17 address the timing of when a seller "ceases to engage" in the private practice of law for purposes of the rule. In particular, there is no discussion of whether a selling lawyer may continue to be involved in the practice to assist in the orderly transition of active client matters. It is clear from Comment [5] that the selling lawyer may no longer accept new matters in the relevant practice or area of practice, and that prohibition should logically take effect immediately upon the closing of the sale. However, given the history and purpose of the rule, as well as the black letter provisions and comments to the rule, it seems reasonable to conclude that the transition of pending or active client matters from a selling lawyer or firm to a purchasing lawyer or firm need not be immediate or abrupt.

For example, one of the purposes stated by the sponsors of new Rule 1.17 was to address the disparity of treatment of clients of sole practitioners and law firms. Lawyers retiring or withdrawing from law firms are not precluded from assisting their former colleagues in the transition of responsibility for pending matters from the retiring or withdrawing lawyer to another firm lawyer. Where appropriate, a selling lawyer or firm should be given a similar opportunity, for a reasonable period of time after the closing of the sale, to assist in the transition of active client matters.

This conclusion is consistent with Comment [12] to Rule 1.17, which notes that if "... approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale...." The drafters of this comment anticipated situations where the selling lawyer or firm would need to stay involved to accomplish the transition of a pending matter.

This conclusion is also consistent with Rule 1.16(d), which provides that upon termination of representation, a lawyer "shall take steps to the extent reasonably practicable to protect a client's interests...." The duty to protect the client's interests appears to apply regardless of the reason for the termination of the representation, and should therefore include any steps reasonably necessary to protect the interests of the client, even if those steps must be taken after the sale of a lawyer's practice or area of practice has closed.[10]

The period of time required for the selling lawyer to comply with Comment [12] to Rule 1.17 or Rule 1.16(d) in any particular client representation will necessarily depend on the circumstances, including the rules and rulings of courts or other tribunals in pending matters. It is therefore impractical to propose any prescriptive time limitation for when the selling lawyer "ceases to engage" in the private practice of law in the relevant practice area or jurisdiction following the sale of a law practice or area of law practice, as long as the selling lawyer stops accepting new matters in the practice or area

10. *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) § 33(1) (in terminating representation, lawyer must take steps to extent reasonably practicable to protect client's interests).

of practice that has been sold and also limits his or her activities to acts reasonably necessary to accomplish the orderly transition of active client matters.

Charging Clients for Time Spent on Transitioning Matters

Finally, neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent on transition activity that does not advance the representation or directly benefit the client. The clear intent of the black letter and the comment of Rule 1.17 is that clients should not experience any adverse economic impact from the sale of a practice or area of practice. As noted above, Rule 1.17(d) unequivocally states: "The fees charged clients shall not be increased by reason of the sale." And Comment [10] further explains: "The sale may not be financed by increases in fees charged clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser."

The need to spend time on transition activity arises only because of the sale of a practice or area of practice. Charging clients for time spent implementing the sale, activity that would not have been undertaken but for the sale, constitutes an "increase" in the original fee arrangement between the seller and the client "by reason of the sale." Even if the hourly rate is unchanged, billing for the additional time spent on transitioning matters will necessarily increase the fee otherwise due for the representation.[11] Thus, time spent implementing the sale may not be billed to clients.

The compensation, if any, to the selling lawyer or law firm for time spent on transitioning matters should be a matter of negotiation between the seller and the buyer in determining the consideration for the sale.

Conclusion

The requirement of Rule 1.17(a) that the seller of a law practice or area of practice must cease to engage in the private practice of law, or in the area of practice that has been sold, does not preclude the seller from assisting the buyer or buyers in the orderly transition of active client matters for a reasonable period of time after the closing of the sale. However, neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters.

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11. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993) (client should only be charged for legal services performed).

116 ETHICAL CONSIDERATIONS IN THE DISSOLUTION OF A LAW FIRM OR A LAWYER'S DEPARTURE FROM A LAW FIRM

Adopted March 17, 2007.

Intoduction and Scope

Many ethical issues arise in connection with the dissolution of a law firm or a lawyer's departure or withdrawal from a firm. Such issues often arise in the context of determining who will represent particular clients following the break-up. The departing lawyer and the responsible members of the firm with which the lawyer has been associated have ethical obligations to clients on whose legal matters they worked.[1] These ethical obligations sometimes can be at odds with the business interests of the law firm or the departing lawyer. In such circumstances, all involved lawyers must hold the obligations to the client as paramount. The ethical considerations discussed in this opinion include the duty to keep the client reasonably informed about the status of the legal matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, pursuant to Colo. RPC 1.4(a) and (b); the duty to provide competent representation to the client, pursuant to Colo. RPC 1.1; avoiding neglect of client matters because of a break-up, in violation of Colo. RPC 1.3; taking appropriate steps upon withdrawal from representation, in accordance with Colo. RPC 1.16(d); ensuring that any funds in which a client or a third party may claim an interest are maintained separate from the lawyers' own property, in accordance with Colo. RPC 1.15(a); refraining from any solicitation or efforts to retain clients that would violate the provisions of Colo. RPC 7.1 or Colo. RPC 7.3; restrictions on a lawyer's right to practice after leaving a firm that might violate Colo. RPC 5.6(a); and generally refraining from any conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Colo. RPC 8.4(c).

The primary focus of this opinion is on the ethical obligations of lawyers to the *clients* they represent at the time of the dissolution or the lawyer's departure. The opinion also touches upon the actions of lawyers toward each other in these circumstances. The ethical obligations of the lawyers involved are the same whether the departing lawyer is a partner/shareholder, an associate, or some other category of lawyer such as one designated as of counsel. However, the opinion does not address the *legal* obligations owed to clients, or the legal duties arising from the relationship between and among the lawyers. It also does not address circumstances in which lawyers who are not in the same firm represent, as co-counsel, a common client.

This opinion substantially adopts and endorses Formal Opinion 99-414 (1999) issued by the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA). [editor's note: ABA Formal Opinion 99-414 was attached to this opinion as Appendix A as printed in the May 2007 issue of *The Colorado Lawyer*, by permission of the ABA] The remainder of this opinion focuses on application of the Colorado Rules of Professional Conduct to these circumstances and on issues that warrant comment beyond that in ABA Formal Opinion 99-414.

