Relevant Rules and Ethical Advice

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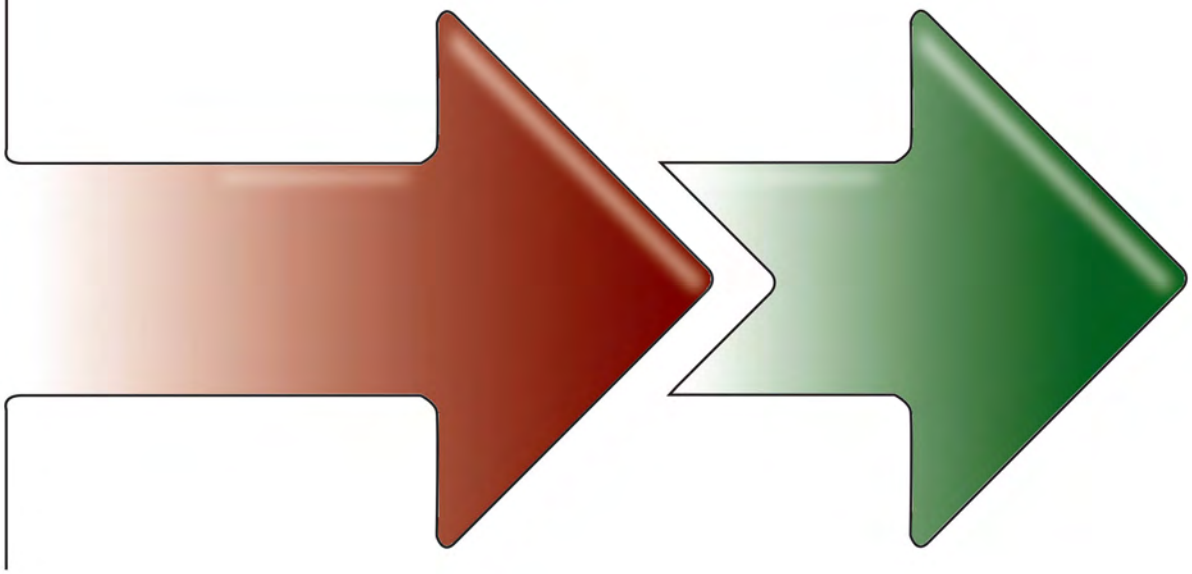

AMERICAN BAR ASSOCIATION

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).

Opinion #210. Restrictions on the Sale of an Attorney's Law Practice

Issued by the Professional Ethics Commission

Date Issued: June 14, 2014

Related Opinion(s) Opinion #143: Disposition of Client Files on Death or Disability of Solo Practitioner

Question (Part I)

Attorney H is a solo practitioner who is reaching the stage in his practice where he would like to start phasing out of the practice of law. He would like to be able to sell the practice, and then come back as an employee or independent contractor without all the headaches and liabilities that are involved with the actual ownership of the firm. May Attorney H sell his practice and then continue to practice law in some limited capacity without running afoul of the Maine Rules of Professional Conduct?

Opinion

The Commission finds that the current version of Maine Rule of Professional Conduct (hereinafter "Rule") 1.17 explicitly prohibits the sale of all or a part of Attorney H's solo law practice if Attorney H were to remain in private legal practice within the state of Maine.

Rule 1.17 provides in relevant part:

> A lawyer or a law firm may sell or purchase a law practice, including good will, if the parties comply with the other applicable provisions of these rules, and the [following] condition[is] satisfied.
>
> . . .
>
> (a) [T]he selling attorney or each attorney in the selling firm [must] cease[] to engage in the private practice of law in the State of Maine.

. . .

> (b) If the seller is or was a solo practitioner, then the entire law practice must be sold as a single unit. . . . The entire law practice, for purposes of this rule, shall mean all client files, for open and closed engagements, excepting only those cases in which a conflict-of interest is present or may arise.[1]

As noted in Comment [3] to Rule 1.17, the requirement to exit the private legal arena after the sale of one's practice is not absolute—one may still practice law within the state (*see* discussion on Rule 1.17 cmt. 4, *infra*) in certain, limited capacities. The prohibition on returning to practice within the state of Maine would not preclude Attorney H from working as a lawyer on "the staff of a public agency or a legal services entity that provides legal services to the poor" nor would it bar Attorney H from employment as "in-house counsel to a business." See Rule 1.17 cmt. [3].[2]

Further, Comment [4] to Rule 1.17 provides that 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 on the occasion of moving to another state."

Upon its promulgation of the Maine Rules of Professional Conduct in 2009, the Maine Supreme Judicial Court adopted American Bar Association ("ABA") Model Rule 1.17 in substantially the same form. In the uniform version of Model Rule 1.17, the ABA gave two options:

> (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted.
> . . .

The options given by the ABA contemplate that some states may have different jurisdictions contained within their borders; however, the state of Maine has only a single jurisdiction. As a result, Attorney H would be barred from returning to private practice in Maine, aside from the limited exceptions noted supra, if he were to sell his solo practice.

Comment [6] may provide insight as to why planned returns to practice after a sale are disfavored; that Comment provides in relevant part:

> 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.[3]

The prohibition on partial sales of an attorney's practice may also reveal its reasoning behind disallowing an attorney's return to private practice after the sale of his or her firm. As noted in Comment [1] to Rule 1.17, "The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will."[4] Based on this language, it appears that allowing the sale of individual clients and particular areas of an attorney's practice would be adverse to public policy, preventing a practitioner whose clients depend on that attorney from simply cashing out and starting over when challenges arise or to "commoditize" clients. The same holds true for sales of less than the entire practice. The strong desire to protect the clients of solo practitioners is further evinced in Comment [5] to Model Rule 1.3.[5] For more on the sale of a practice, see Question (Part II), *infra*.

It should be noted that Comment [2] to Rule 1.17 provides that, a "[r]eturn to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation."[6] Thus, when enacting Rule 1.17, the door was left open for a potential return to private practice, albeit in limited circumstances. It is essential that "unanticipated" circumstances must be truly so, confirmed by a showing of good faith meeting the definition set forth in ABA Opinion 90-357, and may not be used as a sham device to avoid compliance with Rule 1.17. Each attorney's situation will be unique and the determination highly dependent on the specific facts of each case.

We conclude that in order to remain in the practice of law within the state (excepting the limited exceptions noted supra), Attorney H, as a solo practitioner, would have to retain an ownership stake in his practice. This Rule incentivizes the selling attorney to take on and properly mentor or otherwise train a new partner before making a total exit from the practice of law. The goal of such a provision is to ensure competent legal service as well as to aid the clients in the transition by slowly introducing them to, and acquainting them with, the new attorney. Attorney H then seemingly would be free to withdraw as a partner, relieving himself of some of the demands and rigors of ownership, while still practicing law in a more limited capacity.

Question (Part II)

Given that it would be improper under Rule 1.17 for Attorney H to sell his law practice and return to private practice in the state, would it be permissible for Attorney H to continue his practice but (1) begin "farming his or her cases out" under a "fee splitting" arrangement and (2) would he be able to receive percentages of said fees from those clients who, in the future, begin new cases with the lawyer that he referred them to?

Related Opinion(s)

Opinion #175: Lawyer Acting as Solo Practitioner and "of Counsel" to Another Law Firm; Opinion #103: Splitting Fees Without Regard to Responsibility Assumed

Opinion

Fee-splitting arrangements are governed by Rule 1.5 and are not per se disallowed, but are governed by a rather strict set of requirements.[7] Rule 1.5(e) provides in relevant part:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office unless:
>
> (1) after full disclosure, the client consents to the employment of the other lawyer and to the terms for the division of the fees, confirmed in writing; and
>
> (2) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client.

If Attorney H's client, after "full disclosure . . . confirmed in writing[,]" "consent[s] to the employment of the other lawyer and to the terms of the division of fees," then Attorney H may, so long as the fee itself "does not exceed reasonable compensation for all legal services . . . rendered to [that] client[,]" proceed with the fee splitting arrangement.[8]

It is important to note that in the event Attorney H were to receive referrals from the attorney(s) to whom he previously "farmed" clients in exchange for Attorney H's referrals, Rule 7.2 could be implicated due to the Maine Rules of Professional Conduct's prohibition on exclusive*reciprocal* referral arrangements.[9]

Assuming that Attorney H's clients consent in writing, after full disclosure, to the proposed fee splitting arrangement, would Attorney H be able to receive a percentage of said fees from those clients who, in the future, begin new cases with the lawyer to whom he referred them?

This inquiry implicates both Rule 1.5 and Rule 1.17. Rule 1.5, discussed supra, does not prohibit the splitting of fees with "another lawyer who is not a partner in or associate of the lawyer's law firm or office[,]" given that particular requirements are fulfilled, but it does necessitate that the fee represent a *"reasonable compensation for all legal services [the attorneys] rendered to the client."*[10] Though the Rules do not present an absolute bar to Attorney H "farming out" his clients, the Rules do require that the fee be "reasonable."

Would Attorney H's receipt of any fee for a matter in which he has had no involvement or performed any work be *prima facie* "unreasonable?" Though Maine's current Rules do not provide much guidance on this matter, there is some guidance available from the Maine Supreme Judicial Court. In 2005, the Court requested that the Advisory Committee on Professional Responsibility consider whether Maine should adopt the ABA Model Rule version of the fee division rule. The ABA model rule only allows fee sharing "in proportion to the services performed by each lawyer" or if the referring lawyer "assumes joint responsibility for the representation."[11] The Advisory Committee held an open forum on the issue soliciting suggestions from members of the Bar and ultimately decided that Maine's existing version of the fee division rule was adequate.

Accordingly, the Commission finds that Maine's Rules do not create a per se prohibition on the division of fees between Attorney H and the attorney who has received the "farmed out" cases, so long as the fee is reasonable under Rule 1.5(a) and so long as the client has previously consented to the division of fees in writing.[12]

The Rule does not mention anything about receiving fees after Attorney H has left the practice of law altogether and has ceased to be a "lawyer."[13] However, Rule 5.4 states, in relevant part:

> A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. . . .[14]

Though the Rule contemplates the transfer of money in limited circumstances upon a lawyer's death, the Rule otherwise explicitly bars an agreement such as the one proposed by Attorney H. Attorney H may no longer receive any portion of the fees generated by the clients that he or she has "farmed out" once Attorney H has left the practice of law and has ceased to be a "lawyer" while he is still alive.

As for any possibility of Attorney H receiving a portion of the fees generated by his "farmed out" clients *inter vivos* subsequent to his exit from the practice of law, there exists only one allowable exception. Rule 1.17 allows Attorney H to sell, along with the entirety of his practice, the "good will" associated with said practice.[15] The sale of "good will" inexorably includes a particular amount of prospective fees that the buyer expects to receive in the future as a result of the reputation garnered by the selling attorney during his or her tenure in a locale. There is no question that Attorney H could attempt to assign a present value to the prospective fees and include that value in a lump-sum purchase price for the entire firm, though the exact amount may be difficult to estimate. Aside from this limited exception, a non-lawyer would be explicitly precluded under Rules 1.5 and 5.4 from receiving any portion of the fees collected from his or her previously "farmed out" clients for new matters commenced in the future.

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[1]Rule. 1.17, 1.17(a)-(b) (emphasis added).

[2] It should be noted that the Rules are predicated by the following statement "The specific rules of the Maine Rules of Professional Conduct are stated below. To aid in understanding of the rules, a Preamble from the Maine Task Force on Ethics precedes the rules, and the text of each rule is followed by comments and reporter's notes. The Preamble, comments and reporter's notes state the history of and reasons for recommending the rules, discuss the relation of the new rules to the current Code of Professional Responsibility, and offer interpretations of the new rules, but the Preamble, comments and reporter's notes are not part of the rules adopted by the Court."

[3] Rule 1.17 cmt. 6.

[4] Rule. 1.17 cmt. 1.

[5] Rule. 1.3 cmt. 5 ("To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence requires that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action."); *see also* Me. Bd. of Overseers of the Bar, Formal Op. 143 (1994) ("Disposition of Client Files on Death or Disability of Solo Practitioner").

[6] Rule. 1.17 cmt. 2 (emphasis added).

[7] See Rule. 1.5.

[8] Rule. 1.5 cmt. 7.

[9] See Rule. 7.2.

[10] Rule. 1.5 (e) (emphasis added).

[11] *Model Rules of Prof'l Conduct* R. 1.5(e)(1).

[12] See Rule. 1.5 ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. A fee or charge for expenses is unreasonable when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or expense is in excess of a reasonable fee or expense. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the responsibility assumed, the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; (9) whether the client has given informed consent as to the fee arrangement; and (10) whether the fee agreement is in writing.').

[13] Rule. 1.5(e) ("A *lawyer* shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office unless . . .") (emphasis added).

[14] Rule. 1.5(a).

[15] *See* Rule. 1.17.

Credits

PREPARATION CHECKLIST FOR PLANNING ATTORNEY

1. Use retainer agreements that state you have arranged for a Successor Attorney to close your practice in the event of death, disability, incapacity or other inability to act.

2. Have a thorough and up-to-date office procedure manual that includes information on:
   a. How to check for a conflict of interest;
   b. How to use the calendaring system;
   c. How to generate a list of active client files, including client names, addresses, and phone numbers;
   d. Where client ledgers are kept;
   e. How the open/active files are organized;
   f. How the closed files are organized and assigned numbers;
   g. Where the closed files are kept and how to access them;
   h. The office policy on keeping original documents of clients;
   i. Where original client documents are kept;
   j. Where the safe deposit box is located and how to access it;
   k. The bank name, address, account signers, and account numbers for all law office bank accounts;
   l. The location of all law office bank account records (trust and general);
   m. Where to find, or who knows about, the computer passwords; and
   n. How to access your voice mail (or answering machine) and the access code numbers.
   o. Where the post office or other mail service box is located and how to access it.

