

2016 Ethics and Practice of Law Update

Arizona Attorney General's Office
1/11/16

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Significant rule changes resulting from a Supreme Court committee appointed to look at the changing nature of law practice took effect January 1, 2016. Of particular significance for government lawyers are new comments to two rules that directly impact government attorneys.

In addition to changes resulting from that Supreme Court committee's recommendations, the Court also made changes to rules dealing with conflicts for lawyers – including former and current government lawyers – who move between practice settings. These changes were prompted by a State Bar of Arizona rule-change petition.

Finally, the Court also has adopted a requirement that all lawyers – including government lawyers -- plan for their “termination of or inability to continue a law practice, either temporarily or permanently.” In other words, all lawyers must have a succession plan. This change also was prompted by a State Bar of Arizona rule-change petition.

A. Changes resulting from Timmer Committee proposals

In June 2014, then-Arizona Supreme Court Chief Justice Rebecca White Berch appointed a committee to review and consider whether rule changes should be made in light of “the changing nature of legal practice in a technologically-enabled and connected workplace”; the growing trend of multi-state and international practice of law; and changes proposed by an American Bar Association commission.

What became known as the “Timmer Committee” (after its chair, Justice Ann A. Scott Timmer) filed an extensive package of rule-change proposals¹ in January 2015 as well as a final report.

The Court adopted most of the Timmer Committee's major proposals. As a result, the Court has:

- Revised ER 5.5 (unauthorized practice of law) to apply only to lawyers who practice Arizona law. Before the 2016 change, ER 5.5(b) told non-Arizona-admitted lawyers they could not “establish an office or other systematic and continuous presence in this jurisdiction for the practice law,” unless authorized by the rules or other law. ER 5.5(b) now has

¹ Read the Timmer Committee's final report at <http://www.azcourts.gov/Portals/54/Linda/Final%20Report.pdf> and the rule-change petition and court order at <https://www.azcourts.gov/Rules-Forum/aft/501>.

been changed to provide that a non-Arizona-admitted lawyer shall not “engage in the regular practice of Arizona law” in Arizona. The Timmer Committee concluded that in defining what constitutes the practice of law in Arizona, “the appropriate focus is whether a lawyer is providing legal services to Arizona residents that involve the application of Arizona law.” In short, the new rule allows a non-Arizona-admitted lawyer to live in and/or establish an office in this jurisdiction to practice the law of another jurisdiction. That non-Arizona-admitted lawyer nonetheless remains subject to the Supreme Court’s disciplinary jurisdiction.

ER 5.5 now includes helpful new comments:

[3] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in Arizona that involve Arizona law under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.

[4] There is no single test to determine whether a lawyer’s provision of legal services involving Arizona law are provided on a “temporary basis” in Arizona, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides legal services in Arizona that involve Arizona law on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

- Adopted most provisions of the ABA Model Rule on Practicing Pending Admission. As a result of what is now Rule 38(h), a non-Arizona lawyer (already admitted in another jurisdiction) may, under certain conditions, engage in the “regular practice law in Arizona” for up to a year after applying for admission by motion here. The non-Arizona lawyer’s application for admission must be filed and “deemed complete” by the Committee on Character and Fitness. To practice pending admission, the non-Arizona lawyer must be associated with and supervised by an Arizona lawyer. While pending admission, the non-Arizona lawyer could apply for admission pro hac vice.
- Lowered the admission-on-motion active-practice-time requirement. To be admitted on motion, a non-Arizona lawyer has, since Arizona adopted

AOM as of January 2010, been required to show that the lawyer has engaged in the active practice of law for five of the preceding seven years. At the time Arizona adopted AOM, this comported with the ABA model rule. In August 2012, however, the ABA lowered the requirement to three-of-the-previous-five years. The Timmer Committee recommended adopting the ABA standard, and eliminating Arizona's custom definition of "active practice" that required that the applicant have spent at least 1,000 hours practicing law for each of the required five years and have derived at least half of non-investment income from the practice of law. The Timmer Committee said these restrictions "could prejudice lawyers, particularly young lawyers, whose law practice opportunities and income may have been adversely affected by economic developments." Applicants still must have held their law license in "active" status, however.