Analysis

The Client's Right to Choose Counsel

It is now uniformly recognized that the client-lawyer contract is terminable at will by the client.[2] Colo. RPC 1.16(a)(3) codifies this principle.[3] When a lawyer who has had primary responsibility for a client matter withdraws from a law firm, the client's power to choose or replace the lawyer borders on the absolute.[4] Neither the firm nor any of its members may claim a possessory interest in clients.[5] In other words, clients do not *belong* to lawyers.[6]

A lawyer or law firm may not, therefore, take action that impermissibly impairs a client's right to choose counsel. For example, a dispute between attorneys in a law firm over a fee that is due or may come due should not impact the client's right to freely choose counsel.

Nevertheless, the client's right to choose is subject to certain limitations. Generally, a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client, if the representation will result in violation of the Rules of Professional Conduct or other law[7] or if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.[8] For example, the departing lawyer may be the only lawyer in the firm with experience in a specialized area of law applicable to a particular client matter. In such circumstances, the law firm from which the lawyer is departing may be unable to continue the representation, except on a limited basis.[9] On the other hand, the departing lawyer may lack the support and resources necessary to handle a complex matter properly after leaving the firm. The departing lawyer may also be prohibited from representing the client if he or she is associating with a firm that would be precluded from representation due to a conflict of interest. In some situations, the right of a client to select the lawyer may be limited under the provisions of an insurance contract.[10]

In any event, a client represented by a particular lawyer or law firm will have to choose counsel again if the firm breaks up or the responsible lawyer departs from the firm during the course of the representation. In order to make appropriate choices, the client must have sufficient information.

Notice to Clients

In Colorado, a lawyer has a duty to keep a client reasonably informed about the status of a matter[11] and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[12] When a lawyer plans to cease practice at a law firm, or when a law firm plans to terminate the lawyer's association with the firm, both the lawyer and the firm have responsibility for providing timely notification to clients affected by the lawyer's departure and providing such clients with information sufficient to allow informed choice.

Not only are the remaining and departing lawyers *permitted* to contact clients about an impending change in personnel, they are *required* to provide the client with at least enough information to determine the future course of the representation.[13] It is highly preferable that any affected client be notified by a joint communication from the departing lawyer and the firm and that the joint notice be transmitted sufficiently in advance of the lawyer's anticipated departure to allow the client to make decisions about who will represent it and communicate that decision before the lawyer departs. An "affected client" is one for whose active matters the departing lawyer currently is responsible or plays a principal role in the current delivery of legal services.[14] The joint and advance notice helps ensure an orderly transition that will best protect the interests of the affected client. Attached to this Opinion as Appendix B is a form of letter that, if given in a timely manner, should satisfy the ethical requirements of notice to affected clients.

In some limited circumstances joint, advance notice is not practicable.[15] If either the departing lawyer or the firm fails or refuses to participate in providing timely and appropriate joint notice, unilateral notice is necessary. If unilateral notice is given, it should impartially and fairly provide the same type of information as would have been included in the joint notice.[16]

Consistent with Colo. RPC 7.1, 7.3 and 7.4, as applicable, both the departing lawyer and the firm may solicit professional employment from clients or former clients of the firm. In doing so, however, the departing lawyer should be mindful that such solicitation may give rise to a civil claim for damages or other relief under the substantive law, especially while the departing lawyer is still employed by or associated with the law firm.[17] Pursuant to Colo. RPC 7.3, departing lawyers may solicit professional employment through written or electronic communications. Departing lawyers having a "family or prior professional relationship with the prospective client" are not subject to the 30-day waiting period for soliciting clients in personal injury or wrongful death matters as provided in Colo. RPC 7.3(c), and also may solicit clients in person or by telephone without running afoul of Colo. RPC 7.3.[18]

If a client or potential client inquires of the firm seeking to contact a lawyer who has departed the firm, the firm must provide the lawyer's new business address and telephone number, if known. Failure to do so may be a violation of Colo. RPC 1.4 or may reflect a lack of candor.[19] However, after providing information as described above, the firm may inquire whether the call is regarding a legal matter and, if so, may ask whether someone at the firm may help instead.[20]

Proper and Continuous Handling of Client Matters

Amid the turmoil of a firm break-up, attorneys should never forget that they have clients and that they continue to owe those clients ethical and legal duties.[21] While an affected client is choosing between the departing lawyer and the law firm, both have a duty to ensure that the client's matter is handled properly. A lawyer shall act with reasonable diligence and promptness in representing a client, and shall not neglect a legal matter entrusted to that lawyer.[22] Unless the relationship between a lawyer and client is terminated as provided in Colo. RPC 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.[23]

Absent a special agreement, the client employs the firm and not a particular lawyer, and the firm has responsibility, along with the departing attorney, for the cases being handled by the departing attorney.[24] Therefore, subject to the contrary wishes of an affected client, a law firm is obligated to continue to handle matters that were handled by a departing lawyer.[25] The affected client, however, may continue to view the departing lawyer as the client's representative despite the lawyer's withdrawal from the firm. The attorney-client relationship is an ongoing relationship that gives rise to a continuing duty to the affected client unless and until the client clearly understands, or reasonably should understand, that the relationship is one on which he, she or it can no longer depend.[26]

Withdrawal by the Law Firm or Attorney

A lawyer's departure from a law firm generally leads to withdrawal of either the firm or the departing lawyer as counsel for one or more affected clients. In matters in which a lawyer or firm has entered an appearance in a court proceeding, a formal motion to withdraw may be required.[27] Colo. RPC 1.16(d) provides that 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.

When the law firm and the departing lawyer provide proper notice as discussed above, the affected client's matter is handled with diligence and competence during the withdrawal and selection of counsel, and the client chooses to be represented by one or the other (or chooses another lawyer or firm), the interests of the client will have been protected to a large extent. However, client papers and property still can be an issue. In any client matter, files generally are created while the departing lawyer is associated with the firm. The proper handling of these client files is discussed below.