3. Make sure all of your file deadlines (including follow-up deadlines) are on your calendaring system.

4. Document your files.

5. Keep your time and billing records up-to-date.

6. Avoid keeping original documents of clients, such as wills and other estate planning documents. If you do have original documents, maintain them in a central place, indexed, within the office.

7. Have a written agreement with an attorney who will close your practice (the "Successor Attorney") that outlines the responsibilities involved in closing your practice. Determine whether the Successor Attorney will also be your personal attorney. Choose a Successor Attorney who is sensitive to conflict of interest issues.

8. If you have a successor attorney agreement, please notify the South Carolina Bar by visiting this website http://www.scbar.org/MemberResources/SuccessionPlanning.aspx and filling out the form.

South Carolina Bar - PMAP

9. If your written agreement authorizes the Successor Attorney to sign trust or general account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only upon the happening of a specific event. In some instances, you and the Successor Attorney will have to sign bank forms authorizing the Successor Attorney to have access to your trust or general account. Choose your Successor Attorney wisely he or she may have access to your clients' funds.

10. Familiarize your Successor Attorney with your office systems and keep him or her apprised of office changes.

11. Introduce your Successor Attorney to your office staff. Make certain your staff knows where you keep the written agreement and how to contact the Successor Attorney if an emergency occurs before or after office hours. If you practice without regular staff, make sure your Successor Attorney knows whom to contact (the landlord, for example) to gain access to your office.

12. Inform your spouse or closest living relative and the personal representative of your estate of the existence of this agreement and how to contact the Successor Attorney.

13. Forward the name, address, and phone number of your Successor Attorney to your professional liability insurance carrier each year. This will enable the professional liability insurance carrier to locate the Successor Attorney in the event of your death, disability, impairment, or incapacity.

14. Renew your written agreement with your Successor Attorney each year. If you include the name of your Successor Attorney in your retainer agreement, make sure it is current.

Thinking About and Implementing Your Succession Plan

Step 1: ☐ You must locate and designate one or more attorneys (Assisting Attorney[s]) to manage or close your practice in the event of your disability, incapacity, retirement or death.

Step 2: ☐ Consider if you want to have a simple or a detailed succession plan. Prepare the necessary documents to implement your succession plan. See Forms A and B.

Step 3: ☐ Prepare written instructions to your family, your designated Assisting Attorney, your nominated executor, and your office staff including, but not limited to, the following information:

- general information and instructions
- HIPAA authorizations to release medical information, if necessary
- specific and detailed information and authorization to close your law practice, i.e, computer passwords, locations of keys to office, filing cabinets and storage, bank account information – Do not forget to keep this information up to date! See Form E.
- think of this part as the preparation of "an advance directive"

Step 4: ☐ Discuss your succession plan with the appropriate people so they know what you have been planning.

You've found your Assisting Attorney, Now What? – The Big Issues

So, you've made it through the first big step. You have designated an assisting attorney to grapple with and close your practice should something happen to you. You now have to get down to business and draw up the paperwork.

But first . . . Did you discuss making the arrangement reciprocal with the other attorney? Maybe you could help that attorney out, too.

Scope of Duty

You and your assisting attorney need to clarify the scope of the assisting attorney's duty to you and your clients. Is the assisting attorney going to act as your attorney during the closure of your practice or not? Different duties accompany either role. If the assisting attorney is not going to act as your attorney, then the assisting attorney owes a fiduciary duty to your clients, not to you. However, we recommend that you not have the assisting attorney "represent" your clients. Rule 7.3 of the West Virginia Rules of Professional Conduct prohibit in-person or telephone contact with prospective clients with whom the lawyer has no family or prior professional relationship when a motive for doing so is the lawyer's pecuniary gain. The Lawyer Disciplinary Board suggests that focus of the assisting attorney's scope of duty should be to wind down and close the affected attorney's law practice, not the representation of the affected attorney's clients.

Trust Account/General Office Account/IOLTA Account

While the idea of providing access to your trust account and IOLTA account may make you cringe, your trust account must be addressed in your succession plan. But if you want the assisting attorney to handle your office's financial affairs, then access to your office's bank accounts is crucial. A written agreement with another attorney to provide access may not be sufficient and you may need to draw up a Power of Attorney. Questions to think about are what sort of Power of Attorney do you want to grant to the assisting attorney and how and when will the Power of Attorney be triggered. Will the Power of Attorney be triggered by a specific event, who will determine that the triggering event has occurred, what powers will be granted, and what will determine the duration. Some jurisdictions have suggested that you designate a third person to hold a power of attorney that is limited to your trust account. The third person would be instructed to release authority to the named

agent or attorney-in-fact (the assisting attorney) only upon your written instructions or upon a determination of disability, impairment or death. You should also contact your bank to see what documents they would require and to complete any necessary paperwork.

Remember . . . If you have not dealt with your bank accounts in your succession plan, it could be necessary to initiate a court proceeding to access your law office's bank accounts.

Client Notification

If you want to, you can provide client notification of your succession plan in your retainer agreement. Your client's signature on the retainer agreement or fee agreement can serve as written authorization for the assisting attorney to proceed on the client's behalf and allows for disclosure of the client's information to the assisting attorney in the event the assisting attorney is required to act due to your disability or death. See also Forms C and D.

Confidentiality and Conflicts

Clients must be given an opportunity to give their consent to have their confidential information shared or viewed by the assisting attorney. If called upon to implement the succession plan and prior to going through the affected attorney's client files for return or transfer, the assisting attorney should also conduct a conflicts check. See Forms C and D.

Office Organization

Now, it's time to get your office organized. Some general considerations: (1) does your office procedures manual include directions on how to access your client list and their contact information or do you even have an office procedures manual, if not, then draw one up; (2) are your client files up to date and well documented; (3) do you have written fee and/or retainer agreements for each client matter; (4) do you have a current list of clients, computer passwords and bank accounts with account numbers; (5) are your time and billing records current; (6) is your calendar current with all deadlines and follow-up dates; (7) are your open and closed client files clearly and currently designated and stored; and (8) have you considered what to do with your closed client files!!!!! ODC does not have any room for your closed client files. You need to deal with them and now is the time. ODC has enough closed client files from lawyers who are involved in a disciplinary proceeding.

CHECKLIST FOR CLOSING YOUR OWN OFFICE

1. Finalize as many active files as possible.
2. Write to clients with active files, advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this
3. For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.
4. For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.
5. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
6. Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as attorney of record or have a Substitution of Attorney filed with the court.
7. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys.
8. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.

[Editor's Note: These materials are based upon a booklet published by the Oregon State Bar Professional Liability Fund and entitled, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Death or Disability*, which have been edited for Washington lawyers.]

CHECKLIST FOR CLOSING ANOTHER ATTORNEY'S OFFICE

The term "Affected Attorney" refers to the attorney whose office is being closed.

1. Check the calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, etc.
2. Contact clients for matters that are urgent or immediately scheduled for hearing, court appearances, or discovery. Obtain permission for reset. (If making these arrangements constitutes a conflict of interest for you and your clients, retain another attorney to take responsibility for obtaining extensions of time and other immediate needs.)
3. Contact courts and opposing counsel for files that require discovery or court appearances immediately. Obtain resets of hearings or extensions where necessary. Confirm extensions and resets in writing.
4. Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate files.
5. Look for an office procedures manual. Determine if there is a way to get a list of clients with active files.
6. Send clients who have active files a letter explaining that the law office is being closed and instructing them to retain a new attorney and/or to pick up the open file. Provide clients with a date by which they should pick up copies of their files. Inform clients that new counsel should be chosen immediately.
7. For cases before administrative bodies and courts, obtain permission from the clients to submit a Motion and Order to withdraw the Affected Attorney as attorney of record.
8. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
9. Pick an appropriate date and check to see if all cases have either a motion and order allowing withdrawal of the Affected Attorney or a Substitution of Attorney filed with the court.
10. All clients should either pick up their files (and sign a receipt acknowledging that they received it) or sign an authorization for you to release a copy to a new attorney.
11. If the attorney whose practice is being closed was a sole practitioner (the Affected Attorney), try to arrange for his or her phone number to have a forwarding number. This eliminates the problem created when clients call the Affected Attorney's phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.
12. Contact the mal practice carrier of the Affected Lawyer.
13. If you have authorization to handle the Affected Attorney's financial matters, look around the office for checks or funds that have not been deposited. Determine if

funds should be deposited or returned to clients. Some of the funds may be for services already rendered. Get instructions from clients concerning any funds in their trust accounts. These funds should either be returned to the clients or forwarded to their new attorneys. Prepare a final billing statement showing any outstanding fees due, and/or any money in trust. (To withdraw money from the Affected Attorney's accounts, you may need to be an authorized signer on the accounts, or you will need a limited power of attorney. If the Affected Attorney is deceased, another alternative is to petition the court to appoint a personal representative under the probate statutes. Money from clients for services rendered by the Affected Attorney should go to the Affected Attorney or his/her estate.

14. If you are authorized to do so, handle financial matters, pay business expenses, and liquidate or sell the practice.

15. If your arrangement is to represent the Affected Attorney's clients on their pending cases, obtain each client's consent to represent the client and check for conflicts of interest.

[Editor's Note: These materials are based upon a booklet published by the Oregon State Bar Professional Liability Fund and entitled, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Death or Disability*, which have been edited for Washington lawyers.]

Ethics Watch

So You Are Thinking About Moving—A Primer on Ethical Obligations of Departing Lawyers and Their Firms (Part I)

By Nathan M. Crystal

It used to be the case that when a lawyer started work for a firm, it was practically a lifetime commitment. No more. The profession has changed dramatically. Now it is common for lawyers, particularly those who have a large number of clients, to move to another firm or start their own. These departures raise a number of legal and ethical questions. An understanding of the basic principles applicable to such departures is essential for both departing lawyers and their old and new firms.

1. *When should departing lawyers inform their firms of their plans to leave?*

Lawyers have fiduciary obligations to their firms. A fiduciary has a duty to disclose material information to the principal. However, lawyers may engage in preliminary negotiations with prospective new firms and may make plans to open their own practice without disclosing such activities to their current firm. In the leading case of *Meehan v. Shaughness*, 535 N.E.2d 1255 (Mass. 1989), the Supreme Judicial Court of Massachusetts held that departing partners owed fiduciary obligations to their remaining partners and that they could be held civilly liable for breach of those obligations. However, the court decided that the withdrawing partners did not breach their fiduciary obligations by making "logistical arrangements" for their new firm (executing a lease, preparing a list of clients they expected to retain after their departure, and arranging for financing based on their expected clientele) because fiduciaries may "plan to compete with the entity to which they owe allegiance," provided that they do not otherwise breach their fiduciary obligations. *Id.* at 1264.

As a general matter, in my opinion lawyers need not disclose their intention to move until arrangements with the new firm are final. After all, the deal may fall through for many reasons. For example, suppose a lawyer signs an employment agreement with a new firm. Is disclosure to the old firm required at this point? If the employment agreement is subject to any significant condition, such as the satisfactory completion of a conflicts check, which may often be the case, in my opinion disclosure to the old firm would not be required until such conditions are removed and the employment agreement is essentially final. However, if the lawyer is in a management position in the old firm, the lawyer should not be participating in decisions by the firm that are based on the assumption that the lawyer will remain with the firm. If the lawyer is not ready to disclose his intentions at that point, at the very least, he should absent himself from participation in these decisions.

2. *If a lawyer is joining a new firm, may the lawyer reveal information to the new firm to do a conflicts check without violating the lawyer's duty of confidentiality?*

ABA Model Rule 1.6(b)(7), adopted in 2012, provides that a lawyer may reveal confidential information:

> to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

South Carolina has not yet adopted this amendment, but in my opinion the authority to reveal confidential information to a limited extent to determine if conflicts exist is permissible under South Carolina rules because disclosure of this information is necessary to comply with the conflict rules. In fact, the ABA Ethics Committee so advised in Formal Opinion #09-455.

What information may be disclosed? The comment to Rule 1.6(b)(7) states that disclosure should ordinarily be limited to "the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated." Comment 13. Disclosure is not permissible when it would be prejudicial to the client. The comment gives the following examples: "(e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge)."

Suppose a prospective new firm wants to know the amount of revenue generated for the old firm by clients represented by the departing lawyer. May the lawyer reveal this information? I don't think so. This information is not necessary for conflicts purposes, goes beyond what is permitted by either the ABA Model Rules or Opinion #09-455, and reveals proprietary information of the old firm in violation of fiduciary duties. Perhaps a lawyer could give general information about the amount of total revenue that the lawyer personally generated without reference to specific clients.

To protect confidential information, the ABA committee approved retention of an independent lawyer to determine if conflicts exist; the "conflicts lawyer" would then share the results with the departing lawyer and the new firm without disclosing confidential information. The Committee found that this procedure was justified under Rule 1.6(b)(4), which allows disclosure of confidential information to obtain ethics advice.

When confidential information necessary to complete a conflicts check cannot be disclosed because it would be prejudicial to a client, the new firm and the moving lawyer have three options: abandon the move, defer the move until the conflicts check can be completed without prejudice to a client, or complete the move even with an incomplete conflicts check in the hope that a conflict does not exist, or that if it does exist the new firm will deal with the situation as appropriate when the conflict becomes known.

Conflicts checks should be limited to clients the moving lawyer personally represented or with whom the lawyer acquired confidential information, for the reasons set forth in the next paragraph.

