



Lawyerly Transitions

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Materials

- Arizona's 20/20 Ethical Amendments (2015)
- Arizona's Timmer Committee Ethical Amendments (2016)
- Arizona's New Conflicts Screening Amendments (2016)
- Additional materials referenced in the slides below



Agenda on Transitions

- Confidentiality
- Conflicts of Interest
- Fee-Sharing and Flexible Associations
- Selling (or Purchasing) Law Practices
- Succession Planning



Confidentiality

- “New” Exception: You may disclose information to the extent reasonably necessary “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.”
- *See also* Ariz. Ethics Op. 10-02 (2010).



Imputation of Conflicts of Interest

- **General Rule: Lawyers associated in a firm shall not represent a client when any one of them would be prohibited from doing so by the ethical rules. [ER 1.10(a).] Firms include:**
 - Law partnership, professional corporation, sole proprietorship or other association
 - Legal services organization
 - Legal department of a corporation or other organization
 - Public Defender's Office



Exceptions

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

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

(2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter. If the only such information is contained in documents or electronically stored information maintained by the firm, and the firm adopts screening procedures that are reasonably adequate to prevent access to such documents or electronically stored information by the remaining lawyers, those remaining lawyers will not be considered to have protected information within the meaning of this Rule.



Exceptions Continued

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

- ~~(1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a **substantial role** the personally disqualified lawyer did not have **primary responsibility** for the matter that causes the disqualification under Rule 1.9; and~~
- (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;



Exceptions Continued

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule-, including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the former client's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the former client about the screening procedure; and



Exceptions Continued

- (4) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its client.



New Fee-Sharing Amendments in ER 1.5

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the representation;
- (2) the client agrees, in a writing signed by the client, to the participation of all the lawyers involved and the division of fees and responsibilities between the lawyers; and
- (3) the overall fee is reasonable.



Comments on Fee Sharing

A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be completely and diligently completed. See ERs 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).

Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.



New ABA Ethics Opinion (474)

Referral Fees and Conflicts of Interest

- “Rule 1.5(e) allows lawyers who are not in the same firm to divide a fee under certain circumstances . . . [but such arrangements] are subject to Rule 1.7. Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter.
- When one lawyer refers a matter to a second lawyer outside of the firm and the first lawyer either performs legal services in connection with or assumes joint responsibility for the matter and accepts a referral fee, the agreement regarding the division of fees, including client consent confirmed in writing, must be completed before or within a reasonable time after the commencement of the representation.”
- Full opinion available [here](#).
- See also our recent Arizona opinion [here](#) (16-01).



Nontraditional Practice of law

- ER 1.0(c)
 - “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association. . . .
- What is the nontraditional practice of law?
 - Of counsel
 - Associated on select matters
 - Contract lawyers (outsourcing)
 - Lawyers in foreign jurisdictions
 - Remote lawyering
 - UPL?





Unauthorized Practice of Law

- The Arizona Supreme Court recently amended ER 5.5:
 - Now permits non-Arizona-licensed lawyers to practice law in Arizona relating exclusively to (1) the law of another state, (2) federal law, or (3) tribal law.
 - Non-Arizona-licensed lawyers may not practice “Arizona law.”



Selling Your Practice Ethically

- See Arizona Ethical Rule 1.17
- It requires the Seller to (among other things):
 - Sell the entire practice or area of practice
 - Cease practice in the geographical area
 - Protect confidentiality
 - Select a competent buyer
 - Comply with court rules (e.g., substitutions)
 - Notify clients
 - Ensure that clients' fees are not increased



Some Practical Considerations

- Commit Buyer to accept all clients and fee agreements and to comply with all ethical rules
- Commit Buyer to assume leases and licenses
- Arrange for malpractice coverage (for both Buyer and Seller)
- Consider indemnities and similar protections
- Work jointly on the notice to clients
- See also our Ethics Opinion 06-01 [here](#)



Recent and Relevant ABA Ethics Opinion

- “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.”
- The full opinion is available [here](#).



Succession Planning

- New Rule 41(j):
 - The duties and obligations of members shall be . . . [t]o protect current and former client interests by planning for the lawyer's termination of or inability to continue a law practice, either temporarily or permanently.



Succession Planning Commentary

- Lawyers must plan for the possibility that they will be unable or unwilling to discharge their duties to current and former clients or to protect, transfer and dispose of client files, property or other client-related materials. As part of their succession plan, solo practitioners should arrange for one or more responsible transition counsel agreeable to assuming these responsibilities. Lawyers in multi-lawyer firms and lawyers who are not in private practice, such as those employed by government or corporate entities, should have a similar plan reasonable for their practice setting.



Succession Planning Resources

- Handbook and Forms:

<http://www.azbar.org/professionaldevelopment/practice20/successionplanning/>



Thank you. Questions or Comments?

