THE SHELY FIRM, PC

Ethical Rule Changes:

Effective January 1, 2016

By Lynda C. Shely

1. Rule Changes Effective January 1st:

In August, 2015, the Arizona Supreme Court approved two Petitions to Amend the Arizona Rules of Professional Conduct, Ariz. R.S.Ct. 42 ("ERs"), as well as several portions of the Supreme Court Rules involving the regulation of admission to practice. The full Orders can be found on the Supreme Court's Rules forum website: https://www.azcourts.gov/rules/Recent-Amendments/Rules-of-the-Supreme-Court

The text of the amendments follow this summary.

The Ethical Rule amendments that are effective January 1, 2016 involve the following topics:

A. Fee Sharing Between Firms

The present version of ER 1.5(e) provides that the *only* way you can share a fee with a lawyer in another firm is if: 1) the client consents in a signed writing; 2) the overall fee is reasonable; and 3) both lawyers assume "joint responsibility" for the representation. "Joint representation" means joint liability – it does not mean that, for instance, a referring lawyer must be co-counsel on everything.

The amendment to Rule 1.5(e) will *keep* the "joint responsibility" option but add an alternative – that the fee can be divided in proportion to the work performed by each lawyer.

Plus under the amendment, in addition to a signed agreement with the client and assurance that the overall fee is reasonable, the fee agreement also must disclose "the division of the fees and responsibilities between the lawyers." This addition will require getting client consent, in writing, to who is responsible for what and how each lawyer will be paid. This hopefully will avoid disputes later on about the amount of the fee owed to a referring lawyer or lawyer who did not perform the work they agreed to do.

B. Imputed Conflicts

Two separate groups filed petitions to amend ER 1.10, regarding imputed conflicts of interest. The Court approved portions of *both* Rule change petitions.

- Petition R-15-0018 provided for revisions to ER 1.10 pertaining to how electronically stored data at a firm may or may not create an "imputed" conflict when a lawyer who worked on a matter, leaves the firm and the only information remaining with the firm is in stored data:

(a) [No change in text.]

(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) [No change in text.]

(2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter. <u>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.</u>

(c) [No change in text.]

(d) [See Order in R-13-0046.][***see below]***
(e) [No change in text.]

- The second Petition to Amend ER 1.10, R-13-0046 changed the way in which lateral lawyers who previously represented an opposing party in a *litigated* matter infect lawyers at their new firm with their conflicts:

(e) 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~~) <u>the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9</u>;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; ~~and~~

(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

(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.

This amendment changes the test of a lateral litigation attorney "infecting" other lawyers at a new firm from a lateral who had a *substantial role* in the litigation at the former firm, to a lawyer who had *primary responsibility.* Only lawyers who had "primary responsibility" under the amended Rule will cause an imputed conflict that *cannot be screened.*

C. Screening in Several Rules

The Comments to several Rules that address imputed conflicts of interest (ERs 1.10, 1.18) clarify that if the *only* information remaining with a firm about a former client or prospective client is electronic data, the firm avoid having that information "infect" the remaining lawyers at the firm if it implements effective screening/security measures so firm personnel cannot access the data.

D. Government Clients

The Comments to ER 1.13 (regarding representing "entities") will include a new provision that reminds lawyers who represent government clients that usually the "client" is the governmental entity and lawyers must clarify who is the client so that constituents of the entity (i.e., people) understand that usually they are not the clients of the lawyer.

E. Practicing Law *In* Arizona

The Arizona Supreme Court is the first state supreme court to adopt revisions to Ethical Rule 5.5 that will permit lawyers from other states to move to this state, live and work here, and *not* have to be admitted to the State Bar, *if* they limit their practices to the laws of their home licensing state. In other words, just because a "foreign" lawyer lives *in* Arizona, does not mean that they must be admitted here if they do not practice Arizona law.

The public policy consideration is that if the foreign lawyer is not advising on Arizona law, there is no substantive state interest in regulating the lawyer when their home jurisdiction will have primary authority.

The primary change to ER 5.5 is:

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(b) Except as authorized by these Rules or other law, ~~A~~a lawyer who is not admitted to practice in ~~this jurisdiction~~ Arizona shall not:

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

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

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What do these changes mean for lawyers not admitted in Arizona? A "foreign" lawyer may:

1. Move to Arizona, live and work here permanently, as long as they are not practicing Arizona law.

2. Move to Arizona, live and work here if they are in-house (registered) counsel.

3. Practice Arizona law – here or at home – *temporarily*, in accordance with the provisions in ER 5.5 (c). Those provisions permit a foreign lawyer to negotiate a deal here, advise on Arizona law for a client if reasonably related to their representation in their home state, are in anticipation of being admitted *pro hac vice*, are involved in an ADR proceeding, or they associate with an Arizona lawyer.