3. *When does a conflict exist and what can be done about it?*

When lawyers decide to leave a firm and open their own office, conflict of interest issues should not arise because the new firm will not have existing clients. On the other hand, three types of conflicts can arise when lawyers join an existing firm.

First, the lawyer's old firm may represent a client that is directly adverse to a client of the new firm, either in a litigation or a transactional matter. If the client of the old firm will remain with that firm, and if the moving lawyer was not involved in the representation of the client of the old firm and did not acquire any confidential information from the client, then no conflict exists. See SCRPC 1.9(b). In this case the rules do not prohibit either the moving lawyer or the new firm from representing a client of the new firm against the client of the old firm. However, it may be prudent, although not ethically required, for the moving lawyer to avoid involvement in the matter after joining the new firm.

Second, a conflict does arise if the moving lawyer was substantially involved in the representation of the client of the old firm or otherwise acquired confidential information about that client. In this case the moving lawyer is personally disqualified from representing the client of the new firm against the client of the old firm under either SCRPC 1.9(a) or 1.9(b) and, perhaps more significantly, the disqualification is imputed to the new firm. See SCRPC 1.10(a). What can be done when this type of conflict arises? There are four possibilities: (i) abandon the move; (ii) defer the move until the conflict-generating matter ends; (iii) seek the informed consent of both affected clients under Rule 1.9(b). These three options may be either undesirable or impractical. (iv) The fourth option is screening of the disqualified lawyer, but the ethical propriety of this option in South Carolina is questionable. The ABA Model Rules now allow screening when a disqualified lawyer moves to a new firm to prevent disqualification of the firm, ABA Model Rule 1.10(a)(2). Unfortunately, South Carolina has not adopted this provision, and the South Carolina Bar Ethics Advisory Committee has also advised against screening, although the facts of the opinion were somewhat unique. See S.C. EOP #04-10. However, in other jurisdictions courts approved screening for policy reasons even before the adoption of the ABA Model Rule revision, so perhaps a court in South Carolina could be persuaded to approve screening when a disqualified lawyer joins a firm.

Third, a conflict may arise when a client that a moving lawyer plans to bring to the new firm has a conflict with an existing client of the new firm. The conflict may be in a single matter or, more commonly, in unrelated matters. For example, if a lawyer plans to bring a transactional client to the new firm, a conflict exists if the new firm is handling a litigation matter against the transactional client on behalf of another client. In this situation, the screening option is not available. The ABA Model Rules and prior case law only allowed screening when the lawyer moved between firms and the conflict was based on the lawyer's former representation of the client. In this third situation, the conflict arises because of current representation of multiple clients by the new firm under Rule 1.7(a)(1); screening is not permitted; only the first three options listed above can be used. See ABA Model Rule 1.10(a)(2) (limiting screening to situations in which the conflict arises under either Rule 1.9(a) or 1.9(b)). Note, however, that the new firm could propose screening to the affected clients as part of the process of seeking their informed consent to this conflict.

4. *How should the lawyer and the old firm handle notification*

to existing clients of the lawyer's departure?

The issue of notification to clients represented by the departing lawyer arises both when departing lawyers move to new firms or open their own practices. Departing lawyers and their firms must recognize that clients do not "belong" to either of them. Clients have the right to choose who will represent their interests. Thus, both the firm and the departing lawyers have the right and the obligation to notify clients of the departure so that clients can decide whether the old firm, the departing lawyer, or some other attorney will handle the case. In Formal Opinion #99-414, the ABA committee advised that joint notification by the departing lawyer and the firm was the preferred approach. Recognizing that joint notice was infeasible if the departure was not amicable, the committee concluded that departing lawyers could properly provide either in-person or written notice to their current clients—those clients for whom the lawyer was responsible or for whom the lawyer played a principal role in the firm's delivery of legal services—but not clients with whom the lawyer had little or no personal involvement. The committee advised that the initial notice of the lawyer's anticipated departure to clients should conform to the following requirements:

- The notice should be limited to current clients.
- The departing lawyer should not ask the client to end its relationship with the old firm, but the notice could state the departing lawyer's availability to provide services to the client.
- The notice must make clear that the client has the ultimate right to decide who will handle the client's matter.
- The departing lawyer must not disparage the former firm.

The committee stated that the departing lawyer could provide the client with additional information, including a statement of whether the lawyer will be able to continue to represent the client at her new firm. A departing lawyer may also ethically respond to requests for information from clients to assist them in making informed decisions about the handling of their cases. In *Meehan v. Shaughness,* above, the court found that the withdrawing partners breached their fiduciary duties by seeking and obtaining prior to their departure secret consents from clients to retain their services after they left the firm. The court remanded for a determination of whether there was a causal connection between the departing lawyers' breach of fiduciary duty and damage to the partnership. It imposed the burden of proving lack of causation on the departing lawyers because of their breach of duty. See also *In re Smith,* 843 P.2d 449 (Or. 1992) (en banc) (imposing a four-month suspension on an associate who, among other misconduct, secretly met with 31 clients of the firm and had them sign individual retainer agreements during the two and one-half months prior to his departure). ■

So You Are Thinking About Moving— A Primer on Ethical Obligations of Departing Lawyers and Their Firms (Part II)

Ethics Watch

By Nathan M. Crystal

Part I of this column, published in March, discussed four issues: (1) When should departing lawyers inform their firms of their plans to leave? (2) If a lawyer is joining a new firm, may the lawyer reveal information to the new firm to do a conflicts check without violating the lawyer's duty of confidentiality? (3) When does a conflict exist, and what can be done about it? (4) How should the lawyer and the old firm handle notification to existing clients of the lawyer's departure?

5. *When clients of the old firm decide to retain the departing lawyer's new firm, how are fees from these clients' matters allocated between the new and old firms?*

Traditionally, the withdrawal of a partner constituted a dissolution of the partnership. Further, during the period in which a partnership's affairs were being wound up following a partner's withdrawal, the "no-additional-compensation rule" applied. This rule of partnership law meant that withdrawing partners were not entitled to additional compensation for services rendered in winding up partnership business. The seminal case on this rule is *Jewel v. Boxer,* 203 Cal. Rptr. 13 (Ct. App. 1984); see *Huber v. Etkin,* 2012 Pa. Super. Lexis 4076 (2012) (extensive discussion of rule and leading cases). The rule appears to apply to partnerships, but it is unclear whether it applies to other forms of entities in which lawyers practice. See id. (applying the rule to LLP) and *Fox v. Abrams,* 210 Cal. Rptr. 260 (Ct. App. 1985) (rule applies to corporations). But see S.C. Code §33-44-403(d) ("A member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.") In addition, the rule may not apply if the entity continues rather than being dissolved. The economic crisis of recent years has resulted in a number of law firm bankruptcies in which trustees have sought to obtain fees received by departing lawyers and their new firms in both contingency fee and hourly representation cases. See, e.g. *Development Specialists, Inc. v. Aiken Gump Strauss Hauer & Feld, LLP,* 477 B.R. 318, 2012 U.S. Dist. Lexis 73994 (S.D.N.Y. 2012).

Thus, under the no-additional-compensation rule, if a lawyer leaves a firm and a client that the lawyer was representing while a member of the firm elects to have the lawyer complete the client's case, the lawyer is not entitled to the full fee from that matter. The fee would be paid to the old firm, and the lawyer would receive the lawyer's share pursuant to the partnership agreement or pro rata based on the lawyer's interest in the partnership in the absence of an agreement. Note that departing partners also receive benefits from the no-additional-compensation rule because they are paid their partnership percentage in any cases that remain with the firm, even though they will not be performing any services on those cases.

Lawyers practicing in partnerships, LLCs, or LLPs are free to modify the no-additional-compensation rule by agreement; so long as the agreement is reasonable and does not amount to an indirect attempt to restrict the departing lawyer's ability to practice law (see section 6 below), the agreement should be enforceable. See *Kelly v. Smith,* 611 N.E.2d 118 (Ind. 1993) (recognizing no-additional-compensation rule but interpreting partnership agreement to provide that firm would be paid on *quantum meruit* basis for work done before clients elected to retain departing lawyer). For an example of a "*Jewel* waiver" clause in a partnership agreement, see *Geron v. Robinson & Cole, LLP,* 476 B.R. 732, 2012 U.S. Dist. Lexis 128678 (S.D.N.Y. 2012).

If the partnership agreement does not include a provision on fee allocation with departing lawyers, the departing lawyers and the firm may be able to reach an agreement at the time of the departure. For example, the parties might agree that a 50-50 division between the old firm and the departing lawyer of all cases regardless of their stage of completion is fair recognition of the contributions of the old firm before departure and of the moving lawyer in completing the case. The comments to the rules of professional conduct provide that an agreement between an old firm and a departing lawyer about division of fees in a case is not a fee splitting agreement under Rule 1.5(e) and therefore does not require client consent. See SCRPC 1.5, comment 8.

In the absence of an agreement between the old firm and the departing lawyers, either in the partnership agreement or at the time of departure, a court could apply the no-additional-compensation rule, or it could allocate the fees between the departing lawyer and the old firm on a *quantum meruit* basis. Compare *Hurwitz v. Padden,* 581 N.W.2d 359 (Minn. Ct. App. 1998) (in absence of agreement applying no-additional-compensation rule to LLC) with *Miller v. Jacobs & Goodman,* 820 So.2d 438 (Fla. Dist. Ct. App. 2002) (upholding trial court's allocation of 46 percent of fees in cases taken by departing associates under *quantum meruit* principles).

6. *To what extent may a firm impose restrictions on practice*

by a departing lawyer?

In the business world covenants not to compete are quite common and are legally enforceable provided the covenant protects a legitimate interest of the covenantee and provided the covenant is reasonable in its restrictions. Thus, a covenant by a seller of a business not to compete with the purchaser, or by an employee not to compete with his employer, is valid if it is reasonable in scope, geography, and duration. By contrast to the "rule of reason" that governs covenants in general, covenants by lawyers not to compete are *per se* invalid. See SCRPC 5.6(a). The rationale for this prohibition rests on the interests of clients. The client-lawyer relationship is personal and fiduciary in character. It is against public policy to deprive a client of the right to employ the lawyer of the client's choosing. The rule also protects young lawyers from bargaining away their future employment prospects. See SCRPC 5.6, cmt. 1. The rule applies not only to direct restrictions on a lawyer's right to practice law but also to indirect restrictions as well. Partnership agreements typically provide for payments to a departing partner of that partner's share of the capital of the partnership and of any earned but uncollected fees. If a partnership agreement provides that a departing lawyer forfeits that partner's share of termination payments when the partner continues practice in competition with the partner's former firm, courts are likely to find such a provision invalid as an indirect restriction on the departing lawyer's right to practice law.

In *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989), the New York Court of Appeals ruled that a partnership agreement that conditioned payment of a departing partner's share of earned but uncollected revenues on noncompetition by the departing partner was unenforceable because of the ethical prohibition on restriction of practice by lawyers; other courts have agreed with this approach. In cases like *Cohen* the departing lawyers forfeited all payments from their former firms if they continued to practice law. Less restrictive provisions may be upheld. For example, clauses may be valid if they reasonably reduce the amount that a departing lawyer receives to reflect the financial impact on the firm of the lawyer's departure, or if they attempt to measure compensation due the firm for its *quantum meruit* contribution to cases in which clients elect to retain the departing lawyer rather than continue to have the firm represent them.

In *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993), the California Supreme Court rejected decisions from other states and held that a contractual provision imposing a reasonable cost on departing partners to compensate their former firm for their loss was enforceable. The court noted the change in economic climate in which law firms now operate. It expressed the view that such provisions could benefit clients by reducing the "culture of mistrust" among partners that can damage law firm stability.

Rule of Professional Conduct 5.6 contains an exception to the general prohibition against covenants not to compete among lawyers: Covenants not to compete are permissible when the lawyer is receiving "benefits upon retirement." The exception is not limited to full retirement by a lawyer because it would be unnecessary in such a situation. However, the exception applies only to bona fide retirement plans, not to disguised attempts to restrict competition on departure from a firm.

7. May departing lawyers seek to employ other lawyers or staff members of the old firm?

Prior to announcing their departure, lawyers cannot attempt to hire staff members or associates in the firm. To do so would amount to a breach of fiduciary duty, much like attempting to solicit clients. After announcing their departure, the departing lawyers could certainly respond to overtures from staff members or associates seeking possible employment. Whether departing lawyers can attempt to hire associates or staff members depends on the contractual relationship between such employees and the old firm. If they are employed under a contract of a definite duration, then the departing lawyers should not seek to negotiate or hire an employee of the firm without the permission of the firm. To do so could amount to tortious interference with a contractual relationship. If the staff member or associate is employed under an at-will contract, attempts to hire such a person would not amount to tortious interference with a contractual relationship but might be considered to be tortious interference with prospective economic advantage. This tort is difficult to establish and generally requires some wrongful conduct, such as an intentional tort in connection with the solicitation or an intention to harm the employer of the at-will employee. See Ronald C. Minkoff, *Poaching Lawyers: The Legal Risks*, http://fkks.com/article.asp?articleID=188.

8. *What equipment, furniture, and electronic or physical records from the departing firm may a moving lawyer take?*

Ownership of equipment and furniture should be straightforward. If the old firm purchased the equipment or furniture, it is the property of the firm. Equipment, furniture, or art work purchased by departing lawyers is their property. The moving lawyer and the firm may, of course, agree to sell property that belongs to the other.

If a client has informed the old firm that the client wishes to retain a moving lawyer, the client and thereby the moving lawyer will be entitled to the client's file, which should include any accounting and trust account records related to the file. The firm may have a retaining lien on the file for any unpaid fees or expenses, but in South Carolina such a lien could not be exercised if it would prejudice the client. See Wilcox & Crystal, ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT 132 (2010 ed.)

