

Ethical Issues in Lawyer Succession Planning

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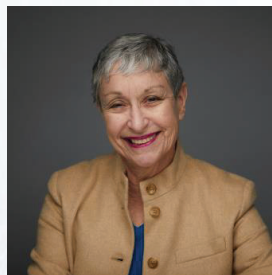
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Karen J. Orlin, licensed to practice law in New York and Florida and residing near New York City, concentrates her law practice on business and not for profit entity governance and transactions law, primarily as a consultant to other law firms, through her private law firm based in South Florida. She also serves as an expert witness in ethics and fiduciary duty of attorneys and entity management, as a public arbitrator, including as Chair of arbitration panels, for the Financial Industry Regulatory Authority, and as an arbitrator for commercial and consumer disputes on the American Arbitration Association's Roster of Arbitrators. She has practiced law through large, medium, and small sized law firms, in her solo law practice, and as in house counsel to financial institutions, and taught Corporation Law and Commercial Lending in law schools in South Florida and survey paralegal studies courses in South Florida and New York City. She is a published author and seminar and webinar presenter.

Her active participation in numerous bar association groups includes her current service as Chair of the Alternative Dispute Resolution Committee of the American Bar Association Senior Lawyers Division, liaison of that Division to the American Bar Association Section of Dispute Resolution, member of the Business Law Committee and Ethics and Professionalism Committee of that Division, and member of the Dispute Resolution Committee and Professional Responsibility Committee of the American Bar Association Business Law Section, as well as member of the Professional Responsibility Committee and Alternative Dispute Resolution Committee of the New York City Bar Association and member and former Chair of the Corporations, Securities, and Financial Services Committee of The Florida Bar Business Law Section. A graduate of the University of Pennsylvania and Harvard Law School and Peer Review Rated AV Preeminent® by Martindale-Hubbell®, Ms. Orlin's biography is included in numerous, including current, editions of The Marquis Who's Who. She received the Albert Nelson Marquis Lifetime Achievement Award and was named among Florida Legal Elite™ by Florida Trend magazine (July 2010) and among South Florida's Top Rated Lawyers of 2015-2018 by Legal Leaders (ALM 2015-2018). She completed five full marathons, including two New York City marathons, and ten half marathons.

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Resources Concerning Ethical Issues

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ABA References Concerning Succession Planning:

https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/

ABA Model Rules of Professional Conduct:

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

ABA Formal Opinions Index by Subject:

https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/index_by_subject/

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Why Ethics Matter If You Are Retiring

2

Rules of Professional Conduct in effect in each state apply to **conduct of a person while holding that person out to the public as a lawyer.**

Paragraph [20] of Scope in the ABA Model Rules of Professional Conduct (“MRPC”) states:

“Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.” Emphasis supplied.

Judges in fact rely on Rules of Professional Conduct in legal malpractice cases.

Applicable Enforceable Rules of Professional Conduct are Those Adopted by Each State

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MRPC Rule 8.5 states:

“(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

“(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

“(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

“(2) for any other conduct, **the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.** A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.” Emphasis supplied.

Diligence Regarding Lawyer Succession 4

MRPC Rule 1.3 states:

“A lawyer shall act with **reasonable diligence and promptness** in representing a client.” Emphasis supplied.

Comment [5] to Rule 1.3 states:

“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, 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.** Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).” Emphasis supplied.

Diligence Regarding Lawyer Succession 5

Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement states:

- A. **“Inventory of Lawyer Files.** If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and **no partner, executor or other responsible party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon proper proof of the fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.**
- B. **“Protection for Records Subject to Inventory.** Any lawyer so appointed shall not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

“Commentary

“In any situation in which the lawyer is not available to protect clients, the agency has an obligation to protect them. When such information comes to the attention of the **agency, it need not await the determination that misconduct has occurred before acting.**

“The cost of the inventory may be paid from the fees owing to the lawyer whose files are inventoried. The cost may also be paid by funds made available for that purpose by state and local bar associations. Often the lawyer appointed as trustee will waive all or part of his or her fee as a public service.