- Changed the registered in-house-counsel rule to allow registered IHC to appear pro hac vice in court for their employers (currently not allowed); to allow them to appear in court, without having to apply pro hac vice, when they are providing pro bono representation for clients as part of legal services organizations; and to transfer authority to waive any requirements of the registered IHC rule from the State Bar Board of Governors to the Supreme Court. The registered IHC rule now appears as Rule 38(a).
- Relocated pro hac vice, which previously occupied Rule 38(a), to its own rule, Rule 39.
- Expanded ER 1.5(e) (the fee-sharing rule) to allow lawyers to share one legal fee with lawyers in other firms if, among other requirements, the division is in proportion to the services provided *or* if each lawyer assumes joint responsibility for the representation. To share a fee, lawyers must get client consent not only to the participation of all lawyers involved, but now to the "division of the fees and responsibilities of the lawyers." Before the 2016 changes, ER 1.5(e) allowed fee-sharing *only* if each lawyer assumed joint responsibility for the representation and did not require the additional agreement from the client. The Timmer Committee recommended the changes to make it easier to assemble "alternative forms of lawyer teams" while at the same time ensuring that both counsel and client would "thoroughly discuss and decide the scope of each attorney's representation."
- Amended ER 1.10(b), which applies when a lawyer has left a law firm and taken a client, to add a mechanism for determining if the lawyers remaining at the firm retain information for conflict purposes. Since its adoption, ER 1.10(b) has provided that the law firm could represent a

new client with adverse interests to the former client unless the matter was the same or substantially related to that in which the departed lawyer represented the client and if “any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter.” In support of the mechanism, the Timmer Committee’s petition explained that “Lawyers in the firm arguably ‘have’ information in firm records, including closed client files and electronic records that may be maintained for a variety of reasons.... This creates an overbroad application that would preclude representation even when no lawyer currently in the firm was involved in the former client’s representation, simply because the firm itself maintains stored electronic or other records.”

- Added a new comment [10] to ER 1.13, which deals with organizational clients. The Timmer Committee proposed the new comment to help government lawyers deal with conflicts between their entity clients and constituents of those entities:

[10] A government lawyer may have an obligation to render advice to a government entity and constituents of a government entity. Normally, the government entity, rather than an individual constituent, is the client. Some government lawyers may also be elected officials or the employees of elected officials who have statutory obligations to take formal action against individual constituents under certain circumstances. The government lawyer, therefore, must clearly identify the client and disclose to the individual constituents any limitations that are imposed on the lawyer’s other legal obligations. See ER 1.2(c) and related comments. Further, where a conflict arises between a constituent and the government entity the lawyer represents or between constituents of the same government entity, the lawyer must make the identity of the client clear to the constituents and determine which constituent has authority to act for the government entity in each instance.

- Added a new comment [6] to ER 3.5 to address when a government law office not only advises tribunals but also appears before those same tribunals in contested proceedings or appeals. ER 3.5(b) prohibits lawyers from having ex parte contact with tribunals. The new comment provides:

[6] At times, a government entity is required to act in a “quasi-judicial” capacity as part of an administrative process. In that capacity, it may act as the decision-maker in contested

proceedings or hear appeals from the determinations of another officer, body or agency of the same government. A government lawyer may be called upon to advise the tribunal after another lawyer in the same office has advised the other government constituent about the matter, or while another attorney from the same office appears before the tribunal. Advice given by the lawyer to the tribunal does not constitute impermissible ex parte contact, provided that reasonable measures are taken to ensure the fairness of the administrative process, such as using different attorneys to advise and represent the two constituents and screening those lawyers from one another or strictly limiting the lawyer's advice to the tribunal to procedural matters. In no event can the same lawyer both provide advice to the tribunal and appear before it in the same matter, even if the advice is limited to procedural advice.

Finally, the Court did not adopt the Timmer Committee's proposal to narrow the scope of ER 1.6, which deals with confidentiality. ER 1.6(a) prohibits a lawyer from disclosing "information relating to the representation of a client" unless the client gives informed consent, the disclosure furthers the representation or some specific exception applies. The Timmer Committee proposed essentially returning to how the Code of Professional Responsibility (in effect in Arizona until February 1985, when Arizona adopted the Rules of Professional Conduct and ER 1.6) defined "confidence": information protected by the attorney-client privilege and "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

B. Changes resulting from the State Bar's "lateral screening" rule-change petition

In 2013, the State Bar filed a rule-change petition proposing to eliminate the so-called "litigation exception" from private-law-firm lateral screening so that Arizona's ER 1.10(d) would be more aligned with the ABA Model Rule 1.10(a).