Work done by a lawyer for clients of the firm, like physical property, belongs to the firm, absent an agreement between the lawyer and the firm. Many lawyers will retain personal files of work product that they produced while employed by the firm and will take such files with them when they leave. Perhaps such action can be justified on the ground that a firm's claim to such material would effectively cripple many lawyers from leaving the firm and would therefore amount to an indirect restriction on the practice of law in violation of Rule 5.6(a). The better way to deal with this issue, of course, is by agreement either in advance or at the time of departure.

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As these columns have shown, there are a number of issues involved when lawyers leave a firm. Because of the breadth of issues and the fact that substantial amounts of money may be involved, the potential for disputes and ill-will is significant. Well-drafted partnership agreements (or similar documents for other organizational forms) can reduce the possibilities of disputes. What should be included in such agreements? In my opinion, a well-drafted agreement should have a section on the fiduciary duties of partners to the firm. This section should include provisions on (a) when notification of departure must be made, (b) procedures for conflict checking when a lawyer is considering departure, (c) procedures for notification of clients when a lawyer is departing, along with prohibitions against solicitation of clients other than through this procedure, (d) allocation of fees and expenses between the old firm and the departing lawyer, (e) amount and method of payment of the departing lawyer's equity interest in the firm, (f) procedures for contacting other lawyers and staff members in the firm about possible employment, and (g) statement of the relative rights of the firm and the departing lawyers to furniture, equipment, and electronic and physical records. ■

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Casemaker and Member Login
Classifieds
Ethics Advisory Opinions
Lawyer Referral Service
Lawyers Helping Lawyers
Legislative Information
Member Benefits
Mentoring
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- Office Management
- Technology
- Forms, Books and Articles
- Practice Management Blogs
- About

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Ethics Issues

A. Five potential areas of ethical concern when there is a lawyer in transition:

1. The continuity of service to clients - **Rule 1.3** requires that a lawyer represent his or her client with reasonable diligence and promptness. This rule requires that the lawyers in transition take care that they continue to fulfill the lawful objectives of their clients. While the client may have a contractual relationship with the firm, any professional relationships with regard to legal matters are necessarily personal as between the client and at least one identifiable lawyer. Any lawyer involved in such a professional relationship with a client at the time of transition has an obligation to continue the representation, as contemplated by the contract of employment, until the matter is concluded or until the lawyer is required or permitted to withdraw.

2. The right of clients to counsel of their choice - The lawyers also must take care to notify present clients of the change in the relationship among the lawyers. In giving this notice, the right of clients freely to choose counsel must be preserved. Ideally, the lawyers will agree on the notice to be sent, who sends it, to whom it is sent, and when it is sent. In the absence of agreement, any lawyers in the firm who have had significant professional contact with the client may send such a notice. Each lawyer in the firm who has an ongoing professional relationship with the client has an obligation to see to it that such a notice is sent.

3. The obligation of the principals to deal honestly with each other - In allocating the firm's personal property, accounts receivable, fees to be received in the future for work in progress, and other assets and liabilities of the firm, the lawyers must deal with each other in compliance with their obligation to refrain from conduct involving dishonesty, fraud, deceit, or misrepresentation.

4. The involvement of clients in the disputes of the principals - If the transition gives rise to disputes among the lawyers about their respective rights to the firm's personal property, account receivables, fees to be received in the future for work in progress, or other issues, the lawyers should strive to resolve such disputes amicably without involving the clients in negotiations or litigation. If the lawyers are unable to resolve such disputes by agreement, they should resolve them, where possible, by arbitration.

5. The protection of the property of clients entrusted to the firm - A full and complete accounting of all fiduciary property of clients entrusted to the firm should be made to each client, with written request for their return or future disposition. Failure of the client to respond should be taken as a request for the return of the fiduciary property to the client unless governed by a court order or proceeding to the contrary.

B. Ethical Obligations When a Lawyer Changes Firms: ABA Formal Ethics Opinion 99-414 provides that "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."

C. Deferred Compensation for Services: South Carolina Bar **Ethics Advisory Opinion 91-20** provides that an amendment to a partnership agreement prohibiting withdrawing partners from receiving deferred compensation for services rendered before their withdrawal, regardless of whether those partners continue to practice law, does not appear to violate **Rule 5.6(a)**, SCRPC. An agreement which sacrifices a benefit due to the continued practice of law must be carefully tailored to come within the retirement exception to Rule 5.6 (a). Specifically, a partnership agreement should not violate Rule 5.6 (a) if withdrawal benefits are clearly specified, qualifications for retirement are specified and are similar to those found in other business settings, retirement benefits are in addition to withdrawal benefits, and expelled partners who retire from practice are entitled to retirement benefits.

D. Law Firms Merge - Fees and Conflicts: **Ethics Advisory Opinion 92-23** provides that where Lawyer C investigated a matter for Client X, prepared the pleadings, and filed a lawsuit on behalf of X against Y and then Lawyer C's firm merged with Lawyer D's firm, which has been hired by the insurance company to defend Y, Lawyer C must withdraw completely from any representation of X in the matter if Lawyer D is to continue to represent Y. Lawyer C may receive a portion of the fee earned for work performed for X prior to withdrawal. If the fee is contingent, a lawyer who is disqualified for reasons other than intentional misconduct may receive a fee, upon successful completion of the case, based on *quantum meruit* and not disproportionate to the amount of time worked by the lawyer prior to withdrawal. Lawyer C cannot share in any part of the fee earned from the representation of Y. The opinion also provides that where Lawyer A represents Wife W in a divorce action and Lawyer B represents husband H and Lawyer B joins Lawyer A's law firm, Lawyer B may continue to represent H if five conditions are met: 1) A must withdraw from representing W. 2) B reasonably must believe that the representation of H will not affect adversely the loyalty and confidentiality interest of W. The reasonableness of that conclusion may depend upon whether A is screened from any contact with or benefits from the matter. 3) W must consent to the firm's continued representation of H. 4) Lawyer A may not use or reveal any information relating to the representation of W. 5) H must consent after consultation to the representation despite Lawyer A's presence in the firm.

E. Conflict Where Newly-Hired Lawyer Has No Knowledge of Conflicting Cases with Lawyer's Old Firm: **Ethics Advisory Opinion 95-28** provides that where law firm A has hired a lawyer who was formerly employed at law firm B, where he worked in the administrative and governmental relations area and where law firm B is defending several civil lawsuits that have been brought by various members of law firm A, SCRPC Rule 1.9(b) does not operate to disqualify the lawyer unless the lawyer has actual knowledge of confidential information protected by Rule 1.6 and Rule 1.9(b). If the lawyer acquired no knowledge or information relating to the client, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same matter even though the interests of the two clients conflict.

F. Law Firm Should Send Notification Letter as Promised and Continue with the Normal Responsibilities of Representation: **Ethics Advisory Opinion 97-30**. Associate was employed by Law Firm. During Associate's tenure, clients signed Attorney-Client contracts naming

Law Firm as counsel. Associate is told by Law Firm at her departure that all clients will be notified that Associate is no longer with Law Firm and that the client is free to retain another firm, or that another attorney in Law Firm will handle any ongoing matter. Thereafter, Associate receives a Motion To Be Relieved in a case filed by Law Firm requesting that Law Firm be relieved as counsel and that Associate remain the Attorney of Record. Also, Associate received contact from an opposing attorney in another matter notifying her that he had been advised by Law Firm that Associate was handling the pending case. Associate took no files from Law Firm and is not presently employed in the practice of law. The opinion provides that Law Firm should send the notification letter as promised and continue with the normal responsibilities of representation. Absent notification by Law Firm, Associate should write to clients to notify them that she is no longer practicing law and that Law Firm has retained all client files.

G. A Lawyer Should Inform a Client of Any Agreement to Split Fees Other Than in Proportion to the Work Performed: **Ethics Advisory Opinion 98-32A**. When Lawyer left Law Firm, Lawyer and Law Firm sent out a joint letter to inform clients on whose files Lawyer had worked that he was leaving and offering clients the option of staying with Law Firm or continuing to be represented by Lawyer. Law Firm and Lawyer reached agreements between them that, as to any client who chose to continue to retain Lawyer, Lawyer would protect Law Firm as to any costs previously expended and would divide any fee derived from the case equally with Law Firm. Clients were not informed of this arrangement nor asked to consent. At the later settlement of a matter, a client who had continued to retain Lawyer instead of Law Firm informs Lawyer that the client believed any prior relationship with Law Firm had ended and objects to anything being paid to Law Firm. Although **Rule 1.5 (e)** generally applies in situations in which one lawyer refers a case to another lawyer, nothing in the rule precludes its application in this situation as well. Thus, a lawyer should inform a client of any agreement to split fees other than in proportion to the work performed. Having failed to do so here, Lawyer is best advised to retain the disputed funds in the lawyer's trust account until any dispute between the client and Law Firm is resolved.

H. Former Firm Inflates Costs: **Ethics Advisory Opinion 98-32B** provides Plaintiff's attorney has left his former law firm, taking a file with him by consent. The agreement between attorney and former firm is, at time of settlement, to reimburse each for costs expended and to divide the fee equally. Attorney believes that the costs being charged by the former firm have been inflated and are greater that the actual cost incurred. Attorney believes this is improper, even though former firm disagrees. 1) Attorney must inform client if he believes costs being charged are improper. If client objects to paying the costs, then attorney must hold the amount of the costs until the dispute is resolved.

I. Trade Secrets, In-house Lawyer and Agreement Not to Compete: **Ethics Advisory Opinion 00-11**. A lawyer who is in-house counsel for a corporation has been asked to sign an agreement not to compete which would prohibit him from working for a similar corporation for two years. One of the concerns of the corporation is the preservation of its trade secrets which may be revealed to the attorney. **Rule 5.6(a)** of the South Carolina Rules of Professional Conduct provides as follows:

> A lawyer shall not participate in offering or making: (a) 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....

The non-compete agreement described would violate the clear provisions of Rule 5.6. (The corporation is not without recourse to protect its trade secrets disclosed to an employee lawyer. See **Rule 1.6**.) Other ethical rules are also implicated. Pursuant to **Rule 1.7(a)**, a lawyer may not represent a client if the representation of that client will be directly adverse to another client unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. Similarly, **Rule 1.7(b)** provides that a lawyer may not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. In addition, **Rule 1.9(c)** precludes a lawyer who formerly represented a client from using information relating to the early representation to the disadvantage of the former client except as allowed by **Rule 1.6** or **Rule 3.3**.

NOBC

NATIONAL ORGANIZATION OF BAR COUNSEL

2014 Annual Meeting

Joint Aging Report Session: Joint Programming with CoLAP/APRL/ABA

Friday, August 8, 2014
3:45 pm - 5:15 pm

Moderators: Sarah D. McShea (APRL-NY)
Kim D. Ringler (APRL-NJ)
Panelists: Stark Ligon (AR)
Lynda Shely (APRL-AZ)
Janet P. Voss (CoLAP-IL)

This program will focus on the final report of the NOBC-APRL-CoLAP Second Joint Committee on Aging Lawyer Issues. Panelists will discuss the innovative approaches taken by jurisdictions across the nation to draw on the experience and wisdom senior lawyers offer to the bar, as well as the methods and programs being utilized to identify and offer assistance to lawyers with age related problems. Panelists will provide instruction on best practices for improving the approaches taken to use the resource that is the senior lawyer, methods for encouraging lawyers to engage in formal succession and transition planning early in their career, and identifying and assisting those in need of help with age-related challenges while continuing to ensure the public and the profession are protected.

NOBC-APRL-CoLAP
SECOND JOINT COMMITTEE
ON AGING LAWYERS
Final Report - April, 2014

James C. Coyle
A. Root Edmonson
Barbara Ezyk
Stark Ligon
Sarah D. McShea
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INTRODUCTION

In August 2005, the National Organization of Bar Counsel ("NOBC") and the Association of Professional Responsibility Lawyers ("APRL") appointed a joint committee to examine the effectiveness of the traditional professional disciplinary system model as it applied to aging or senior lawyers. The NOBC-APRL Joint Committee on Aging Lawyers ("Joint Committee" or "NOBC-APRL Joint Committee") studied and analyzed the issues, identified a number of problems and possible responses, and recommended actions and approaches to dealing with what was widely predicted to be a "senior tsunami" of age-impaired lawyers, some percentage of whom were expected to generate an inordinate number of complaints and disciplinary proceedings around the country. The Joint Committee's Report was issued in May 2007 ("2007 Report") (available at http://www.aprl.net/publications/downloads/NOBC-APRL.pdf).

In September 2013, the NOBC and APRL, together with the American Bar Association's Commission on Lawyer Assistance Programs ("CoLAP"), appointed a Second Joint Committee on Aging Lawyers ("Second Joint Committee" or "Committee") to further study the manner in which the legal profession is preparing for its aging lawyer population and to follow up on the recommendations

in the "2007 Report".[1] The Second Joint Committee's focus centered on whether jurisdictions have experienced or are anticipating non-disciplinary challenges associated with an aging lawyer population, including age-related impairments and retirement or semi-retirement, and what practices have been or should be implemented for effectively dealing with those challenges to avoid harm to clients and discipline for the lawyer. In addition, the Second Joint Committee considered means to reap the benefits to the bar of practitioners who have practiced for many decades.