“The trustee is appointed to inventory the files of the lawyer's clients, not to represent them. The trustee should review each file and recommend to the judge who appointed him or her a proposed disposition. The trustee may take only such action with respect to each client's file as is authorized by the judge who appointed him or her.

“The lawyer-client privilege must be extended so that review of the file by the trustee is not deemed to be disclosure to a third party, which would waive the privilege.” Emphasis supplied.

If you do not plan for your clients and their files, the state will plan for you at your expense. The ABA References Concerning Succession Planning include a recommend vs. mandate state by state chart.

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Disposition of Client Files/Property

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MRPC Rule 1.15 states:

“(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. **Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.**

“(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

“(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

“(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall **promptly deliver to the client or third person** any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a **full accounting regarding such property.**

“(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.” Emphasis supplied.

Check Rules of Professional Conduct in each state where you practice, as they vary.

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Disposition of Client Files/Property

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ABA Formal Opinion 92-369, “Disposition of Deceased Sole Practitioners’ Client Files and Property” (December 7, 1992) provides in part (principles apply to retirees):

“[A] lawyer should prepare a **future plan providing for the maintenance and protection of [client files and property] in the event of the lawyer’s death . . . [,which] should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer’s death . . . As a precaution to safeguard client interests . . . [that plan should] ensure insofar as is reasonably practicable that client matters will not be neglected [e.g., court dates, statutes of limitations, or document filings].**” Emphasis supplied.

“[T]he lawyer’s fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship.” Emphasis supplied.

“Lawyers have a fiduciary duty to inform their clients in the event of their partnership’s dissolution.”

“[S]imply informing a client of a firm’s dissolution without telling the client where the client’s files are located would be tantamount to saying ‘your files are no longer here.’” *Vollgraff v. Block*, 117 Misc. 2d 489, 458 N.Y.S. 2d 437 (Sup. Ct., Special Term, Suffolk County 1982).

Non-competition Agreements

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MRPC Rule 5.6 states in part:

“A lawyer shall not participate in offering or making:

“(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement” Emphasis supplied.

“[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.”

“[3] **This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to [MRPC] Rule 1.17.**” Emphasis supplied.

Communications For Lawyer Succession 9

MRPC Rule 1.4 states:

“(a) A lawyer shall:

“(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in [MRPC] Rule 1.0(e), is required by these Rules;

“(2) reasonably consult with the client about **the means by which the client's objectives are to be accomplished**;

“(3) **keep the client reasonably informed about the status of the matter**;

“(4) **promptly comply with reasonable requests for information**; and

“(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Communications For Lawyer Succession 10

ABA Formal Opinion 489, “Obligations Related to Notice When Lawyers Change Firms” (December 4, 2019) provides in part (principles apply to retirees):

“The ethics rules **do not allow non-competition clauses** in partnership, member, shareholder, or employment agreements.” Emphasis supplied. See MRPC Rule 5.6, discussed earlier in this presentation, and ABA Formal Ethics Opinion 06-444, “Permissibility of Restrictive Covenants in Lawyer Agreements Concerning Benefits Upon Retirement” (September 13, 2006).

“Lawyers and law firm management have ethical obligations to **assure the orderly transition of client matters** when lawyers notify a firm they intend to [leave the firm.]” Emphasis supplied.

“The **period of time [of a lawyer’s advance notice to the firm of an intended departure] should be the minimum necessary, under the circumstances, [for the firm and departing lawyer to notify clients,] for clients to make decisions about who will represent them, [and for the firm to] assemble [, organize, and update] files, adjust [and update] staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer’s possession [(e.g., client confidential information, and firm intellectual property, proprietary information, and hardware/phones/computers)]. Firm notification requirements. . . cannot be so rigid that they restrict or interfere with a client’s choice of counsel or the client’s choice of when to transition a matter.**” Emphasis supplied. “[N]otification periods cannot be . . . used to coerce or punish a lawyer for electing to leave the firm, nor . . . unreasonably delay the diligent representation of a client . . . [lest they] violate [MRPC] Rule 5.6.” Fixed periods for notice to the firm and financial disincentives to a competitive departure are criticized in ethics opinions and not enforced by courts under [MRPC] Rule 5.6.