2. ***Reminders About Last Year's Rule Changes:***

There were several Ethical Rule amendments in both 2014 and 2015. The following are some reminders about a few key changes.

- **"Reasonable" Measures to Safeguard Client Data and Understanding Technology**

ER 1.1 was amended to notify lawyers that in order to be a "competent" lawyer, the lawyer must understand the risks and benefits of relevant technology.

ER 1.6 added the requirement of using "reasonable measures" to safeguard client information – including in the use of technology *and* the supervision of nonlawyer employees, vendors, and other third parties who are authorized to access such data.

- **Use of Confidential Information to Check for Conflicts**

ER 1.6 added a provision to recognize that lawyers must disclose some information to check for conflicts when moving laterally, but the new firm cannot use that information for any other purpose.

ER 1.6 also added a paragraph reminding lawyers that they are responsible for assuring that they use "reasonable measures" to safeguard client information – including when transmitting or storing electronic data.

- **Advertising Changes**

ER 7.2 added language to clarify which online "group advertising" platforms comply with the Rule's prohibition against for-profit referral services and which do not.

ER 7.2 now requires all advertising and marketing to include a firm name and "some contact information" – meaning address *or* telephone number *or* website.

3. 2015 Ethics Opinions:

Two Opinions issued in 2015, one pertaining to files and one to criminal defense representations. The State Bar summaries of the Opinions follow, with one practice tip:

> **15-02: Client Files; Safekeeping of Property; Maintaining Client Files; Termination of Representation** Lawyers are ethically obligated, upon a client's request at the conclusion of representation, to provide the client with the client's documents and all documents reflecting work performed for the client. This obligation does not require the lawyer to retain paper or electronic documents generated or received in the course of the representation, that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client at the conclusion of the representation. Understanding the lawyer's duty to preserve client documents in this manner advances client interests. It enables a lawyer to restrict "the file" to documents that actually assist the lawyer in competently and diligently representing the client, in the context of the particular client matter and the lawyer's practice, as well as effectively communicating with the client and exercising professional judgment on the client's behalf, rather than preserving anything and everything ever generated or received during the course of the representation. To the extent prior opinions of this Committee may be construed as asserting otherwise, they are withdrawn.

Practice Tip: Update your file/data retention clauses in fee agreements to clarify that all "substantive" documents (including emails) will be sent to the client during the course of the representation and the client is obligated to keep those copies. Original documents may be returned at the end of the representation, where appropriate (such as original trademark registrations, incorporation documents, estate planning documents, etc.) and the firm need not retain ***the firm's copy of the file*** *beyond the amount of time when property would be deemed abandoned (currently three years).*

> **15-01: Plea Agreements; Waiver; Ineffective Assistance; Conflict of Interest; Criminal Representation** The conflict-of-interest rules prohibit a defense attorney from advising a criminal defendant to waive the defendant's right to raise that attorney's ineffective assistance of counsel. The ethical rules also prohibit a prosecutor from insisting that a defendant waive the right to raise ineffective assistance of counsel and prosecutorial misconduct claims. Opinion 95-08 is accordingly withdrawn.

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Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics and risk management advice to law firms. She also assists lawyers in responding to initial Bar charges, performs law office management reviews, trains law firm staff in ethics requirements, and advises on a variety of ethics topics including ancillary business ventures, conflicts of interest, fees and billing requirements, trust account procedures, multi-jurisdictional practice requirements, and law firm advertising/marketing. Lynda serves as an expert witness on professional responsibility issues and frequently presents continuing legal education programs around the country. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona for ten years. Prior to moving to Arizona, Lynda was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC. Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from The Catholic University in Washington, DC.

Lynda was selected as the State Bar of Arizona Member of the Year in 2007 and has received other awards from the State Bar for her contributions to Law Related Education Projects and Outstanding Leadership in Continuing Legal Education. Lynda received the Scottsdale Bar Association's 2010 Award of Excellence. She is a prior chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. Lynda is the 2015-2016 President of the Association of Professional Responsibility Lawyers and serves on the ABA Center for Professional Responsibility Coordinating Council. She serves on several State Bar of Arizona Committees and has taught ethics at all three Arizona law schools.