THE ISSUES

The 2007 Report highlighted three critical issues. First, the report discussed the fact that the legal profession was facing a "senior tsunami," as a greater percentage of lawyers moved into age classes typically associated with being a "senior citizen." Second, the report discussed the good news/bad news of having an aging bar. The good news is that there are a greater number of lawyers with tremendous experience, insight and wisdom that can be shared with newer members of the bar. These same lawyers can devote themselves to valuable public service and improvement of the profession. The bad news is that there is an ever increasing risk of more lawyers with age-related impairments and insufficient preparation for transitioning away from practice before a crisis forces that

[1] In October 2012, the NOBC began studying the scope and effectiveness of the recommendations contained in the 2007 Report and then recommended that a second Joint Committee be formed to follow up on the efforts of the first Joint Committee.

transition. Third, the report identified steps that every bar should take to identify and effectively assist the increasing population of aging lawyers, while protecting the public.

Not surprisingly, these issues have not changed since 2007. Thanks to the work of the NOBC/APRL Joint Committee and its 2007 Report, many jurisdictions responded to the anticipated "tsunami" by planning and implementing programs that serve as a model for addressing difficult and sensitive issues for all involved. This Committee's hope is that by sharing some of the initiatives taking place in many jurisdictions, all jurisdictions will develop comprehensive programs to aid one of the profession's most valuable resources, *i.e.*, its senior lawyers.

A WORD ABOUT THE INTENT OF THIS REPORT

At the outset, any discussion of an aging lawyer population carries with it the risk that some will view the discussion as an offensive attack on senior lawyers.[2] That is not the intent or focus of this Committee or this report. The fact is that we are all aging and any discussion about the possible problems and risks that entails necessarily, and obviously, involves our collective interests and obligations. A thirty year old lawyer who has not begun planning for retirement is

[2] ***See, e.g.***, Results of the 2013 Florida Bar Survey on Senior Lawyer Programming, Unsolicited Comments Provided by Respondents: "As a lawyer who is part of the age demographics that is the subject to this survey, I find it is condescending and discriminatory." "The last thing any 'senior' attorney wants is to join a section that turns out to be a continuing seminar on aging and the liability risks of cognitive decline." "Stay out of the medical profession. You cannot create a section solely to place lawyers out to pasture."

facing an aging-lawyer issue because some day that lawyer will likely want to retire and should be planning for it now.

The intent of this report is not to disparage aging or senior lawyers. The observations and recommendations contained in this report are intended for the benefit of the profession at large. The Joint Committee hopes this report provides all jurisdictions with useful information about existing and recommended programs that effectively address the problems presented by lawyers with diminishing capacities with dignity, regardless of age. For example, a program designed to help with lawyers facing mental or physical incapacity or impairment will apply equally to lawyers who are thirty-five years old as well as those who are eighty-five years old. We must accept the fact that lawyers, like the general population, are moving as a group into an older demographic profile while remaining in practice.[3] Along with the aging-lawyer population comes an increased risk of age-related challenges. Ignoring these challenges because the issues are sensitive, uncomfortable or may cause some lawyers to feel singled-out would be a disservice to the profession and the public. Those elderly lawyers who remain fit

[3] In 2013 the American Bar Association Market Research Department Lawyer Demographics reported that in 2005, for which the most recent statistics were provided, thirty four percent of practicing lawyers were age fifty-five or over, compared to twenty-five percent in 1980. ***See*** http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf. Likewise, the median age of a practicing lawyer in 2005 was forty-nine as compared to thirty-nine in 1980. ***Id.*** Given the large percentage of baby-boomer lawyers this trend is likely to continue such that within a few years more than fifty percent of lawyers will be in their fifties or older.

are the focus of this report only insofar as their experience and longevity in law practice can serve as a resource to the legal profession.

THE JOINT COMMITTEE'S METHOD

In December, 2012, the NOBC circulated a survey to its members (the "2012 Survey") to research whether jurisdictions had or were anticipating non-disciplinary challenges associated with an aging lawyer population and what best practices could be recommended to deal with those challenges. Twenty-one jurisdictions responded to part or all of the 2012 Survey. The Committee followed up with an additional survey conducted at the NOBC's 2014 Midyear Meeting (collectively the 2012 Survey and the 2014 Midyear Meeting survey are referred to as the "Committee's Surveys"). The Committee thanks the jurisdictions that responded to the Committee's Surveys for their assistance in providing information on the aging lawyer population and the programs that these jurisdictions have planned or that are already in place. The Committee also learned of some programs through additional research beyond the results generated by the Committee's Surveys and had valuable feedback to its inquiry from members of APRL and CoLAP. This additional information is also included in the Committee's recommendations. The Committee also thanks John T. Berry, Director of the Legal Division for the Florida Bar, who served as Chair of the 2007 Joint Committee, for his invaluable contributions to the Committee's work.

THE 2007 REPORT RECOMMENDATIONS: WHAT IS IN PLACE AND WHAT IS STILL NEEDED

A. Make a Demographic Assessment of the Lawyers

The 2007 Report recommended that each jurisdiction conduct a demographic assessment of its lawyers to determine how many are presently 65 or 70 years old and how many are expected to reach retirement age in the coming two decades. Of the jurisdictions that responded to the Committee's Surveys, the majority had conducted a demographic assessment that included information on lawyers in age ranges from 50-54, 55-59, 60-64, 65-69 and seventy years old or more. In those jurisdictions, lawyers aged 65 or older represented from just under 9% to 20% of the jurisdiction's total active lawyers. Most jurisdictions reported that 13% to 16% of their active lawyers were 65 years of age or older. This is significant for a number of reasons. First, a lawyer who is 65 or older has likely been practicing for forty or more years. Such a lawyer will have a wealth of valuable experience and institutional knowledge about the practice of law in his/her jurisdiction. The ability to share this experience with newer members of the bar, and provide a resource and connection for newer members represents a tremendous opportunity for both the bar and the older lawyer.

Second, is another side to the age statistics that makes it important for all lawyers to be familiar with the demographics of the profession: age-related dementia, and specifically Alzheimer's, typically begins to appear in individuals

who are 60 or older.[4] Starting at age 65, the risk of developing the disease doubles every five years.[5] According to the Centers for Disease Control and Prevention, 25-50% of the 85-and-older population exhibits some signs of Alzheimer's or age-related dementia.[6] The unavoidable conclusion is that as lawyers age and remain in practice, statistically a greater number will experience cognitive impairments, as well as other significant medical problems, such as heart disease and strokes. Age-related dementia and Alzheimer's present special problems for lawyers in that individuals suffering from such diseases may not appear obviously impaired or incapacitated until the disease is quite advanced. In addition, the prospects of recovery and effective treatment are often uncertain or unlikely. And, while any impairment may affect a lawyer's ability to function at full and optimum capacity, diseases of the brain strike at the core of what many lawyers do on a daily basis – think, analyze, evaluate, and advise.

It is therefore imperative that the legal profession create programs and devote the necessary resources to assist the lawyers who will need help and support, while continuing to protect the public.

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[4] ***See*** Centers for Disease Control and Prevention, Dementia/Alzheimer's Disease, available online at http://www.cdc.gov/mentalhealth/basics/mental-illness/dementia.htm.
[5] ***See id.***
[6] ***See id.***

Many jurisdictions have taken the important first step of making a demographic assessment of their lawyers. For those jurisdictions that have not done so, best practices dictate that demographics be gathered as soon as feasible.

B. Take Steps to Identify Lawyers with Age-Related Impairments

The 2007 Report recommended that each jurisdiction take steps to identify senior lawyers with age-related (or non age-related) impairments. The steps that jurisdictions have taken to identify lawyers with impairments are varied and include: (1) relying on lawyers reporting impaired lawyers to regulatory authorities or to a lawyers assistance program under the jurisdiction's version of Model Rule 8.3; (2) petitioning the Supreme Court or Disciplinary Board for a mental health evaluation of lawyers demonstrating signs of impairment and requesting that such lawyers be suspended or placed on disability or inactive status; (3) relying on lawyers self-reporting; and (4) educating lawyers about impairment issues. The majority of responding jurisdictions rely heavily on lawyer assistance programs to take reports of lawyers demonstrating signs of impairment and to educate lawyers and others on recognizing signs of impairment. Those jurisdictions often characterized this as an "informal" approach.

Several jurisdictions have projects in place or have developed tools to more systematically evaluate lawyers who may be suffering from age-related (or non age-related) disability or cognitive impairment, assist lawyers who may have age-

related impairments, and educate the public (and family members and law firm staff) on impairment issues. For example, one jurisdiction (Kansas) reported that it offers approximately 20 education programs devoted to lawyer assistance issues and maintains a website and a 24 hour hotline for reports related to lawyer incapacity, whether due to age, substance abuse or some other condition. Another jurisdiction (Florida) has worked with medical providers to develop a confidential, online self-assessment form that a lawyer can complete to determine if the lawyer's behavior indicates possible impairment. This tool has been modeled after a similar assessment form used by physicians and compares the lawyer's functioning to other lawyers of similar age.

A third jurisdiction (New Mexico) developed a training video to be shown at State Bar annual meetings, continuing education seminars, and other programs, in which physicians discuss how lawyers, their colleagues, staff, family and friends can recognize and identify signs of impairment. This jurisdiction is also considering the use of an assessment form that can be used for either self-assessment, or the assessment of others who may be exhibiting age related impairment.

Another jurisdiction (Indiana) has produced a video designed to illustrate how a newer lawyer might approach other members of his or her law firm with concerns about a senior lawyer. Using a role play model, the video demonstrates

how difficult it can be to raise concerns about a lawyer's cognitive functioning, the resistance and disbelief that others around the lawyer might display, and the importance of pursuing the matter and considering available resources that might be employed.

Another idea the Committee considered was the possibility of jurisdictions preparing a video for distribution on the internet that will assist non-lawyer third parties in winding up the affairs of a law firm when a lawyer unexpectedly leaves the practice. This video would include general information about who to contact, how to get help, and what steps to take and to avoid in wrapping up a law practice.

Another jurisdiction (North Carolina) is recruiting volunteers who will be trained to recognize and intervene when a lawyer appears to be demonstrating cognitive impairment.[7] This jurisdiction has made available resources, including a worksheet for use in assessing lawyers with signs of cognitive impairment and a checklist for individuals who are considering intervening in a situation where a lawyer may be showing signs of cognitive impairment. This jurisdiction is also designing CLE courses to raise the bar's awareness of the issue of cognitive impairment in lawyers.

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[7] ***See*** North Carolina Bar Association Transitioning Lawyers Commission, Model Protocol for Assisting Lawyers Approaching the End of A Career, (2013), available at https://www.ncbar.org/media/29307503/tlcbook.pdf

Best practices indicate that while relying on self-reports by impaired lawyers and on third-party reports of impaired lawyers is important, educational initiatives to increase awareness of lawyer impairments and encourage reports of such impairments is critical and more effective. Educational initiatives include training videos, live CLE programs, assessment guides and forms or checklists, and easily accessible websites that include discussions on cognitive impairment and cognitive decline. All educational material should be widely available and routinely reviewed and updated for content accuracy. The materials should include access to confidential resources for self-help, medical treatment, and the professional assistance of colleagues willing to help impaired lawyers.

Training and education initiatives should involve experienced members of lawyer assistance programs who are familiar with the issues related to identifying, treating and assisting lawyers with other impairments. While lawyers and judges have an ethical responsibility to recognize the signs and symptoms of a colleague who may be impaired and, if feasible, to assist the colleague in obtaining help, most lawyers probably are not familiar with the warning signs of cognitive impairment (either in themselves or in others) and most lawyers are not familiar with the resources available for such impaired lawyers. Educational initiatives should include programs on how to conduct a self-assessment and how to recognize and address cognitive impairment issues in others. This would include

discussing the common warning signs and symptoms of mild cognitive impairment, Alzheimer's disease and reversible causes of cognitive impairment. Such programs should also include discussion on when neuropsychological or other testing is appropriate. Programs should also discuss the resources available for assistance and referral. Periodic announcements in publications that reach bar members offering and encouraging the use of training materials and assessment forms would be a valuable supplement to the training materials themselves. Additionally, education initiatives should involve medical professionals who can best articulate the issues and assist in developing assessment tools and identifying treatment options for use by lawyers, their colleagues, staff, families and friends.

To assist jurisdictions with accessing resources, the Joint Committee recommends that the NOBC, APRL, and ABA CoLAP websites include links to the online resources listed in this Joint Report.

C. Provide Planning Ahead and Law Practice Transfer Guidance

The 2007 Report recommended a number of steps lawyers should consider for insuring a smooth transition of client matters in the event of an unexpected, long-term interruption or cessation of a lawyer's practice. While the 2012 Survey did not specifically seek information on this issue, the subsequent Midyear meeting survey and this Committee's research has shed light on progress made in this area. Similar to the steps taken to identify a lawyer with an age-related or other

incapacity issues, most jurisdictions recognize the need to undertake a broader education initiative to encourage lawyers, particularly small firm and solo practitioners and lawyers in niche or boutique practices within larger firms, to engage in advance planning for unexpected practice interruptions or cessation. Some jurisdictions have already published articles on the aging of the profession and the need for lawyers to engage in advance planning for unexpected events.[8] Likewise, a number of jurisdictions, including California, Colorado, Florida, Iowa, North Carolina, Washington, and West Virginia, have excellent succession planning manuals and/or online resources that provide step-by-step suggestions and useful forms for lawyers to use in effective succession planning.[9]

Additionally, Comment 5 to ABA Model Rule 1.3, on "diligence," highlights the voluntary effort by the profession to direct lawyers, especially those in solo practices, to plan ahead by designating an "inventory" attorney with limited authority to review client files and take immediate action to protect the interests of the clients. Many jurisdictions already have rules that provide for inventorying or

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[8] ***See, e.g.***, Disciplinary Note, Succession Planning, William D. Slease, New Mexico Bar Bulletin, April 3, 2013; Shades of Gray: The Opportunities and Challenges of An Aging Bar, Gary Toohey, Missouri Bar Precedent, Fall 2011; Succession Planning for Solo and Small Firm Practitioners, Jill A. Snyder, Maryland Bar Bulletin, October, 2010; Growing Old Together, Martin A. Cole, Bench & Bar of Minnesota, April, 2008.