“The departing lawyer may be required, pre- or post-departure, to assist the firm in assembling [, organizing, and updating] files [including docketing of deadlines], [updating lawyers at the firm that will take over the files and the like], [and] transitioning matters that remain with the firm, or in the billings of pre-departure matters.”

Communications For Lawyer Succession 11

ABA Formal Opinion 489, “Obligations Related to Notice When Lawyers Change Firms” (December 4, 2019) also provides in part (principles apply to retirees):

The obligation of lawyers “to communicate relevant information to clients in a timely manner, according to [MRPC] Rule 1.4. . . . would include **promptly notifying a client if a lawyer is changing law firm affiliations.**” Emphasis supplied. This duty is limited to clients with which the departing attorney has had “significant client contact,” e.g., **clients “identifying the departing lawyer, by name, as one of the attorneys representing the client.”** Emphasis supplied. See MRPC Rule 7.1, prohibiting false or misleading statements to clients, and MRPC Rules 1.16(d) and 1.17(c).

“Law firms may not restrict a lawyer’s prompt notification of clients, once the law firm has been notified or otherwise learns of the lawyer’s intended departure. . . . While the departing lawyer and the firm each may unilaterally inform clients of the lawyer’s impending departure at or around the same time that the lawyer provides notice to the firm, the firm and departing lawyer should attempt to agree on a joint communication to firm clients with whom the departing lawyer has had significant contact, giving the clients the option of remaining with the firm, going with the departing attorney, or choosing another attorney. In the event that a firm and departing lawyer cannot promptly agree on the terms of a joint letter, a law firm cannot prohibit the departing lawyer from soliciting firm clients.” Emphasis supplied. But see, e.g., Florida Rules of Professional Conduct Rule 4-5.8(c)(1). Check Rules of Professional Conduct in each state where you practice, as they vary.

“[T]he firm should provide the lawyer with a list of their current and former clients for conflict-checking purposes.” Emphasis supplied.

Communications For Lawyer Succession 12

Regarding continued inclusion of an attorney's name in the name of the firm after retirement, or that attorney's remaining employed by the firm under the title "of counsel" or "counsel," consider:

MRPC Rule 7.1, which states:

"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." Emphasis supplied.

and Comment [5] to MRPC Rule 7.1, which states in part:

"A firm may be designated by . . . the names of deceased members where there has been a succession in the firm's identity **A law firm name or designation is misleading if it implies a connection with . . . a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer. . . .**" Emphasis supplied.

Communications For Lawyer Succession 13

ABA Standing Committee on Ethics and Professional Responsibility (the “Standing Committee”) Formal Opinion 90-357, “Use of ‘Of Counsel’” (May 10, 1990) states in part:

“The use of the title ‘of counsel,’ or variants of that title, in identifying the relationship of a lawyer or law firm with another lawyer or firm is permissible as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading. . . .The [ABA Model Code of Professional Responsibility (1969, amended 1980 “MCPR”), superseded by the MRPC (1983, subsequently amended)] included a specific reference to the title ‘of counsel’ . . . And the term does not appear in the [MRPC]; but there is no substantive significance to this difference. . . .The essence of the ethical requirement under both the [MRPC] and the [MCPR] is avoidance of misrepresentations as to the lawyer’s status, and the relationship between lawyer and firm. . . .

“The Committee believes that in the case of a new or recent firm affiliation there is no escaping an implication that a name in the new firm name implies that the lawyer is a partner in the firm, with fully shared responsibility for its work. **On the other hand, the Committee also believes that there is not a similar misleading implication in the use of a retired partner’s name in the firm name, while the same partner is of counsel, where the firm name is long-established and well-recognized.**” Emphasis supplied.

Deletion during or after 2018 of MRPC Rules 7.4 and 7.5 do not change this conclusion because, according to the Standing Committee, the topics of those Rules are addressed in MRPC Rules 7.1 and 7.2.