The affected client may have paid an advance retainer for representation in a particular matter. Typically, such retainers are paid to the firm rather than an individual lawyer. These funds must be held separate from the lawyers' own property.[28] If the lawyer or law firm holding the client funds is withdrawing from representation, and neither the lawyer nor any third person claims any interest in the funds, the lawyer or firm holding the funds must promptly pay the remaining trust balance to the client or otherwise apply the funds as directed by agreement with the client.[29] If the departing lawyer will be representing the affected client, the client funds held by the firm may, with the client's consent, be transferred to an appropriate trust account established by the departing lawyer.

In some circumstances neither the departing lawyer nor the law firm wants to continue representing the affected client. In this situation, the obligations of the lawyers are no different than in any other situation in which a lawyer wishes to withdraw from representation. The departing lawyer and the firm must bear in mind the responsibilities imposed under Colo. RPC 1.3 (diligent representation), Colo. RPC 1.4 (communication), and Colo. RPC 1.16 (termination of representation).

Client Files

With limited exceptions, the client is entitled to the client file.[30] The departing lawyer may remove client files only with the consent of the affected client. If the affected client so requests, the firm must provide the files to the departing lawyer, subject to the limitations discussed in CBA Formal Opinion 104. Pending receipt of instructions from the client, both the departing lawyer and the law firm should have reasonable access to the file in order to protect the interests of the client, which remains the paramount obligation of both.[31] Even if the client has requested that the file be transferred to the departing lawyer, the file should not be removed without giving the firm notice and opportunity to copy the file. Likewise, if the affected client requests that the firm continue the representation, the departing lawyer should be given the opportunity to copy the file.[32] The contents of such client files remain confidential pursuant to the provisions of Colo. RPC 1.6.

In some circumstances, a client wishing to have a file transferred to the departing lawyer may owe the firm for past services or for costs advanced on the client's behalf. It is this Committee's view that such situations should be treated the same as any other in which a client discharges a lawyer without fully satisfying his or her financial obligations to the lawyer. The firm may, under certain limited circumstances, assert a retaining lien against client property in its possession.[33]

The law firm may possess client files in legal matters that are inactive or have been closed. Both the departing lawyer and the firm should consider any ethical obligations they may have with respect to such files insofar as they pertain to client matters for which the departing lawyer was responsible or played a principal role.[34]

Conflicts of Interest Arising Out of the Departing Lawyer's New Affiliation

The departing lawyer must also be aware of and avoid conflicts of interest that may arise out of his or her affiliation with another law firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Colo. RPC 1.7, 1.8(c), 1.9 or 2.2.[35] The rule of imputed disqualification flows from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client.[36] Thus, when the departing lawyer brings clients to his or her new firm, they become the new firm's clients. Likewise, the new firm's clients become the departing lawyer's clients.

Because of the rules concerning imputed disqualification, the departing lawyer and the new firm must perform a thorough conflicts check. This conflicts check should be designed to determine whether the departing lawyer's association with the new firm may involve conflicts of interest based on consideration of the departing lawyer's current *and* former clients.[37] The process of checking for conflicts of interest may, in some circumstances, be undertaken prior to the departing lawyer's affiliation with the new firm.[38]

Restrictions on the Right to Practice

Colo. RPC 5.6(a) provides that a lawyer shall not participate in offering or making a "partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or as permitted by Rule 1.17 [regarding the sale of a law practice]." The comment to Rule 5.6 provides that such an agreement "not only limits the lawyer's professional autonomy but also limits the freedom of clients to choose a lawyer."

In Colorado, an agreement prohibiting a departing lawyer from soliciting clients after departure from a firm impermissibly impairs the client's right to discharge and choose counsel, and may lead to discipline for the offending attorney.[39] Courts in many other jurisdictions have refused to enforce agreements between lawyers and law firms that they viewed as anti-competitive.[40] While a departing lawyer must be mindful of the lawyer's fiduciary obligations to the firm and of the existing contractual relations between the firm and affected clients, the lawyer may not agree to, and the firm must not impose, conditions that might inhibit a client's right to choose counsel.

Duty of Candor

Regardless of the nature of the departure, a departing lawyer and firm each have a duty to act with candor toward the other.[41] Colo. RPC 8.4(c) states that, "it is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The duty of candor, as well as Rule 8.4(c), may be breached by a lawyer who misrepresents the lawyer's status or intentions to others at the firm, and vice versa.

While a discussion of the legal, as opposed to ethical, duties of lawyers is beyond the scope of this opinion, lawyers and firms contemplating a dissolution or departure should give careful consideration to their respective legal duties, including potential obligations based on their contractual, agency, or fiduciary relationships. A departing lawyer should consider the consequences that may arise from contacting clients and attempting to obtain consent to transfer matters to the departing lawyer in advance of notifying the firm, or in denying to the firm the lawyer's intention to depart. Firms likewise should consider the consequences of similar actions prior to the contemplated departure of a lawyer who is not yet aware of impending change.[42] Such actions by a departing lawyer or a firm may reflect a lack of candor.

NOTES

1. The Colorado Rules of Professional Conduct apply to lawyers as individuals and not to law firms as separate entities. Any references to the duties and obligations of a law firm within this opinion are to the responsible members of the firm.

2. Charles W. Wolfram, *Modern Legal Ethics,* § 9.5.2, at 545 (1986). The Colorado Supreme Court recognized the client's right to terminate the attorney-client relationship as a matter of public policy in *Olsen & Brown v. City of Englewood,* 889 P.2d 673, 676 (Colo. 1995).

3. Colo. RPC 1.16(a)(3) provides that except when a lawyer is ordered to do so by a tribunal, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged, subject to the approval of the tribunal where applicable.

4. Robert W. Hillman, *Hillman on Lawyer Mobility,* ("Hillman"), Chapter 2, § 2.3.1 (2000 Supplement).

5. *Id.*

6. In expressing this view, the committee is aware that the Restatement of the Law Governing Lawyers suggests that clients belong to the firm and not an individual lawyer. Rest. (3d) Law Governing Lawyers, § 9(3), cmt. i. The Committee disagrees with any characterization of clients as property.