[9] ***See, e.g.***, Colorado Supreme Court, Office of Attorney Regulation Counsel, Planning Ahead: A Guide to Protecting Your Clients' Interests In the Event of Your Disability or Death (One of Which is Inevitable), available at http://www.coloradosupremecourt.com/pdfs/General/Closing_Practice.PDF; West Virginia State Bar Succession Plans, available at http://wvbar.org/wp-content/uploads/2012/04/succession.pdf; Washington State Bar Association, Succession Planning, available at http://www.wsba.org/Resources-and-Services/Ethics/Succession-Planning. See also New York State Bar Association's Planning Ahead Guide, currently being updated by the Practice Continuity Subcommittee of the Law Practice Management Section.

receivership attorneys to step in and distribute client files and funds when a lawyer is obliged to cease practice. Some states have rules authorizing appointment of conservators or similar agents, including the state attorney regulation office, to perform this function.[10] The time and expense involved in closing a lawyer's practice, whether it is done by outside successor counsel or bar counsel, can be significant. Voluntary action by local lawyers and bar associations often is on an ad hoc basis, without much guidance on how the volunteer lawyer should communicate with clients and courts about the incapacity of the impaired lawyer. There are a myriad of issues that may be involved, including outstanding fee claims and entitlement to unpaid fees by the impaired lawyer, conflicts of interest implicating the unwitting successor or inventory counsel, potential professional liability by the successor or inventory counsel to clients whose interests may have been harmed, and the role of the impaired attorney's family and office staff, among other things.

The Committee is also aware that some jurisdictions, including Arkansas, California, Florida, Indiana, South Carolina and Wyoming, either have taken or are taking steps to enact rule changes or add commentary to existing rules to require or encourage lawyers to name successor attorneys and develop a comprehensive

[10] The American Bar association has compiled a fairly comprehensive list addressing resources available for lawyers' succession planning, including state caretaker rules, and guides for dealing with lawyer disability and other unexpected events. This material is available at http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/client.html#Retirement.

succession or transition plan.[11] Further, the Committee understands that several professional liability insurers ask lawyers to identify an attorney who can serve as a backup or inventorying attorney in the event that the insured lawyer's practice is interrupted or terminated.

One effort to address succession issues as they pertain to client files is being undertaken by the ABA Standing Committee on Client Protection (SCCP). The SCCP is currently considering whether to issue guidelines or seek a formal ethics opinion to address the definition of client files, permissible charges related to providing the client a copy of the file, the appropriate retention period for client files, the need for lawyers, particularly those in solo practice, to have a succession plan agreed to by a successor counsel, and the development of a plan for the orderly distribution of client files upon the cessation of a lawyer's practice or the dissolution of a law firm. This initiative will have significant implications for all jurisdictions and their lawyer regulation offices, given the relatively high percentage of solo practitioners in the legal profession. The burden of inventorying and distributing files, reconciling trust accounts and distributing funds, while protecting client interests and conserving resources, is great,

[11] ***See, e.g.***, Arkansas Rules of Professional Conduct, Rule 1.3 comment 5 ("To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action"); Disciplinary Code for the Wyoming State Bar, Rule 23(a), Protection of Client Interests ("Solo practitioners shall execute a 'Designation of Surrogate Attorney Form' as provided by the Wyoming State Bar).

particularly when the attorney who failed to adequately plan ahead is suddenly no longer available to deal with the issues.

Another possible comment jurisdictions should consider adding to their Rules to encourage lawyers to identify successor counsel and raise the awareness of the risks of not doing so is as follows:

> Lawyers have an ethical duty to assure that clients receive all original documents generated during a representation and if a client does not receive all original documents, the lawyer has a duty to safeguard that property for the length of time required for the practice area. Original wills and other estate planning documents should not be retained by the lawyers unless the lawyer has designated successor counsel who has agreed to safeguard the documents if the lawyer ceases to practice law, whether by reason of retirement, disability, or death. Failure to designate backup counsel may result in the State Bar perfecting a conservatorship of the client files and ultimately seeking court authorization to destroy the documents, after reasonable attempts to notify former clients to retrieve their documents.

The Committee applauds the increasing awareness that all jurisdictions have of the need for lawyers to engage in succession or transition planning as well as the work being performed by the SCCP. Increased education on the topic and guidance in the form of rules, commentary to existing rules and working guidelines will be some of the most effective means of improving the bar's awareness of and response to this critical need.[12] Additionally, if one is not already in place, each

[12] A compelling article on the importance of succession planning to which every practicing member of the bar should be referred is Death of a Practice: After Lawyer Dies Her Friend is Faced With Closing Down Her Firm, Susan A. Berson, ABA Journal, January 2013, available at

jurisdiction should consider developing a succession planning manual and an improved mechanism for insuring that lawyers, particularly those in solo practice, make arrangements for successor counsel who can assist in case of an emergency or other circumstance that interrupts a lawyer's ability to continue to serve his/her clients. Further, in addition to or in supplementation of rules or rule commentary addressing the need to name a successor lawyer, bar associations should consider organizing practice continuity committees and training volunteers to serve as successor counsel when needed.

D. Encourage and Support Senior Lawyers in Practice

The 2007 Report recommended that jurisdictions take steps to support senior lawyers in practice consistent with what has been referred to as the Second Season of Service.[13] Among other things, the 2007 Report recommended using senior lawyers as mentors and involving them in *pro bono* work thereby taking advantage of the wealth of experience senior lawyers possess. Several jurisdictions, such as Arizona, New Mexico, Utah and Ohio have taken steps that effectively implement this recommendation.

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http://www.abajournal.com/magazine/article/death_of_a_practice_terminally_ill_lawyers_friend_faces_closing_down_firm.

[13] In August, 2006, then ABA President Karen J. Mathis introduced the Second Season of Service initiative to the ABA. As part of that initiative, the ABA formed the Commission on Second Season of Service to assist lawyers in the transition from full-time practice to pursue other interests and opportunities such as pro bono and volunteer work.

The Committee encourages all jurisdictions to consider implementation of similar programs to match seasoned lawyers with new members of the profession. Such mentoring matches may address *two* issues facing the legal profession – 1) assuring continuing competent legal work by aging lawyers at risk for or experiencing some impairment and 2) providing employment opportunities for recent graduates. A mentoring relationship gives the new lawyers a chance to learn from seasoned experienced practitioners (full of wisdom, war stories and practical knowledge), while helping assure that senior lawyers continue to provide competent diligent representation in an increasingly technologically-complex practice environment (see RPC 1.1's requirement for understanding relevant technology). Given the significant increase in unemployed and underemployed new lawyers, as well as the upsurge in new lawyers immediately opening solo practices, mentoring matches are likely to benefit both new and senior lawyers. Moreover, a mentorship program may provide an opportunity for a senior lawyer to eventually transition out or practice knowing that his or her firm and clients are in the hands of a lawyer committed to the clients and trained to take over and operate the business.

Other examples of existing programs that encourage mentoring include creating a license category for senior lawyers such as "emeritus." A lawyer

holding an emeritus license pays lower bar fees and may be able to practice in a limited setting, perhaps limited to *pro bono* matters, usually under the supervision of a fully licensed lawyer. The emeritus lawyer will typically forgo compensation for his or her work and is typically required to provide legal service through an approved or recognized legal services organization.

Further, many law schools either have or are developing clinical law programs for students to serve otherwise underserved legal needs. (New York's Chief Judge has adopted a requirement for a minimum of 50 hours of pro bono work as a condition of admission for new bar applicants).[14] Recruitment of senior lawyers to serve as mentors in such programs is desirable in that it provides a resource and connections to the bar for the soon-to-be or newly admitted lawyers while utilizing the skills and experience of the senior lawyer.

The Committee is also aware that many jurisdictions have either formed or are forming a senior lawyers division within the bar. At least one jurisdiction (Florida) has learned through a survey within its state that senior lawyers are particularly interested in support from their bar in finding employment opportunities, obtaining details on closing or selling a law practice, and learning about technology.[15] An active senior lawyers division can assist in identifying such needs and interests and facilitating the bar's support to its members. The

[14] ***See*** http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml.
[15] ***See*** Results of the 2013 Florida Bar Survey on Senior Lawyer Programming, April, 2013, at 7-7b.

Committee encourages each jurisdiction to explore the formation and funding of such a division within the bar. These divisions would be well-suited to matching needs with newer lawyers to the potential benefit – financial, rainmaking, training and affiliations -- of all parties.

E. Responding to Age-Impaired Lawyers

The Committee recognizes, as did the NOBC/APRL 2007 Committee, that maintaining respect for and the dignity of an aging lawyer is critical while simultaneously protecting the public that lawyers are privileged to serve. Virtually every jurisdiction reported a disciplinary mechanism to address lawyers whose age-related or other impairments put the public at risk. But as one Committee member observed, discipline does not make an impaired lawyer well, nor has it been shown to be the most effective mechanism for actually protecting the public from impaired lawyers. Moreover, this Joint Committee's focus was on addressing impairment and other age-related challenges for lawyers before the lawyer becomes entangled in the disciplinary system. To that end, the Committee was encouraged to learn that many jurisdictions have implemented or are considering programs designed to identify and detect impairment issues at an early stage.

For example, the 2007 Report recommended that each jurisdiction adopt rules to provide for voluntary and involuntary disability status, both temporary and permanent. Several jurisdictions that responded to the Committee's Surveys

reported having such rules and using them in matters not involving lawyer misconduct under the Rules of Professional Conduct.[16] The Committee recommends that those jurisdictions that have not already done so consider adding such rules. Such rules should make it clear that the proceedings under the rules are not disciplinary proceedings and do not involve a finding of misconduct against the attorney. Additionally, such rules may provide for both voluntary and involuntary transfer of a lawyer to temporary or permanent disability status.

Likewise, the 2007 Report recommended that each jurisdiction consider enacting a permanent retirement rule for lawyers whose actions do not warrant discipline but who, nevertheless, should never again practice law. Many jurisdictions reported having a retirement class or category of license. In 2012, the NOBC created a Special Committee on Permanent Retirement (the SCPR Committee) to address this issue. The SCPR Committee's report and recommendations are attached as Appendix "A" to this Report. The Committee urges each jurisdiction to consider the attached report and adopt its recommendations for establishing a permanent retirement license class.

One of the critical recommendations of the 2007 Report was that disciplinary agencies use judges and lawyers assistance program ("JLAP")

[16] ***See, e.g.***, Colorado Rules of Civil Procedure, Rule 251.23, Disability Inactive Status; Florida Rules of Discipline, Rule 3-7.13, Incapacity Not Related to Misconduct; Internal Operating Rules of the Kansas Board for Discipline of Attorneys, Rule 220, Proceedings Where an Attorney is Declared or is Alleged to be Incapacitated; New Mexico Rules Governing Discipline, Rule 17-208, Incompetency or Incapacity.

resources to respond effectively to age-impaired lawyers. Almost all states now have one form or another of a JLAP program. Responses by forty-eight states and the District of Columbia to a recent CoLAP survey revealed that fifty-three percent of JLAP programs are structured as an agency within a bar, thirty-one percent are structured as an independent agency and sixteen percent are an agency of the state courts.[17] Services offered by each program vary, depending on funding. Most JLAP programs do offer assessments, interventions and referrals at a minimum.[18]

The vast majority of jurisdictions responding to the Committee's Surveys reported heavy reliance on JLAPs in addressing lawyers with age-related challenges. Jurisdictions reported using JLAPs formally and informally to assist lawyers demonstrating age-related impairments, including one-on-one consultations with a lawyer and an JLAP member, more traditional interventions, referrals to employee assistance type programs, and designation of a crisis response team to transition a lawyer out of practice, provide counseling and other medical and social services or referrals for the lawyer, and orderly distribute the lawyer's client files and funds.

Several years ago, the CoLAP Senior Lawyer Committee drafted, with input from several states' JLAPs, the Cognitive Impairment Worksheet for Attorney

[17] ABA Commission on Lawyer Assistance Programs 2012 Comprehensive Survey of Lawyer Assistance Programs, pp. 3-4. ***See*** http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_2012_lap_comprehensivesurvey.authcheckdam.pdf

[18] ***Id.*** at pp. 10-12.

Assistance Programs. This worksheet helps identify signs and symptoms of cognitive impairment, and has a best practices section on how to approach and handle with dignity a lawyer exhibiting cognitive impairment. Further, the ABA CoLAP Senior Lawyer Committee is currently in the process of drafting a paper on cognitive impairment and cognitive decline that will include the worksheet.[19] Also attached is an Illinois intervention guide with suggestions for conducting a dignified intervention for a lawyer exhibiting signs of cognitive impairment issues. ***See*** Appendix B.

