



**2016 CLM Annual Conference
April 6-8, 2016
Orlando, FL**

Law Firm Dissolutions, Receivers, Bankruptcy and Claims

When a law firm fails, the pending client representations and engagements do not come to an end. The firms' existing clients still need representation. The firm's former clients still have property (mainly files) that are being held by the firm.

I. ETHICS AND ACTION ITEMS - Ethical rules require immediate action by the lawyers.

A. Communication:

General Rule: Lawyers leaving a firm and the law firm have ethical obligations to ensure that the client's interests are represented competently, diligently and with loyalty during a period of transition.

ABA Formal Opinion 99-414: "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." Rule of Professional Conduct 1.4 mandates that clients be kept reasonably informed – which would include the fact that a lawyer who has had "significant personal contact" with a client is leaving the firm.

Florida Rule 4-5.8: Procedures for Lawyers Leaving Law Firms and Dissolution of Law Firm.

Virginia Rule of Professional Conduct 5.8: Procedures For Notification to Clients When a Lawyer Leaves a Law Firm or When a Law Firm Dissolves (Effective May 1, 2015).

B. Competence:

Model Rule of Professional Conduct 1.1 Client-Lawyer Relationship / Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A departing lawyer must be competent to handle files that move. Or, the firm retaining the file, must be able to competently staff the file.¹

C. Model Rule of Professional Conduct 1.16 Declining or Terminating Representation:

RPC 1.16(a) – Mandatory withdrawal where:

- (1) The representation will result in violation of the rules of professional conduct or other law;
- (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) The lawyer is discharged.

RPC 1.16(b) – Permissive withdrawal where:

- (1) Withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) The client has used the lawyer's services to perpetrate a crime or fraud;
- (4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

¹ See e.g., ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 99-414.

(7) Other good cause for withdrawal exists.

D. Client Money & Property:

Model Rule of Professional Conduct 1.16 (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.*

A lawyer can retain copies of documents that were prepared by the lawyer and are considered the lawyer's property or are in the public domain. Other documents require former firm's consent to do so.

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 99-414:

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

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

E. Model Rule of Professional Conduct 1.6 - Confidentiality: The rule prohibits an attorney from disclosing "information relating to the representation of a client" unless the client consents to the disclosure or one of the exceptions to the confidentiality rule applies. The rule is broader than the attorney-client privilege evidentiary rule. Confidentiality survives and obligates a departing attorney and the former firm.

F. Model Rule of Professional Conduct 1.7 - 1.10 - Conflicts, Imputed Conflicts and Screening:

Rule 1.10 - Comment 2: "The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the

obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).”

G. Bankruptcy / Receivership:

- Qualifications for Trustee / Receiver
- Privilege / Confidentiality where Creditor wants to seize assets (files)
- Who controls open files – Trustee / Receiver or former partners
- Retaining liens – Trustee / Receiver holds onto files with good receivables
- Closed files in storages – who pays
 - o In NV, State Bar forced prior partners to agree on cost sharing, distribution of files
- Limited Immunity

II. SUCCESSION PLANNING

A. Arizona – effective January 1, 2016:

Rule 41, Ariz. R. Sup. Ct.:

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.

Comment 2: 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.

B. South Carolina:

RULE 1.19: Succession Planning

(a) Lawyers should prepare written, detailed succession plans specifying what steps must be taken in the event of their death or disability from practicing law.

(b) As part of any succession plan, a lawyer may arrange for one or more successor lawyers or law firms to assume responsibility for the interests of the lawyer's clients in the event of death or disability from practicing law. Such designation may set out a fee-sharing arrangement with the successor. Nothing in this rule or the lawyer's designation shall prevent the client from seeking and retaining a different lawyer or law firm than the successor. The lawyer to be designated must consent to the designation.

(c) A registry shall be maintained by the South Carolina Bar. The successor lawyer(s) shall be identified on the lawyer's annual license fee statement.

III. JEWEL CLAIMS – “Where’s my share of the money?”

Jewel v. Boxer, 156 Cal App 3d 171 (1984): Law firm dissolves and former partners dispute allocation of fees stemming from work in progress (“unfinished business”) during the dissolution at new firm. Court held under Uniform Partnership Act in existence in 1980s that any fees paid to the partners for cases in progress during the dissolution should be allocated to the former partners according to their right to fees during the partnership.

Later cases have questioned *Jewel* in the context of a law firm bankruptcy.

In *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP* (USDC ND Cal. June 11, 2014), the Court distinguished *Jewel* noting 5 distinctions:

“First, the dissolution of the firm at issue in *Jewel* was voluntary, while *Heller*’s dissolution was forced when Bank of America withdrew the firm’s line of credit. This is significant because the partners in *Jewel* could have, but chose not to, finish representing their clients as or on behalf of the old firm. Here, *Heller* lacked the financial ability to continue providing legal services to its clients, leaving clients with ongoing matters no choice but to seek new counsel and *Heller* Shareholders no choice but to seek new employment. Second, in *Jewel*, “[t]he new firms represented the clients under fee agreements entered into between the client and the old firm.” *Id.* at 175. Here, the clients signed new retainer agreements with the new firms. Third, in *Jewel*, the new firms consisted entirely of partners from the old firms: one firm with four partners had become two firms with two partners each. Here, Defendants are preexisting third-party firms that provided substantively new representation, requiring significant resources, personnel, capital, and services well beyond the capacity of either *Heller* or its individual Shareholders. Where in *Jewel*, the departed partners continued to have fiduciary duties to each other and the old firm, here, the third-party firms never owed any duty, fiduciary or otherwise, to the dissolved firm. Fourth, *Jewel* treated hourly fee matters and contingency fee matters as indistinguishable. Here, there are no contingency fee

cases at issue. Finally, Jewel was decided in 1984 and thus applied the Uniform Partnership Act (the “UPA”) which the materially different Revised Uniform Partnership Act (the “RUPA”) has since superseded. The RUPA, which applies after 1999 to all California partnerships, allows partners to obtain “reasonable compensation” for helping to wind up partnership business, Cal. Corp. Code § 16401(h), and thus undermines the legal foundation on which Jewel rests.”

In re Thelen LLP, 2014 NY Slip Op. 04879 (July 1, 2014), New York answered certified questions from the 2nd Circuit Court of Appeals and held hourly fee matters pending at the time of bankruptcy are not partnership property or unfinished business within the meaning of New York’s Partnership Law. The Court concluded that a law firm does not own a client or an engagement and is only entitled to be paid for services actually rendered.

IV. LITIGATION AND CLAIMS

Failure to pay liens timely – clients go to collection

Failure to keep proper accounting/ledger – subsequent inventory mistakes
nure to Attorney

Failure to account for retainers

Flat Fee matters and Failure to refund retainers

Client Files / Asset Protection practice – Unable to locate client list or identify
client files

Unpaid Storage units with client files

- Nevada requires files be maintained for seven (7) years from end of representation; this can be modified by written agreement
- In Nevada, more than 50% of State Bar storage is for client files from deceased/abandoned practice

Proof issues: No witnesses, no documents, e-discovery