7. Colo. RPC 1.16(a)(1).

8. Colo. RPC 1.16(a)(2).

9. The comment to Colo. RPC 1.1 provides in pertinent part:

> While the licensing of a lawyer is evidence that the lawyer has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which the lawyer is not qualified. However, a lawyer may accept such employment if in good faith the lawyer expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to clients. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which the lawyer is not and does not expect to become so qualified should either decline the employment or, with the consent of the client, accept the employment and associate with a lawyer who is competent in the matter.

The comment further provides:

> In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

10. *See* CBA Formal Op. 91, "Ethical Duties of Attorney Selected by Insurer to Represent Insured" (Jan. 16, 1993). 11. Colo. RPC 1.4(a)

12. Colo. RPC 1.4(b).

13. Alexander R. Rothrock, *Essays on Legal Ethics and Professional Conduct* ("Rothrock") § A4.2.1, CLE in Colorado, Inc. (2005).

14. *See* ABA Formal Op. 99-414, Appendix A hereto, which provides a similar definition for the term "current clients." In determining whether or not the departure of a lawyer from a firm triggers the requirement to notify a client on whose matter the lawyer has been working (that is, whether the client is an "affected client"), the lawyer and the firm also should consider whether the client reasonably would believe itself to be affected by the lawyer's departure, for example, where a lawyer is specifically named in an engagement letter as being expected to provide services to the client. Even if a client is not an affected client, the departing lawyer may choose to notify the client of his or her departure if such notification complies with Colo. RPC 7.1 and 7.3. Restrictions purporting to prohibit such contact likely would violate the prohibition of Colo. RPC 5.6 on restrictions of the right of a lawyer to practice after termination of his or her relationship with a firm.

15. There will be situations in which a departing lawyer will be unable to represent the client, and the notice to the client would not present representation by the departing lawyer as an option. For example, the departing lawyer would be unable to represent the client if the lawyer were suspended from the practice of law or placed on disability inactive status. However, a difference of opinion between the firm and the departing lawyer regarding the competence or ability of one or the other to represent the client does not, standing alone, justify failure or refusal to extend to the client a choice in representation.

16. Kentucky Bar Assn. Ethics Op., KBA E-424 ("KBA E-424"), n. 4 (2005).

17. *See e.g., Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989) (addressing an employee's duty of loyalty, generally). *See also* additional cases cited in ABA Formal Op. 99-44, Appendix A hereto, at n.16, 17.

18. The Committee concurs with the ABA view that a lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter along with other lawyers in a way that afforded little or no direct contact with the client. "Prior professional relationship" also may apply to the constituents of an organizational client with whom the lawyer has had substantial contact, who in their individual capacity never were clients of the firm or lawyer. *See* 2 G. Hazard & W. Hodes, *The Law of Lawyering*, § 57.7, n. 4, p. 57-25 (3d ed. 2001).

19. Colo. RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. To the extent such inquiries are handled by non-lawyers employed or associated with the firm, partners or principals in the firm, or those lawyers having direct supervisory authority over the non-lawyer, shall make reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that the non-lawyer's conduct will be compatible with the professional obligations of the lawyer, or shall make reasonable efforts to insure that the person's conduct is compatible with those professional obligations. Colo. RPC 5.3(a) and (b).

20. Phila. Bar Assn./Pa. Bar Assn. Joint Ethics Op. 99-100 (April 1999).

21. Rothrock § A4.2.1.

22. Colo. RPC 1.3.

23. Comment, Colo. RPC 1.3. Even after the attorney-client relationship has terminated, the firm and the departing lawyer have an obligation to avoid harming the client's interests. For example, where a client has terminated the client's relationship with a firm, the firm nonetheless has the obligation to make sure that communications coming to the client through the firm are promptly communicated to the client. *See* Restatement (Third) The Law Governing Lawyers, § 33(2)(c).

24. ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1428 (Feb. 16, 1979).

25. Wisconsin Ethics Op. E-97-2, State Bar of Wisconsin CLE Books (July 1998).

26. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (quoting *In re Weiner*, 120 Ariz. 349, 352, 586 P.2d 194, 197 (1978)). In *People v. Bennett*, the Colorado Supreme Court held that whether an attorney-client relationship exists turns on the reasonable, subjective view of the client, and an important factor is whether the client believes that the relationship existed. "The attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client until the client understands, or reasonably should understand, that the relationship is no longer to be depended on." Id.

27. C.R.C.P. 121, §1-1(4), applicable to attorneys practicing in the district courts in Colorado, seems to indicate that when an attorney enters an appearance as a member of a firm, it is the firm as a whole that becomes counsel of record. Thus, if the departing lawyer will not be continuing the representation after leaving the firm, a formal motion to withdraw may not be necessary if the firm will continue representing the client. In

contrast, the local rules of the United States District Court for the District of Colorado state that the law firm is not counsel of record. D.C. Colo. L. R. 83-5(B). Thus, in a matter pending in certain federal courts, it may be necessary for the departing lawyer to withdraw from representation and for a different lawyer with the firm, who will take over responsibility for the case, to enter an appearance.

28. Colo. RPC 1.15(a).

29. *See* Colo. RPC 1.15(b). For proper handling of funds in a lawyer's possession in which the lawyer or another person claims an interest, *see* Colo. RPC 1.15(c).

30. *See* CBA Formal Op. 104, "Surrender of Papers to the Client Upon Termination of the Representation," (April 17, 1999).

31. ISBA Op. 95-02, n. 4; Utah Ethics Op. 132 (1993).

32. *See* KBA E-424 (recognizing that both the firm and the departing lawyer may have legitimate interest in the content of a client file because, among other reasons, it would be essential in defending a later malpractice action). *See also,* D.C. Bar Legal Ethics Comm. Op. 168 (1986) (concluding that a firm may copy transferred files at its own expense).

33. *See* CBA Formal Op. 82, "Assertion of Attorney's Retaining Lien on Client's Papers," (April 15, 1989; Addendum Issued 1995).

34. For general discussion regarding client files in closed legal matters, *see* Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan-Part I," 30 *The Colorado Lawyer* No. 10, p. 147 (October 2001); Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan-Part II," 30 *The Colorado Lawyer* No. 11, p. 77 (November 2001).