The Committee strongly recommends that each jurisdiction develop a formal, working plan to utilize its JLAP in the efforts to identify and assist lawyers demonstrating age-related impairment. There are many reasons why JLAPs are more effective than discipline and diversion programs. Among other things, a lawyer's ability to access an JLAP rather than face discipline will likely foster more self-referrals by lawyers facing age-related illnesses and fewer professionals are likely to go "underground" and leave their illness untreated. Further, JLAPs have medical and other experts and resources to both assess a lawyer facing age-related challenges and provide treatment alternatives in a confidential and less-

[19] As of the date of this report, the latest available draft of the ABA CoLAP Senior Lawyer Committee Working Paper on Cognitive Impairment and Cognitive Decline, which included the worksheet is available at http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_paper_on_cognitive_imp.authcheckdam.pdf

threatening environment. Likewise, JLAPs provide better opportunities of an earlier intervention when a lawyer begins demonstrating symptoms of age-related impairment and, therefore, problems are identified before a lawyer becomes entangled in the discipline system, with the attendant harm to the public that precedes the disciplinary complaint. Based upon the experience in identifying and treating lawyers with substance abuse, JLAPs are also ideally suited to conduct early interventions or crisis management with a lawyer exhibiting age-related incapacity. JLAPs are also better able to provide hope and advocacy for an aging lawyer by, among other things, offering life coaching, assistance in how to retire, or a redirection allowing a senior lawyer to serve in different ways. Likewise, JLAPs can provide advocacy for the professional's health while preserving dignity, reducing shame and fear, yet still protecting the public. This contrasts with the more traditional discipline model where significant resources are expended on a disciplinary investigation and prosecution that will only force the lawyer out of the practice without assistance to the lawyer and often end an otherwise stellar career on a disciplinary note.

The Committee also encourages NOBC and APRL leadership to work in tandem with CoLAP and the ABA in developing new and effective educational tools and programs to deal with this growing issue. As a first step, NOBC, APRL, and CoLAP websites should work together to provide resources for regulatory

authorities and lawyers, family members and staff to help evaluate lawyer impairment and provide resources to assist with assuring the wellbeing and dignity of the impaired lawyer and the protection of the lawyer's clients.

Another recommendation of this Committee is to coordinate liaisons between each jurisdictions' young lawyer section/division and the jurisdictions' senior lawyer section/division to promote a working partnership between the sections to pair new, un-employed lawyers with senior lawyers who may need some assistance in managing their offices. By fostering such two-way mentoring, jurisdictions will create voluntary affiliations that encourage senior lawyers to mentor new lawyers with their years of practical experience while simultaneously affording senior lawyers the benefit of the new lawyer's knowledge of technology and attention to detail.

The ultimate goal of the Joint Committee is to encourage jurisdictions to implement programs for the early detection of lessening skills, provide assistance to age-related impaired lawyers (and their staff and families) before there is an ethics violation, and assure that senior lawyers are treated with respect and encouraged to share their valuable wisdom with new lawyers.

Board of Overseers of the Bar

Home → Attorney Services → Ethics Opinions → Opinion

Opinion #210. Restrictions on the Sale of an Attorney's Law Practice

Issued by the Professional Ethics Commission

Date Issued: June 14, 2014

Related Opinion(s) Opinion #143: Disposition of Client Files on Death or Disability of Solo Practitioner

Question (Part I)

Attorney H is a solo practitioner who is reaching the stage in his practice where he would like to start phasing out of the practice of law. He would like to be able to sell the practice, and then come back as an employee or independent contractor without all the headaches and liabilities that are involved with the actual ownership of the firm. May Attorney H sell his practice and then continue to practice law in some limited capacity without running afoul of the Maine Rules of Professional Conduct?

Opinion

The Commission finds that the current version of Maine Rule of Professional Conduct (hereinafter "Rule") 1.17 explicitly prohibits the sale of all or a part of Attorney H's solo law practice if Attorney H were to remain in private legal practice within the state of Maine.

Rule 1.17 provides in relevant part:

> A lawyer or a law firm may sell or purchase a law practice, including good will, if the parties comply with the other applicable provisions of these rules, and the [following] condition[is] satisfied.
>
> . . .
>
> (a) [T]he selling attorney or each attorney in the selling firm [must] cease[] to engage in the private practice of law in the State of Maine.
>
> . . .
>
> (b) If the seller is or was a solo practitioner, then the entire law practice must be sold as a single unit. . . . The entire law practice, for purposes of this rule, shall mean all client files, for open and closed engagements, excepting only those cases in which a conflict-of interest is present or may arise.[1]

As noted in Comment [3] to Rule 1.17, the requirement to exit the private legal arena after the sale of one's practice is not absolute—one may still practice law within the state (*see* discussion on Rule 1.17 cmt. 4, *infra*) in certain, limited capacities. The prohibition on returning to practice within the state of Maine would not preclude Attorney H from working as a lawyer on "the staff of a public agency or a legal services entity that provides legal services to the poor" nor would it bar Attorney H from employment as "in-house counsel to a business." See Rule 1.17 cmt. [3].[2]

Further, Comment [4] to Rule 1.17 provides that 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 on the occasion of moving to another state."

Upon its promulgation of the Maine Rules of Professional Conduct in 2009, the Maine Supreme Judicial Court adopted American Bar Association ("ABA") Model Rule 1.17 in substantially the same form. In the uniform version of Model Rule 1.17, the ABA gave two options:

> (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted. . . .

The options given by the ABA contemplate that some states may have different jurisdictions contained within their borders; however, the state of Maine has only a single jurisdiction. As a result, Attorney H would be barred from returning to private practice in Maine, aside from the limited exceptions noted supra, if he were to sell his solo practice.

Comment [6] may provide insight as to why planned returns to practice after a sale are disfavored; that Comment provides in relevant part:

> 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.[3]

The prohibition on partial sales of an attorney's practice may also reveal its reasoning behind disallowing an attorney's return to private practice after the sale of his or her firm. As noted in Comment [1] to Rule 1.17, "The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will."[4] Based on this language, it appears that allowing the sale of individual clients and particular areas of an attorney's practice would be adverse to public policy, preventing a practitioner whose clients depend on that attorney from simply cashing out and starting over when challenges arise or to "commoditize" clients. The same holds true for sales of less than the entire practice. The strong desire to protect the

clients of solo practitioners is further evinced in Comment [5] to Model Rule 1.3.[5] For more on the sale of a practice, see Question (Part II), *infra*.

It should be noted that Comment [2] to Rule 1.17 provides that, a "[r]eturn to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation."[6] Thus, when enacting Rule 1.17, the door was left open for a potential return to private practice, albeit in limited circumstances. It is essential that "unanticipated" circumstances must be truly so, confirmed by a showing of good faith meeting the definition set forth in ABA Opinion 90-357, and may not be used as a sham device to avoid compliance with Rule 1.17. Each attorney's situation will be unique and the determination highly dependent on the specific facts of each case.

We conclude that in order to remain in the practice of law within the state (excepting the limited exceptions noted supra), Attorney H, as a solo practitioner, would have to retain an ownership stake in his practice. This Rule incentivizes the selling attorney to take on and properly mentor or otherwise train a new partner before making a total exit from the practice of law. The goal of such a provision is to ensure competent legal service as well as to aid the clients in the transition by slowly introducing them to, and acquainting them with, the new attorney. Attorney H then seemingly would be free to withdraw as a partner, relieving himself of some of the demands and rigors of ownership, while still practicing law in a more limited capacity.

Question (Part II)

Given that it would be improper under Rule 1.17 for Attorney H to sell his law practice and return to private practice in the state, would it be permissible for Attorney H to continue his practice but (1) begin "farming his or her cases out" under a "fee splitting" arrangement and (2) would he be able to receive percentages of said fees from those clients who, in the future, begin new cases with the lawyer that he referred them to?

Related Opinion(s)

Opinion #175: Lawyer Acting as Solo Practitioner and "of Counsel" to Another Law Firm; Opinion #103: Splitting Fees Without Regard to Responsibility Assumed

Opinion

Fee-splitting arrangements are governed by Rule 1.5 and are not per se disallowed, but are governed by a rather strict set of requirements.[7] Rule 1.5(e) provides in relevant part:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office unless:
>
> (1) after full disclosure, the client consents to the employment of the other lawyer and to the terms for the division of the fees, confirmed in writing; and

> (2) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client.

If Attorney H's client, after "full disclosure . . . confirmed in writing[,]" "consent[s] to the employment of the other lawyer and to the terms of the division of fees," then Attorney H may, so long as the fee itself "does not exceed reasonable compensation for all legal services . . . rendered to [that] client[,]" proceed with the fee splitting arrangement.[8]

It is important to note that in the event Attorney H were to receive referrals from the attorney(s) to whom he previously "farmed" clients in exchange for Attorney H's referrals, Rule 7.2 could be implicated due to the Maine Rules of Professional Conduct's prohibition on exclusive*reciprocal* referral arrangements.[9]

Assuming that Attorney H's clients consent in writing, after full disclosure, to the proposed fee splitting arrangement, would Attorney H be able to receive a percentage of said fees from those clients who, in the future, begin new cases with the lawyer to whom he referred them?

This inquiry implicates both Rule 1.5 and Rule 1.17. Rule 1.5, discussed supra, does not prohibit the splitting of fees with "another lawyer who is not a partner in or associate of the lawyer's law firm or office[,]" given that particular requirements are fulfilled, but it does necessitate that the fee represent a *"reasonable compensation for all legal services [the attorneys] rendered to the client."*[10] Though the Rules do not present an absolute bar to Attorney H "farming out" his clients, the Rules do require that the fee be "reasonable."

Would Attorney H's receipt of any fee for a matter in which he has had no involvement or performed any work be *prima facie* "unreasonable?" Though Maine's current Rules do not provide much guidance on this matter, there is some guidance available from the Maine Supreme Judicial Court. In 2005, the Court requested that the Advisory Committee on Professional Responsibility consider whether Maine should adopt the ABA Model Rule version of the fee division rule. The ABA model rule only allows fee sharing "in proportion to the services performed by each lawyer" or if the referring lawyer "assumes joint responsibility for the representation."[11] The Advisory Committee held an open forum on the issue soliciting suggestions from members of the Bar and ultimately decided that Maine's existing version of the fee division rule was adequate.

Accordingly, the Commission finds that Maine's Rules do not create a per se prohibition on the division of fees between Attorney H and the attorney who has received the "farmed out" cases, so long as the fee is reasonable under Rule 1.5(a) and so long as the client has previously consented to the division of fees in writing.[12]

The Rule does not mention anything about receiving fees after Attorney H has left the practice of law altogether and has ceased to be a "lawyer."[13] However, Rule 5.4 states, in relevant part:

> A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
>
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. . . .[14]

Though the Rule contemplates the transfer of money in limited circumstances upon a lawyer's death, the Rule otherwise explicitly bars an agreement such as the one proposed by Attorney H. Attorney H may no longer receive any portion of the fees generated by the clients that he or she has "farmed out" once Attorney H has left the practice of law and has ceased to be a "lawyer" while he is still alive.

As for any possibility of Attorney H receiving a portion of the fees generated by his "farmed out" clients *inter vivos* subsequent to his exit from the practice of law, there exists only one allowable exception. Rule 1.17 allows Attorney H to sell, along with the entirety of his practice, the "good will" associated with said practice.[15] The sale of "good will" inexorably includes a particular amount of prospective fees that the buyer expects to receive in the future as a result of the reputation garnered by the selling attorney during his or her tenure in a locale. There is no question that Attorney H could attempt to assign a present value to the prospective fees and include that value in a lump-sum purchase price for the entire firm, though the exact amount may be difficult to estimate. Aside from this limited exception, a non-lawyer would be explicitly precluded under Rules 1.5 and 5.4 from receiving any portion of the fees collected from his or her previously "farmed out" clients for new matters commenced in the future.

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[1]Rule. 1.17, 1.17(a)-(b) (emphasis added).

[2] It should be noted that the Rules are predicated by the following statement "The specific rules of the Maine Rules of Professional Conduct are stated below. To aid in understanding of the rules, a Preamble from the Maine Task Force on Ethics precedes the rules, and the text of each rule is followed by comments and reporter's notes. The Preamble, comments and reporter's notes state the history of and reasons for recommending the rules, discuss the relation of the new rules to the current Code of Professional Responsibility, and offer interpretations of the new rules, but the

Preamble, comments and reporter's notes are not part of the rules adopted by the Court."

[3] Rule 1.17 cmt. 6.

[4] Rule. 1.17 cmt. 1.

[5] Rule. 1.3 cmt. 5 ("To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence requires that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action."); *see also* Me. Bd. of Overseers of the Bar, Formal Op. 143 (1994) ("Disposition of Client Files on Death or Disability of Solo Practitioner").

[6] Rule. 1.17 cmt. 2 (emphasis added).

[7] See Rule. 1.5.

[8] Rule. 1.5 cmt. 7.

[9] See Rule. 7.2.

[10] Rule. 1.5 (e) (emphasis added).

[11] *Model Rules of Prof'l Conduct* R. 1.5(e)(1).

[12] See Rule. 1.5 ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. A fee or charge for expenses is unreasonable when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or expense is in excess of a reasonable fee or expense. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the responsibility assumed, the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; (9) whether the client has given informed consent as to the fee arrangement; and (10) whether the fee agreement is in writing.').

[13] Rule. 1.5(e) ("A *lawyer* shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office unless . . .") (emphasis added).

[14] Rule. 1.5(a).

[15] *See* Rule. 1.17.

Credits

Opinion #143. Disposition of Client Files on Death or Disability of Solo Practitioner

Issued by the Professional Ethics Commission

Date Issued: July 19, 1994

Question

The Commission has been asked for guidance by attorneys faced with the following problem. Within the State there still remains a significant number of solo practitioners. As the years pass, these attorneys discover they are custodians of an overwhelming number of client files. As long as the lawyers are working, the secure storage of this material is the only major concern. However a serious problem arises when a lawyer's practice is unexpectedly terminated through death or disability. What arrangements should solo practitioners make in advance to insure all/ any obligations to their then former clients?

Opinion

It must be recognized that the Commission cannot establish an exhaustive set of specific procedures that all solo practitioners must follow to meet their obligations in this difficult situation. However, it can identify the concerns that must be addressed by these circumstances, and at least proffer some specific suggestions that would meet these concerns. See also ABA Formal Opinion 92-369 for further discussion and suggestions.