Communications For Lawyer Succession 14

Conclusion regarding the name of a law firm:

A lawyer's name included in the name of a law firm while the lawyer practiced law exclusively with that law firm ethically may remain in the name of that law firm (a) for so long as that lawyer remains licensed to practice law and associated with that law firm as a partner, of counsel, counsel, special counsel, senior counsel, or associate, and (b) after that lawyer is deceased. Whether continued inclusion of a lawyer's name in the name of, or profit participation in, that law firm exposes the lawyer to liability as a partner of that law firm is beyond the scope of this presentation.

The name of a living person not associated with a law firm as partner, of counsel, counsel, special counsel, senior counsel, or associate, regardless whether that person is licensed to practice law or engaged in the practice of law, may not ethically be included in the name of that law firm.

Truthfulness in Communications

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In addition to MRPC 7.1, note:

MRPC Rule 4.1, which states:

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

“(a) **make a false statement of material fact or law to a third person;** or

“(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [MRPC] Rule 1.6.” Emphasis supplied.

MRPC Rule 4.2, which states:

“In representing a client, **a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter,** unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” Emphasis supplied.

Truthfulness in Communications

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MRPC Rule 4.3, which states:

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. **The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”**
Emphasis supplied.

MRPC Rule 4.4, which states:

“(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

“(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

Dividing Legal Fees

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Comment [8] to MRPC Rule 1.5 states that the **restrictions in that Rule upon dividing legal fees between lawyers who are not in the same law firm “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.”** Emphasis supplied.

Comment [1] to MRPC Rule 1.17 states in part:

“[W]hen a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the **selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms.** See [MRPC] Rules 5.4 and 5.6.” Emphasis supplied.

MRPC 5.4 states in part:

“(a) 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 purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;”

Continuing to Practice Law After License Lapses

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Unless you obtain a provisional license for pro bono legal services or become employed by an organization in a jurisdiction that does not require in house counsel to be licensed to practice law in that jurisdiction, **do not practice law without a valid in force license to do so in each jurisdiction in which you intend to practice law.**

MRPC Rule 5.5 states in part:

“(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

“(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

“(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

“(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”

Confidentiality

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Under MRPC Rule 1.6(a), the duty of an attorney not to reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by that Rule “**continues after the client-lawyer relationship has terminated**. See [MRPC] Rule 1.9(c)(2).” Emphasis supplied. Comment [20].

MRPC Rule 1.6(b) states in part:

“(b) **A lawyer may reveal information** relating to the representation of a client to the extent the lawyer reasonably believes necessary:

“(7) **to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm**, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.” Emphasis supplied.

Confidentiality

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Under MRPC Rule 1.9(c), a lawyer who, or whose present or former firm, has formerly represented a client in a matter **shall not thereafter use or reveal information relating to the representation** except as the MRPC would permit or require with respect to a client, except that **the restriction on use is limited to information used to the disadvantage of the former client that has not become generally known.**

Under MRPC Rule 1.8(b), the **restriction on use does not exempt information used to the disadvantage of a current client that has become generally known.**

Confidentiality in Negotiating With Buyer 21

Comment [7] to MRPC Rule 1.17 states:

“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 [MRPC] 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. See [MRPC] Rule 1.6(b)(7). **Providing the purchaser access to detailed information relating to the representation, such as the client’s 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.**” Emphasis supplied.

Check Rules of Professional Conduct in each state where you practice, as they vary.

Conflicts of Interest

22

MRPC Rule 1.7 states in part:

“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

“(2) there is a significant risk that the representation of one or more clients will be materially limited . . . by a **personal interest of the lawyer.**” Emphasis supplied.

“(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

“(4) **each affected client gives informed consent, confirmed in writing.**” Emphasis supplied.

Comment [10] states:

“[W]hen a lawyer has **discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent,** such discussions could materially limit the lawyer's representation of the client. In addition, **a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.**” Emphasis supplied.

See MRPC Rule 1.0 for definitions of “informed consent” and “writing.”

Conflicts of Interest

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MRPC Rule 1.8, discussed earlier in this presentation, states in part:

“(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

“(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

“(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

“(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

“(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.” Emphasis supplied. See MRPC Rule 1.9(c)(1) regarding former clients.

Comment [1] states, in part, “The requirements of paragraph (a) must be met **even when the transaction is not closely related to the subject matter of the representation. . . .**” Emphasis supplied.