35. Colo. RPC 1.10(a).

36. Colo. RPC 1.10, Comment.

37. Even if the departing lawyer did not personally represent a particular client at the prior firm, a conflict of interest can exist if the lawyer's new firm represents a client in the same or a substantially related matter, the interests of the prior firms's client are materially adverse to those of the new firm's client, and the departing lawyer acquired information protected by Rule 1.6 that is material to the matter. Colo. RPC 1.9(b).

38. The Committee recognizes that there is an inherent tension between the new firm's need to obtain information concerning the departing lawyer's former and current clients in order to comply with the conflict rules, and the departing lawyer's obligations under Colo. RPC 1.6(a) not to reveal information relating to representation of clients. The Colorado Supreme Court is currently considering a proposed new comment to Colo. RPC 1.6, which would generally recognize a departing lawyer's implied authorization to disclose certain limited non-privileged information protected by Colo. RPC 1.6 in order to conduct a conflicts check. *See* Proposed Amendments to Colorado Rules of Professional Conduct (Dec. 30, 2005), Colo. RPC 1.6, Comment [5A], available at http://www.courts.state.co.us/supct/committees/profconductdocs/sc-appendixa-1205.pdf. In addition, the departing lawyer may seek the consent of former or current clients to disclose information to permit a conflict check and under some circumstances it may be possible to check for conflicts of interest without disclosing information relating to the representation of former clients. For a more thorough discussion of such situations, *see* Marcy Glenn, "Conflict Issues When Attorneys Switch Jobs," 27 *The Colorado Lawyer* No. 5, p. 49 (May 1998).

39. In *People v. Wilson*, 953 P.2d 1292 (Colo.1998), the Colorado Supreme Court disciplined a lawyer for attempting to enforce an employment agreement prohibiting departing lawyers from soliciting clients and providing for forfeiture of all fees earned by departing lawyers through such solicitation. The court held that such conduct violated Colo. RPC 8.4(g), which prohibits conduct in violation of accepted standards of legal ethics.

40. For a thorough discussion of agreements discouraging competition among lawyers, *see* Hillman, § 2.3.4 (2004 Supplement).

41. This committee agrees with the Oregon Bar Association and the Oregon Supreme Court that a lawyer has a duty of candor to her or his firm. Or. Bar Assn. Formal Op. No. 2005-70. ("Regardless of contractual, fiduciary, or agency relationship between Lawyer and Firm A, however, it is clear under Oregon RPC 8.4(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm A. *See In re Smith*, 315 Or. 260, 843 P.2d 449 (1992); *In re Murdock*, 328 Or. 18, 968 P.2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is a duty of candor toward that law firm)").

42. *See, e.g., Meehan, et al. v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1998); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978); *In re Smith, supra; In re Murdock, supra*, at n. 7.

Appendix A

September 8, 1999

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 99-414
Ethical Obligations When a Lawyer Changes Firms

September 8, 1999

A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients' interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him. The departing lawyer and the responsible members of her firm who remain must take reasonable measures to assure that the withdrawal is accomplished without material adverse effect on the interests of clients with active matters upon which the lawyer currently is working. The departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure that prompt notice is given to clients on whose active matters she currently is working. The departing lawyer and responsible members of the law firm who remain also have ethical obligations to protect client information, files, and other client property. The departing lawyer is prohibited by ethical rules, and may be prohibited by other law, from making in-person contact prior to her departure with clients with whom she has no family or client-lawyer relationship. After she has left the firm, she may contact any firm client by letter.

When a lawyer ceases to practice at a law firm, both the departing lawyer and the responsible members of the firm who remain have ethical responsibilities to clients on whose active matters the lawyer currently is working to assure, to the extent reasonably practicable, that their representation is not adversely affected by the lawyer's departure. In this Opinion, the Committee addresses obligations under the Model Rules of Professional Conduct that a lawyer has when she leaves one law firm for another, including the following: (1) disclosing her pending departure in a timely fashion to clients for whose active matters she currently is responsible or plays a principal role in the current delivery of legal services (sometimes referred to in this Opinion as "current clients"); (2) assuring that client matters to be transferred with the lawyer to her new law firm do not create conflicts of interest in the new firm and can be competently managed there; (3) protecting client files and property and assuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal; (4) avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; and (5) maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the lawyer's former firm.[1]

1. This Opinion addresses mainly the obligations of the departing lawyer. Nevertheless, the firm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, and may have obligations as well under other law, to assure to the extent reasonable practicable that the withdrawal from the firm is accomplished without material adverse effect on any clients' interests, especially clients on whose active matters the departing lawyer currently is working. *Cf.* ABA Informal Opinion 1428 (1979), decided under the former Model Code of Professional Responsibility, and California Bar Ethics Op. No. 1985-86, 1985 WL 57193 *2 (Cal.St.Bar.Comm.Prof.Resp. 1985), both of which place the responsibility of notifying clients upon the departing lawyer and her firm. Among remaining firm members' ethical obligations are to make reasonable efforts to ensure that there are in effect measures: (1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure

The departing lawyer also must consider legal obligations other than ethics rules that apply to her conduct when changing firms, as well as her fiduciary duties owed the former firm. The law of agency, partnership, property, contracts, and unfair competition impose obligations that are not addressed directly by the Model Rules. These obligations may affect the permissible timing, recipients, and content of communications with clients, and which files, documents, and other property the departing lawyer lawfully may copy or take with her from the firm. Although the Committee does not advise upon issues of law beyond the Model Rules, we must take account of other law in construing the Rules; so must the departing lawyer before determining an appropriate course of action.

Notification to Current Clients Is Required

The impending departure of a lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter (i.e., the lawyer's current clients), is information that may affect the status of a client's matter as contemplated by Rule 1.4.[2] A lawyer who is departing one law firm for another has an ethical obligation, along with responsible members of the law firm who remain, to assure that those clients are informed that she is leaving the firm. This can be accomplished by the lawyer herself, the responsible members of the firm, or the lawyer and those members jointly. Because a client has the ultimate right to select counsel of his choice,[3] information that the lawyer is leaving and where she will be practicing will assist the client in determining whether his legal work should remain with the law firm, be transferred with the lawyer to her new firm, or be transferred elsewhere. Accordingly, informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him.[4]

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of a lawyer having substantial responsibility for the clients' active matters; (2) to make clear to those clients and others for whom the departing lawyer has worked and who inquire that the clients may choose to be represented by the departing lawyer, the firm or neither (*see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. h (Proposed Official Draft 1998); (3) to assure that active matters on which the departing lawyer has been working continue to be managed by remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that, upon the firm's withdrawal from representation of any client, the firm takes reasonable steps to protect the client's interests pursuant to Rule 1.16(d). *See infra*, n.4 and accompanying text. This Opinion does not address the issue of a division of fees between the departing lawyer and her law firm.