Here's an example: Assume you're at a private law firm and think opposing counsel would be an awesome addition to your firm. She agrees to leave her firm (and leave the client at that firm) and join your firm. Let's call her Opposing Counsel, her former firm Former Firm, and her former client Former Client.

- If Opposing Counsel had been handling a *non-litigation* matter for Former Client, Opposing Counsel could leave Former Client at Former Firm and join your firm, even though you represent the opposing party. Opposing Counsel might have been negotiating a multi-million-dollar land transaction for Former Client, but she could still join your firm, which could continue to represent the party who

had sat on the other side of the negotiating table from Opposing Counsel. Your Firm would screen Opposing Counsel from having anything to do with your client, but otherwise your firm would keep representing your client and you add Opposing Counsel to your stable.

- However, if Opposing Counsel had been handling "*a proceeding before a tribunal*" -- any proceeding before a tribunal -- in which she had a "*substantial role*," she couldn't join your firm unless your firm withdrew from representing your client, because her mere presence would infect all lawyers in your firm.

After receiving input from the Timmer Committee (among others), the Court did indeed remove the "litigation exception." It also, however, tightened up another part of the rule to make it more restrictive so that if a lawyer had "primary responsibility" for a matter -- regardless whether the matter involved a multi-million-dollar land transaction or small litigation -- the lawyer cannot move to opposing counsel's firm and be screened. In the example above, if Opposing Counsel had "primary responsibility" for the matter, she could not join your firm and be screened. You would have to either not hire her or withdraw from representing your client.

In addition, the Court beefed up the notice and screening requirements of not only ER 1.10, which guides lawyers in private firms, but also ER 1.11, which deals with conflicts of current and former government lawyers; ER 1.12, which deals with former judges and other third-party neutrals, including judicial law clerks; and ER 1.18, which deals with duties to prospective clients. All four rules allow screening under certain circumstances. That screening now not only means that written notice must be given to the appropriate parties under each rule, but that the notice includes:

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 agency'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 agency about the screening procedure

In addition, in all screening circumstances, the personally disqualified lawyer and the new firm must "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."

C. Changes resulting from the State Bar's succession-planning rule-change petition

All lawyers now must have a succession plan. Rule 41, Ariz. R. Sup. Ct., now includes this new duty as subparagraph (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.

The Court added a comment explaining this new duty:

[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.

This was among the rule changes the State Bar proffered in a rule-change petition it filed last January as the result of its Succession Planning Task Force. The Court adopted many of the State Bar's proposed changes.

The Court adopted the State Bar's proposed language for the new Rule 41(j), although it slightly changed the State Bar's proposed comment language. The State Bar had proposed that the comment explain that new Rule 41(j) require, at a minimum, identifying an active lawyer to assume successor duties. In the new comment, the Court instead says solo practitioners "should" arrange for "responsible transition counsel."

Why did the State Bar propose this addition? The rule-change petition explained:

The lack of succession planning by lawyers has directly impacted the State Bar because many lawyers who have died, disappeared, become disabled or been disbarred or suspended have left either an ongoing practice that needs to be closed down or have abandoned client files. A lawyer who dies suddenly may leave hundreds of active files and clients who need to be notified. A lawyer who has been disbarred may abandon boxes of files with a landlord or storage facility who is not being paid to keep those files safe.....

Nothing requires *all* lawyers – no matter their practice setting -- to adopt a succession plan. ABA Formal Op. 92-369 *suggests* that a sole practitioner have a backup lawyer named to notify the lawyer's client in the event the lawyer is unable to practice. Ariz. Ethics Op. 04-05 *advises* that a prudent lawyer would make arrangements to administer the lawyer's trust account if the lawyer dies or becomes disabled.

It appears to be time to add a professional obligation that clearly obligates all members to plan for their termination of or inability to continue a law practice. To that end, the State Bar suggests adding a new section to the rule that lists the general duties and obligations of members -- Rule 41, Ariz. R. Sup. Ct. -- to require that lawyers plan for their temporary or permanent closing or inability to continue their law practice.....

Lawyers in multi-lawyer firms, government or corporate entities also need a plan. Toddlers drown in swimming pools even when lots of people are around because no one is specifically designated to watch them. Similarly, everyone in a multi-lawyer firm may assume *someone else* is handling the cases and matters of a lawyer who has become incapacitated.

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