See MRPC Rule 1.0 for definitions of “informed consent” and “writing.”

Conflicts of Interest

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MRPC Rule 1.9, discussed earlier in this presentation, states in part:

“(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

“(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

“(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.” Emphasis supplied. See Rule 1.6, Comment [20] discussed earlier in this presentation.

Contrast MRPC Rule 1.8(b) regarding use of information relating to the representation of a current client to the disadvantage of the client.

Conflicts of Interest

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MRPC Rule 1.10 states in part:

“(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 [MRPC] Rules 1.6 and 1.9(c) that is material to the matter.” Emphasis supplied.

Comment [5] explains:

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

Termination Client Representation

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MRPC Rule 1.16 states in part:

“(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

“(7) other good cause for withdrawal exists.

“(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. [See Comment [12] to MRPC Rule 1.17.]

“(d) **Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.** The lawyer may retain papers relating to the client to the extent permitted by other law.” Emphasis supplied. See MRPC Rule 1.4 and ABA Formal Opinion 489, “Obligations Related to Notice When Lawyers Change Firms” (December 4, 2019), discussed earlier in this presentation, and MRPC Rule 1.17(c).

Sale of Law Practice

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MRPC Rule 1.17 states:

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

“(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;

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

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

“(1) the proposed sale;

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

“(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

“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 court having jurisdiction. 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.

“(d) The fees charged clients shall not be increased by reason of the sale.” Emphasis supplied.

Check Rules of Professional Conduct in each state where you practice, as they vary.

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See MRPC Rules 1.3, 1.4, 1.5 Comment [8] and 1.17 Comment [1], 1.7-1.10, 1.15, 1.16, 5.4, 5.6 Comment [3], and ABA Formal Ethics Opinion 06-444, “Permissibility of Restrictive Covenants in Lawyer Agreements Concerning Benefits Upon Retirement” (September 13, 2006), mentioned earlier in this presentation.

Comment [2] states in part:

“Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation.”

Comment [3] states:

“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.”

Comment [6] states in part:

“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.”

See Comment [7] regarding confidentiality in negotiating with buyer, discussed earlier in this presentation.

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Comment [11] states:

“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 [MRPC] 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 [MRPC] Rule 1.7 regarding conflicts and [MRPC] Rule 1.0(e) for the definition of informed consent); and the **obligation to protect information relating to the representation** (see [MRPC] Rules 1.6 and 1.9).” Emphasis supplied.

Comment [12] states:

“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 [MRPC] Rule 1.16[(c))).”

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Comment [13] states:

“**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.”
Emphasis supplied.

Comment [14] states:

“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.**” Emphasis supplied.

ABA Model Rules of Professional Conduct, if Adopted by States in That Form, and ABA Formal Opinions, Would Require Regarding Lawyers' Succession:

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1. Each sole practitioner lawyer should prepare a plan that, at a minimum, designates another competent lawyer to review and inventory client files, notify clients of the sole practitioner's ceasing to practice law and the location or disposition of their files, and determine the need for immediate protective action of the respective files. The plan should reference court dates, statutes of limitations, document filings, and other deadlines. If the sole practitioner dies or becomes disabled without doing so, a court may do so and charge the cost to fees owed to the sole practitioner. Some states mandate and others only recommend this plan. See link to ABA References Concerning Succession Planning mentioned earlier in this presentation.
2. MRPC Rule 1.15 prescribes the period (varying from state to state) that a lawyer is required to retain complete records of funds and other property of clients or third persons. It requires prompt notice and delivery of those funds or property, with a full accounting, to the respective persons entitled to them unless that Rule, or law or agreement, otherwise requires or permits. MRPC Rule 1.16 also requires the lawyer to surrender papers to which the client is entitled except to the extent that other law permits.
3. The period of time of a lawyer's advance notice to the firm of intended departure should be the minimum necessary, under the circumstances, for the firm and departing lawyer to notify clients, for clients to make decisions about who will represent them, and for the firm to assemble, organize, and update files, adjust and update staffing if the firm will continue as counsel on matters previously handled by the departing lawyer, and secure firm property in the departing lawyer's possession, e.g., client confidential information, and firm intellectual property, proprietary information, and equipment.