2. Rule 1.4 (Communication) states:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment [1] to Rule 1.4 provides that "the client should have sufficient information to participate intelligently in decisions concerning . . . the means by which they [the objectives of the representation] are to be pursued . . . ."

3. Rule 1.16 (Declining Or Terminating Representation) in paragraph (a)(3) states in pertinent part that a lawyer "shall withdraw from the representation of a client if . . . the lawyer is discharged." *See also* Comment [4]; Restatement § 26 cmt h, *supra* n.1.

4. State ethics opinions also have determined that, under the Model Rules, a departing lawyer has an ethical duty to inform current clients that she is leaving the firm. *See, e.g.*, District of Columbia Bar Legal Ethics Committee Op. No. 273 (1997); State Bar of Michigan Std. Com. on Prof. and Jud. Ethics Op. No. RI-224, 1995 WL 68957 (Mich.Prof.Jud.Eth. 1995). *See also* Rule 1.16(d), *infra* n.8. The ABA Committee gave approval under the former Model Code of Professional Responsibility for a partner or associate who is leaving one firm for another to send an announcement soon after departure to those clients for whose active, open, and pending matters the lawyer had been directly responsible immediately before resignation. Informal Opinions 1457 (1980) and 1466 (1981). These opinions did not, however, address the question whether the departing lawyer might send notices to any clients *before* resigning.

Notification of Current Clients is Not Impermissible Solicitation

Because she has a present professional relationship with her current clients, a departing lawyer does not violate Model Rule 7.3(a)[5] by notifying those clients that she is leaving for a new affiliation. Under Rule 7.3(a), the departing lawyer is, however, prohibited from making in-person contact with firm clients with whom she does *not* have a prior professional or family relationship. A lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client.[6] The departing lawyer nevertheless may contact the client through written or oral recorded communication pursuant to Rule 7.2(a), subject to the limitations in Rules 7.1, 7.3(b), and 7.3(c), at least after the lawyer has departed the firm and joined the new firm.[7]

The Committee also is of the opinion that a departing lawyer must, under Rule 1.16(d),[8] take steps to the extent practicable to protect her current clients' interests. Moreover, the responsible members of the former firm must themselves comply with Rule 1.16(d) respecting all clients who select the departing lawyer to represent them, whether or not they are current clients of the departing lawyer.[9]

A lawyer's duty to inform her current clients of her impending departure is similar to a lawyer's obligation to inform clients if the lawyer will be unavailable to provide legal services to them for an extended period

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5. Model Rule 7.3(a) states:
A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

6. The rationale for the prohibition is that "there is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to be in need of legal services." Rule 7.3, Comment [1]. The rationale for the exception is that "there is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal (*sic*) or professional relationship . . . ." Rule 7.3, Comment [4]. The Committee views the exception under Rule 7.3(a) to permit in-person solicitation *only* of those current clients of the firm with whom the lawyer personally has had sufficient professional conduct to afford the client an opportunity to judge the professional qualifications of the lawyer and as not extending beyond the text of the Rule to apply to firm clients with whom her relationship is solely personal and not professional. *See, e.g.*, N.C. Bar Opinion 200, 1994 WL 899607 (N.C.St.Bar 1994) (lawyer after departure may contact clients of firm for whom he has been responsible); Arizona Comm. on Rules of Professional Conduct Op. No. 91-17 (June 10, 1991) (permissible before departure to notify clients with whom he had a personal, professional relationship); Kentucky Bar Opinion E-317 (1987) (permissible before departure to notify clients whom he personally represented of his impending departure).

7. Lawyers are permitted, subject to certain limitations, "to make known their services not only through reputation but also through organized information campaigns. Rule 7.2, Comment [1]. Rule 7.2 permits not only general advertising, but also targeted "written or recorded communication."

8. Model Rule 1.16(d) states:
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 other law.

9. If a current client chooses to remain with the firm or to move with the departing lawyer to her new firm, the lawyer(s) selected must continue the representation unless withdrawal is necessary under Rule 1.16(a) or permissible under Rule 1.16(b). In the Committee's opinion, "other good cause for withdrawal" does not exist under Rule 1.16(b)(6) solely because the client's matter is difficult or time consuming or has little chance of success, so long as no other enumerated predicate for withdrawal exists.

because of major surgery or an extended vacation.[10] In all of these situations, the clients have a right to know of the impending absence so that they can make informed decisions about future representation, even though the lawyer who temporarily will be unavailable is likely to believe that other lawyers in the firm are fully capable of handling the clients' matters during her absence.

The Initial Notice Must Fairly Describe the Client's Alternatives

Any *initial* in-person or written notice informing clients of the departing lawyer's new affiliation that is sent before the lawyer's resigning from the firm generally should conform to the following:

1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);
2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
4) the departing lawyer must not disparage the lawyer's former firm.[11]

The Departing Lawyer Should Provide Additional Information

In order to provide each current client with the information needed to make a choice of counsel, the departing lawyer also may inform the client whether she will be able to continue the representation at her new law firm.[12] If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future represen-

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10. *Cf.* Passanante v. Yormack, 138 N.J.Super. 233, 238, 350 A. 2d 497, 500 (N.J. 1975), *cert. denied*, 704 N.J. 144, 358 A.2d 199 (N.J. 1976) (lawyer has implicit obligation to inform clients of failure to act for whatever cause to permit clients to engage another lawyer).