I. The Bar Rules

First of all, the Bar Rules, while not directly addressing the problem, do articulate some requirements that relate to the question. Rule 3.6(e)(2) states:

A lawyer shall:

> (i) Promptly notify a client of the receipt of the client's funds, securities, or other properties;
>
> (ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe-deposit box or other place of safekeeping as soon as practicable;

(iii) Maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and render prompt and appropriate accounts to the client regarding them; and

(iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Rule 3.5(a)(2) states:

A lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the lawyer's client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Rule 3.6(a) states:

A lawyer must employ reasonable care and skill and apply the lawyer's best judgment in the performance of professional services. A lawyer shall be punctual in all professional commitments.

Finally, Rule 3.6(h)(1) states that a lawyer shall not. . .knowingly reveal a confidence or secret of the client.

II. The Need for a Plan

From these Rules two obvious principles emerge. First, the files must be kept secure at all times. They cannot be abandoned or simply casually passed on to some accommodating custodian. See Opinion 74. Arrangements must be made not only to prevent destruction but to preserve the confidential information that is contained within the files. Furthermore, many documents (e.g. wills, contracts, and notes) may not only be confidential but irreplaceable.

Secondly, arrangements must be made to inform the client of the termination and protect the client from deadlines in pending proceedings that require replacement representation in a timely manner.

To carry out the above obligations it is obvious that the solo practitioner should adopt a plan *in advance* of his departure. It is obviously too late to wait until death or disability to let unprepared successors deal with an impossible situation. Spontaneous improvisation when the crisis occurs is unacceptable.

III. Suggestions as to Plan Provisions

The specific content of the plan is a matter for each practitioner to determine based on his or her practice. Due to the complexity of the problem and the variety of circumstances surrounding any given solo practice, it is impossible for the Commission to promulgate what *must* be in every plan. However, the Commission

makes the following suggestions it hopes will assist the lawyer in designing a plan that will meet the clients' legitimate needs and expectations.

First, a plan should include as one of its elements the engagement of an attorney to supervise the winding down of the practice.

Second, the plan ought to provide that clients be promptly notified of any termination. They should be advised of the name of the supervising attorney and key staff who might be employed to assist in the transition. They should be invited to retrieve the files and seek replacement counsel if further legal services are required to complete a task.

The above provisions are not unlike those that take place when a lawyer is disbarred or suspended. See Rules 7.3(i)(1)(B) and 7.3(i)(1)(c). The procedures in such instances also include prompt notification of opposing parties and courts in which the lawyer has any matters which might in any way be deemed ongoing.

Third, for those files that are not seasonably retrieved by clients, a determination should be made by a lawyer, presumably the supervising attorney described in the first suggestion, as to what to do next. Can the file be delivered even if the client makes no effort to retrieve it? Is destruction possible and permissible? See Opinion 74 for further discussion of this issue.

Fourth, what is to be done with those remaining files where destruction appears unreasonable at the time of transition and no client takes custody of the material? In those cases a suitable custodian ought to be engaged by the lawyer or the lawyer's estate, who is willing to assume custody of the files.

Finally, the Commission suggests that the supervising attorney notify the Board of Overseers of the Bar of the location of the unclaimed files. This gives former clients who were unable to be contacted during the transition period a chance to locate the file at some later date.

While the suggestions in the previous paragraphs may satisfactorily discharge the departing lawyer's duties, it will be argued that they are based on an unrealistic expectation that any lawyer can be found who would be willing to undertake the supervisory obligations described. While many lawyers extend the courtesy of "covering" for one another during a vacation or temporary disability,[1] it is unlikely in the extreme that any lawyer would have the time or desire to assume virtually a second practice—especially when there is no real possibility he will be compensated for it by clients. Furthermore, the lawyer contemplating his professional demise may be apprehensive about involving another attorney in such a position due to problems such as preserving confidences with respect to specific clients. However, the Commission believes that the Bar Rules require that the solo practitioner make suitable arrangements in advance to both oversee the notification process and take custody of the files.

Footnote

[1] [Malpractice insurance carriers for some time have required solo attorneys to have some other attorney be available to "back up" in cases of disability or vacations.]

Credits

Enduring Ethics Opinions: Opinion #77 (Inclusion of Deceased Partner on Office Letterhead) and #86 (Firm Name including "Of Counsel") - *By David L. Herzer Jr., Esquire - Professional Ethics Commission*

In 1987 and 1988, the Professional Ethics Commission addressed the ethics of listing attorneys in the name of a law firm or on letterhead in the event of a named attorney's death and when an attorney assumes "of counsel" status. Opinion #77, March 4, 1987 (deceased attorney); Opinion #86, August 31, 1988 ("of counsel" role of attorney). The factual scenario addressed in Opinion #77 involved a law firm named "A, B, C & D" in which Attorney C had passed away. The firm wanted to know whether and on what conditions the Bar Rules permitted listing Attorney C in the law firm name and including Attorney C's name in the list of attorneys on the letterhead and whether the firm was required to identify all other deceased partners with the same surname. In Opinion #86, Lawyer E was a long-time solo practitioner looking to reduce the client and administrative workload. Lawyer F proposed assuming "of counsel" status at Lawyer F's separate firm, where Lawyer E would provide consultations at the office of Lawyer F. Lawyer F wanted the Commission to advise whether it would be ethically proper to name the firm "E & F."
The Commission answered these questions by consulting then applicable Maine Bar Rule 3.9. At the time, the Rule provided, in relevant part,

a. False Advertising Forbidden. A lawyer shall not, on behalf of the lawyer or any affiliated lawyer, knowingly use, or assist or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim. A public communication is any communication, through mass media, direct mail, or other means including professional cards, announcements, letterheads, office signs, and similar accoutrements of a law practice.
b. False Advertising Defined. Without limitation, a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim that:

1. Contains a material misrepresentation of fact or law;
2. Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
3. Is intended or is likely to create an unjustified expectation;
4. Violates Rule 3.8;
5. Is intended, or is likely, to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official; or
6. Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived thereby, or fails to contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive.

Me. B. R. 3.9(a) & (b).

In Opinion #77, the Commission concluded that Rule 3.9 permitted retaining the deceased partner's name in the firm's name. It was not misleading or deceptive because, traditionally, law firm names do not change when a named partner dies, so the appearance of the lawyer's name did not imply that the partner still was an active member of the firm. However, listing lawyers associated with a firm on the firm's letterhead, on business cards etc. implied that the lawyers listed were in active practice. In order not to deceive or mislead the public, deceased members must be identified in some form, e.g., John Smith (1900 - 1987). The rationale for identifying those listed attorneys who were deceased did not, however, require the firm to list all deceased partners with the same surname as an attorney whose name was listed.

In Opinion #86, it was decided that the firm name "E & F" was not misleading or deceptive under the meaning of then applicable Maine Bar Rule 3.9, but under very specific assumed facts:

- the relationship of the two lawyers was more than mere office sharing;
- to the extent Lawyer E practiced law, that practice occurred in conjunction with Lawyer F;
- Lawyers E and F consulted with each other on a continuing basis and otherwise cooperated with each other;
- Lawyers E and F shared some significant level of mutual responsibility for providing professional services to clients of the newly formed firm; and
- clients of the individual lawyers were considered clients of the new firm for purposes of conflicts of interest, confidences, and secrets.

The Commission was divided, and the dissenting opinion of one member was expressly noted. The concern was that the new firm name created an unjustified expectation that the semi-retiring attorney, Lawyer E, was a partner actively involved in the firm and responsible for partnership debts, thereby violating Maine Bar Rule 3.9(b)(3).

The results under today's Maine Rules of Professional Conduct would be the same as the results under the abrogated Maine Bar Rule 3.9. Rules 7.1 and 7.5 address the specific facts presented in the 1987 and 1988 opinions of the Commission:

- "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." M. R. Prof. Conduct 7.1.
- "A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." M. R. Prof. Conduct 7.5(a).
- "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." M. R. Prof. Conduct 7.5(d).

The only difference between the current Maine Rules of Professional Conduct applicable to these facts and the former Maine Bar Rule underlying Opinions #77 and #86 is that the Maine Rules of Professional Conduct are more generally stated and do not include the enumerated examples of false advertising appearing in Maine Bar Rule 3.9(b)(1)-(6).

Several other Maine Rules of Professional Conduct also are implicated by the facts presented to the Commission in Opinions #77 and #86. The duty to communicate honestly with third parties, generally and not just in the firm's name or letterhead, is addressed in M. R. Prof. Conduct 4.1, "Truthfulness in Statements to Others." The mutual responsibility incumbent on named lawyers in a firm for providing professional services to clients mentioned generally in Opinion #86 is delineated more specifically in M. R. Prof. Conduct 5.1, "Responsibilities of Partners, Managers, and Supervisors"; M. R. Prof. Conduct 5.3, "Responsibilities Regarding Nonlawyer Assistants"; and M. R. Prof. Conduct 5.7, "Responsibilities Regarding Law-Related Services."

Board of Overseers of the Bar

Home → Attorney Regulation → Maine Bar Rules

1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination or neglect. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will

handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence requires that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

REPORTER'S NOTES:

Model Rule 1.3 (2002) corresponds to and is substantively equivalent to M. Bar R. 3.6(a). The Task Force liked the positive language in Model Rule 1.3 (2002) and recommended its adoption.

The Task Force discussed the use of the term "zeal" as used in Model Rule 1.3 Comment [1] (2002). The Task Force determined that the term "zeal" was often used as a cover for a lawyer's inappropriate behavior. Moreover, the Task Force thought the term was not needed to describe a lawyer's ethical duties. Accordingly, the Task Force recommended its deletion.

The Task Force recommended the inclusion of the term "neglect" in Comment [3]. The Task Force believed that neglect is a broader concept than procrastination, and thus ought to be specifically referenced in the Comment.

With respect to Comment [5], the Task Force observed that a sole practitioner's duty of diligence includes preparation of a plan designating another responsible lawyer to act in the event of a sole practitioner's death or disability. This is not a new requirement and has been addressed in a Professional Ethics Commission Opinion.

Credits

Board of Overseers of the Bar

Home → Attorney Regulation → Maine Bar Rules

1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, including good will, if the parties comply with the other applicable provisions of these rules, and the conditions of this rule are satisfied.

(a) The selling attorney or each attorney in the selling firm has retired, become disabled or has died; or the selling attorney or each attorney in the selling firm has ceased to engage in the private practice of law in the State of Maine.

(b) If the seller is or was a solo practitioner, then the entire law practice must be sold as a single unit. If the seller is or was a law firm, then the entire practice of the firm must be sold as a single unit. The entire law practice, for purposes of this rule, shall mean all client files, for open and closed engagements, excepting only those cases in which a conflict-ofinterest is present or may arise.

(c) The purchaser, who must be registered with the Board as an active member of the Bar of the State of Maine, assumes the obligations of an attorney to the client or clients whose files are transferred.

(d) The seller gives the following notices:

(1) written notice to each of the seller's clients and to the Board of Overseers of the Bar regarding:

(A) the proposed sale including the name of the purchasing attorney or the names of the attorneys who practice within the purchasing firm;

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

(C) 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 ninety (90) days of receipt of the notice; and

(D) the terms of any proposed change in the fee arrangement authorized by paragraph (e).

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a single justice of the Maine Supreme Judicial Court, which shall not issue without the Board of Overseers of the Bar having been given notice and opportunity to be heard. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(2) Further notice shall be given by publication in a newspaper of general circulation in each county in which seller has engaged in the practice of law, at least thirty days before the anticipated transfer of files. Such notice shall include the anticipated date of sale and identification of the purchasing lawyer or firm.

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

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, 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 be sold is satisfied if the seller in good faith makes the entire 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.

[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 on the occasion of moving to another state.

[5] [Reserved]

Sale of Entire Practice

[6] The Rule requires that the seller's entire 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 Model 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 the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a single Justice of the Maine Supreme Judicial Court authorizing their transfer or other disposition. The Board of Overseers of the Bar must be given notice and an opportunity to be heard in any such proceeding. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[9] All 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 arrangements 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 Rule

[13] This Rule applies to the sale of a law practice 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.

REPORTER'S NOTES:

Model Rule 1.17 (2002) addressing the issue of the sale of a law practice, corresponds to M. Bar R. 3.14. Until recently in Maine, lawyers were forbidden to sell all or part of their law practices, other than tangible items such as furnishings, equipment, books and leases. Because clients are not the "property" of the lawyer, they could not be "sold." Moreover, good will was not recognized as an asset of a law practice. Firms could, however, buy-out withdrawing or retiring partners, return their capital and continue to pay distributions and provide benefits to such departing partners, thus affirmatively recognizing that a departing partner leaves behind some value in the firm. Unfortunately, unless solo practitioners joined in partnerships, upon their departure from their "firm" there was no opportunity for them to capture the value they created in their firm.

In 2000 the Maine Supreme Court Advisory Committee on the Rules of Professional Responsibility began consideration of what was to become M. Bar R. 3.14. The Advisory Committee's deliberations focused on the requirement that seller cease the private practice of law in order to be eligible to "sell" his/her practice. After much discussion, the Advisory Committee recommended allowing the sale of an entire law practice to a single purchaser, subject to narrowly specified exceptions. The Advisory Committee also recommended that Bar Counsel, on behalf of the Board of Overseers, be involved in such sales at an early stage in the process, in order to provide lawyers with assistance in avoiding unintended violations of the rule. (The Board of Overseers is already the central repository of information on attorneys who have ceased practicing law pursuant to M. Bar R. 6(c)(1) and (2).)

After a review and discussion of the Advisory Committee notes on M. Bar R. 3.14, the Task Force recommended the adoption of the form of Model Rule 1.17 (2002), substantively revised to reflect the recent revision of M. Bar R. 3.14.

Credits