ABA Model Rules of Professional Conduct, if Adopted by States in That Form, and ABA Formal Opinions, Would Require Regarding Lawyers' Succession: 32

4. A client with which a lawyer had “significant client contact,” e.g., a client identifying the departing lawyer, by name, as one of the attorneys representing the client, is entitled to prompt notice of a lawyer’s intention to cease providing legal services to that client to permit the client to make informed decisions about legal representation and to employ other counsel. The rules of various states regarding the rights of the firm and the departing lawyer, respectively, to give that notice and the relative timing of notices to clients vary. Before a prospective seller of a law practice may disclose to the prospective buyer detailed information regarding the seller’s client, 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 the period prescribed by the state’s version of MRPC Rule 1.17. If nothing is heard from the client within that time, consent to the sale is presumed.
5. Communications by a lawyer with the public and to parties opposed to clients of the lawyer must not include a false statement of material fact or law and are restricted differently in circumstances in which those parties are or are not represented by counsel.
6. During the lawyer’s lifetime, a lawyer must retain a close, regular, personal relationship with the law firm from which the lawyer retires or withdraws, with the title partner, of counsel, counsel, special counsel, senior counsel, or associate, in order that the lawyer’s name may remain in the name of the law firm.

ABA Model Rules of Professional Conduct, if Adopted by States in That Form, and ABA Formal Opinions, Would Require Regarding Lawyers' Succession: 33

7. A lawyer departing from a law firm may divide with the law firm fees to be received in the future for work done when the lawyer was associated with the law firm and the reasonable value of the practice from which the lawyer withdraws.
8. Similarly, a selling lawyer may obtain compensation for the reasonable value of the sold practice.
9. A lawyer that wants to retain the flexibility of resuming the practice of law in the future, if circumstances change, should maintain that lawyer's license to practice law.
10. A lawyer can be restricted by a non-competition agreement only regarding benefits upon the lawyer's retirement or in connection with the sale of the lawyer's law practice.
11. A lawyer's fiduciary duties of loyalty (e.g., avoiding conflicts of interest) and confidentiality to a client continue beyond the termination of the attorney-client relationship.

ABA Model Rules of Professional Conduct, if Adopted by States in That Form, and ABA Formal Opinions, Would Require Regarding Lawyers' Succession: 34

12. Generally, a lawyer may not **reveal** information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is otherwise permitted by MRPC Rule 1.6, **but** (a) a lawyer may **reveal** information regarding representation of a client to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest without compromising the attorney-client privilege of, or otherwise prejudicing, the client, (b) restriction on **use** of that information by the lawyer regarding a **current client** is limited to information used to the disadvantage of the current client, and (c) restriction on **use** of that information by the lawyer regarding a **former client** is limited to information used to the disadvantage of the former client **that has not become generally known**.. Providing a prospective buyer of a law practice access to detailed information relating to a client representation, such as the client's file, requires client consent.

13. When selling a law practice or withdrawing or retiring from a law firm, a lawyer must consider whether doing so creates a conflict of interest between any client and the lawyer's or the buyer's personal interest and, if consentable, obtain the informed consent, confirmed in writing, by the client. A lawyer may not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to the client without, among other conditions, that informed consent, confirmed in writing, if the conflict is consentable.

ABA Model Rules of Professional Conduct, if Adopted by States in That Form, and ABA Formal Opinions, Would Require Regarding Lawyers' Succession:

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14. MRPC Rule 1.17, the form of which in effect in different states varies, imposes restrictions upon the practice of law by the seller after the sale of a law practice and imposes additional specific requirements for (a) the **seller's exercising competence** in identifying a purchaser qualified to assume the practice, **avoiding disqualifying conflicts** and obtaining clients' informed consent for consentable conflicts, **protecting the confidentiality of client information** as mentioned earlier in this presentation, and **giving notice of the sale** to clients of the seller as mentioned earlier in this presentation, and (b) the **buyer's** undertaking competently the legal representation of **all of the clients of the sold practice** subject only to clients' consent to that representation and absence of conflicts of interest.