11. ABA Informal Opinion 1457 (1980) found consistent with the Model Code of Professional Responsibility the timing, content, and choice of recipients of a form letter announcement by a lawyer that he had resigned from a law firm to become a member of another firm sent "soon after making the change to clients (and only those clients) for whose active, open, and pending matters he was directly responsible as a member of the ABC law firm immediately before his resignation." The form letter stated that the client had a right to decide how and by whom the pending matters would be handled and did not urge the client to choose the departing lawyer over the firm. In ABA Informal Opinion 1466 (1981), Opinion 1457 was extended to include associates, assuming the same fact pattern. The Committee there noted it "does not determine or advise upon issues of law," but then distinguished the facts presented to the Committee from the facts shown in Adler v. Epstein, 393 A.2d 1175 (Pa. 1978), *cert. denied*, 442 U.S. 907 (1979) (departing group of associates enjoined from actively soliciting clients of old firm as part of pre-departure efforts to borrow money on the basis of the clients). Today we reject any implication of Informal Opinions 1457 or 1466 that the notices to current clients and discussions as a matter of ethics must await departure from the firm.

12. The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation. When discussing an association with another firm, the departing lawyer also must be mindful of potentially disqualifying conflicts of interest in her old firm if the new firm currently represents any client with interests adverse to a client of the old firm. Should such a client be identified, the departing lawyer may need to be screened within the old firm no later than the commencement of serious discussions with the new firm. *See* ABA Formal Opinion 96-400. Lastly, the departing lawyer also might find that her work in her former firm would, upon her arrival at the new firm, create a conflict of interest under Rule 1.9 with one of her new firm's clients requiring the creation of a screen that, subject to the affected clients' consents in most jurisdictions, would avoid imputation of her individual conflict of interest to her new firm under Model Rule 1.10(a).

tation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter.[13] The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the firm, the departing lawyer and her new firm, or some other lawyer will continue the representation.

Joint Notification By the Lawyer and the Firm is Preferred

Far the better course to protect clients' interests is for the departing lawyer and her law firm to give joint notice of the lawyer's impending departure to all clients for whom the lawyer has performed significant professional services while at the firm, or at least notice to the current clients.[14] Unfortunately, this is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt her immediate termination. When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services, in the manner described above, and preferably should confirm the conversations in writing so as to memorialize the details of the communication and her compliance with Model Rules 7.3 and 7.1.[15]

Law Other Than the Model Rules Applies to the Departure

In addition to satisfying her ethical obligations, the departing lawyer also must recognize the requirements of other principles of law as she prepares to leave, especially if she notifies her current clients before telling her firm she is leaving. For example, the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.[16]

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13. In this respect, we agree with D.C. Bar Legal Ethics Opinion 273 (1997), "Ethical Considerations of Lawyers Moving From One Private Firm to Another."

14. Cal. Bar Ethics Op. No. 1985-86, 1985 WL 57193 at * 2, *supra*, n.1, interprets the California Rule to require both the departing lawyer and the law firm to provide fair and adequate notice of the withdrawal to the client sufficient to allow a client an opportunity to make an informed choice of counsel, and states that, where practical, the notice should be made jointly. ABA Informal Opinion 1428 (1979) suggested that, under the Model Code, both the departing lawyer and the law firm had an obligation to give the client "the choice as to whether or not the client wishes the firm to continue handling the matter or whether the client wishes to choose another lawyer or legal services firm." *See also* Cleveland Bar Opinion 89-5 (under the Model Code, either the departing lawyer or the law firm must give due notice to those clients of the former firm for whose active, open, and pending matters the lawyer is directly responsible).

15. The responsible members of the law firm must not take actions that frustrate the departing lawyer's current clients' right to choose their counsel under Rule 1.16(a) and Comment [4] by denying access to the clients' files or otherwise. To do so may violate the responsible members' ethical obligations under Rules 1.16(d) and 5.1.

16. *See, e.g.*, Siegel v. Arter & Hadden, 85 Ohio St. 3d 171, 707 N.E.2d 853 (Oho. Sup. Ct. 1999) (unresolved fact issues precluded summary judgment on unfair competition and trade secret counts because of departing lawyer's use of client list with names, addresses, telephone numbers and matters and fee information, despite notice to firm before notice to clients). *See also* Shein v. Myers, 394 Pa. Super. 549, 552, 576 A.2d 985, 986 (Pa. 1990), *appeal denied*, 533 Pa. 600, 617 A.2d 1274 (Pa. 1991) ("break-away" lawyers tortiously interfered with contract between their former firm and its clients by taking 400 client files, making scurrilous statements about the firm, and sending misleading letters to firm clients). In a joint opinion, the Pennsylvania and Philadelphia Bars warned that notice to clients before advising the firm of her intended departure "may be construed as an attempt to lure clients away in violation of the lawyer's fiduciary duties to the firm, or as tortious interference with the firm's relationships with its clients." Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Joint Op. No. 99-100, 1999 WL 239079 * 2. (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.1999). The Committee also noted that the "prudent approach" is for the departing lawyer not to notify her clients before advising the firm of her intention to leave to join another firm. *Id.*

Charges of breach of fiduciary and other duties owed the former firm also might be avoided if the departing lawyer and her new firm go no further than the permissible conduct noted in *Graubard Mollen v. Moskovitz*[17] and avoid the conduct the court found actionable, such as secretly attempting to lure firm clients to the new firm (even when the departing lawyer originated and had principal responsibility for the clients' matters) and lying to clients about their right to remain with the old firm and to partners about the lawyer's plans to leave. Although that case involved civil litigation, other courts have imposed discipline on lawyers for similar conduct because it involved dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).[18]

Entitlement to Files, Documents, and Other Property Depends on The Model Rules and Other Law

A lawyer moving to a new firm also may wish to take with her files and other documents such as research memoranda, pleadings, and forms. To the extent that these documents were prepared by the lawyer and are considered the lawyer's property or are in the public domain, she may take copies with her. Otherwise, the lawyer may have to obtain the firm's consent to do so.

The Committee is of the opinion that, absent special circumstances, the lawyer does not violate any Model Rule by taking with her copies of documents that she herself has created for general use in her practice. However, as with the use of client lists, the question of whether a lawyer may take with her continuing legal education materials, practice forms, or computer files she has created turns on principles of property law and trade secret law. For example, the outcome might depend on who prepared the material and the measures employed by the law firm to retain title or otherwise to protect it from external use or from taking by departing lawyers.

Client files and client property must be retained or transferred in accordance with the client's direction.[19] A departing lawyer who is not continuing the representation may, nevertheless, retain copies of client documents relating to her representation of former clients, but must reasonably ensure that the confidential client information they contain is protected in accordance with Model Rules 1.6 and 1.9.

Conclusion

Both the lawyer who is terminating her association with a law firm to join another and the responsible members of the firm who remain have ethical obligations to clients for whom the departing lawyer is providing legal services. These ethical obligations include promptly giving notice of the lawyer's impending departure to those current clients on whose matters she actively is working.

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17. 86 N.Y.2d 112, 653 N.E.2d 1179 (1995). The Court stated that a departing lawyer's efforts to locate alternative space and affiliations would not violate his fiduciary duties to his firm because those actions obviously require confidentiality. Also, informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible. *Id.* at 1183. A departing lawyer should, of course, consult all case law applicable in the practice jurisdiction.

18. *See, e.g.*, In the Matter of Cupples, 979 S.W.2d 932, 935 (Mo. 1998); *In re* Cupples, 952 S.W.2d 226, 236-37 (Mo. 1997) (in separate disciplinary proceedings involving a lawyer in connection with his departure from two different law firms, the court held that the lawyer's conduct, which included secreting client files as he prepared to withdraw from a firm, removing files without client consent, failing to inform client of change in nature of the representation, and other actions constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Missouri's counterpart to Model Rule 8.4(c)). *See also In re* Smith, 853 P.2d 449, 453 (Or. 1992) (Before leaving law firm, lawyer met with new clients in his office, had them sign retainer agreements with him, and took files from the office. In imposing a four (4) month suspension from practice of law, the Court stated that "although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR 1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation.").

19. *See* Model Rule 1.16(d), *supra*, n.8. Pending client instructions, client property must be held in accordance with Model Rule 1.15.

The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.

Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm's information or other property.

Appendix B

Form Letter Announcing Departure of a Lawyer from a Firm Joint Announcement

[Date]

[Client Name]
[Client Address 1]
[Client Address 2]

Re: [Matter Reference]

Dear [Client Salutation],

Effective [Date], Susan Q. Lawyer will no longer be a member of Frip & Frap, LLP. Effective that date, she will be a member of Lawyer & Doe, PC. While a member of [or employed at] Frip & Frap, Ms. Lawyer provided legal representation to you. In light of her departure, you may choose whether you want to have Ms. Lawyer continue to represent you as a member of Lawyer and Doe, P.C.; have another lawyer from Frip & Frap continue to represent you; or engage another lawyer of your choosing.

In order to facilitate a smooth transition, please advise Ms. Lawyer and Melville Frip of Frip & Frap in writing at your earliest convenience of your choice of attorney. You may respond by noting your choice below, and signing and faxing this letter to Ms. Lawyer and Mr. Frip at 303-XXX-XXXX.

If you have any questions, please call either of us at 303-XXX-XXXX. Thank you for your prompt attention to this request.

Sincerely,

_____ _____

Susan Q. Lawyer

Melville Frip
Frip & Frap, LLC

☐ I wish to be represented by Susan Q. Lawyer and authorize the transfer of all paper and electronic files to Ms. Lawyer at her new firm, Lawyer & Doe, PC.

☐ I wish to be represented by Frip & Frap, LLC and would like to be contacted by Frip & Frap to discuss its continuing representation of me.

☐ I wish to be represented by _____ and authorize the transfer of all paper and electronic files to her/him at the firm of _____.

_____

[Client Name]

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

Colo. RPC 1.10(2012)
Rule 1.10. Imputation of Conflicts of Interest: General Rule.
*****reflects changes received through March 13, 2012*****

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the matter is not one in which the personally disqualified lawyer substantially participated;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(3) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to the affected former clients and the former clients' current lawyers, if known to the personally disqualified lawyer, to enable the former clients to ascertain compliance with the provisions of this Rule; and

(4) 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.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

GENERAL RULE

Definition of "Firm"
[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments 2 - 4 .

Principles of Imputed Disqualification
[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to

avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment 22 . For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

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Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.

Colo. RPC 1.11(2012)
Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.
reflects changes received through March 13, 2012

(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.

(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.

(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. As used in this Rule, 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.

(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) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the

conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[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.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[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. See Rule 1.13 Comment 6 .

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Rule 1.17. Sale of Law Practice.

Colo. RPC 1.17(2012)
Rule 1.17. Sale of Law Practice.
reflects changes received through March 13, 2012

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) the seller ceases to engage in the private practice of law in Colorado, or in the area of practice in Colorado that has been sold;

(b) the entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) the seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice to the client at the client's last known address; and

(d) the fees charged clients shall not be increased by reason of the sale.

Source: Entire rule added June 12, 1997, effective July 1, 1997; (i) added and adopted and comment amended and adopted April 18, 2001, effective July 1, 2001; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment 5 amended and effective November 6, 2008.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(d). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser written notice must be mailed to the client at the client's last known address. The notice must include the identity of the purchaser, and the client must

be told that the decision to consent or make other arrangements must be made within 60 days of the mailing of the notice. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] [No Colorado comment.]

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser
[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards
[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rul
[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

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Not Reported in P.3d, 2013 WL 4008757 (Colo.)
(Cite as: 2013 WL 4008757 (Colo.))

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Supreme Court of Colorado.
Richard C. LAFOND, Petitioner,
v.
Charlotte N. SWEENEY, Respondent.

No. 12SC205
AUGUST 5, 2013

Court of Appeals Case No. 10CA2005

En Banc.

Petition for Writ of Certiorari GRANTED.

Summary of Issues:

***1** Whether the court of appeals' holding that a contingent fee earned by an attorney who previously represented the client in a dissolved law firm is an asset of the dissolved firm is inconsistent with Colorado law limiting discharged contingency fee attorneys to a quantum meruit recovery in order to promote the public policy of protecting the client's unfettered right to be represented by counsel of his own choice.

If the contingent fee is an asset of the dissolved firm, whether the new firm completing the work should receive compensation for the reasonable value of its post-dissolution work in successfully completing the case.

DENIED AS TO ALL OTHER ISSUES.

Colo., 2013
LaFond v. Sweeney
Not Reported in P.3d, 2013 WL 4008757 (Colo.)