Clients' Rights During Transitions Between Attorneys

by Rob Marsh and Lisha McKinley

Colo. RPC 1.16(a)(3) grants clients the right to terminate the attorney–client relationship at will and select or replace counsel if the primary lawyer for the matter transitions away from the firm. This article examines the interplay between client and attorney's interests in case files and attorney's liens, the appropriate accounting and distribution of funds to avoid disputes concerning payment, and lawyers' ethical obligations to provide notice to clients where cooperation between the departing lawyer and his or her former law firm is no longer feasible.

For many attorneys, the words "consumer protection" do not immediately bring to mind a client's rights relative to a current or former attorney. Consumers of legal services, however, are no less entitled to protection from improper business practices than customers of any other business. To the contrary, an attorney's ethical obligations to current and former clients heighten the applicable standards and give rise to unique issues.

For example, Colorado law consistently recognizes a client's absolute right to counsel of his or her choice and to discharge an attorney for any or no reason.[1] No less apparent is an attorney's right to withdraw from an ongoing representation, subject to any limitations imposed by a fee agreement, court rules or orders, or the attorney's ethical obligations.[2]

When confronted with the actual or potential transition of an ongoing matter to a new firm, however, an attorney's personal and economic interests may no longer align with the client's interests in an efficient transition and successful conclusion of a pending matter. In that event, and particularly where there is an outstanding balance due to a departing attorney, the person who was previously the client's most zealous advocate may well become an equally motivated adversary. This article addresses some of the client's fundamental rights in such cases consistent with Colorado law and the Colorado Rules of Professional Conduct (Colo. RPC).

Notice and Full Disclosure

As an initial matter, when an attorney who had substantial responsibility for a client's case departs from a firm or withdraws from a case, the client is entitled to formal notice of the departure.[3] Questions arise, however, over the content of the required notice. What can, should, and must the firm and/or attorney say to clients about the departing lawyer and the conduct of the client's business moving forward? Is there any obligation to disclose potentially damaging information about the attorney or the firm if it potentially could have a material impact on the representation or the client's choice of counsel?

A recent Colorado Court of Appeals decision addressed a firm's ethical obligation to warn clients about the dangers of being represented by an attorney whose abilities are compromised, but leaves unresolved the question of whether a firm could subject itself to liability for the content or lack of information it provides to clients in such a notice.[4] Accordingly, in this evolving area, all concerned must tread carefully to avoid trampling the clients' rights, which are the paramount consideration in any transition.[5]

Colo. RPC 1.4 requires a lawyer to keep clients "reasonably informed about the status of a matter" and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." When representation terminates for any reason, the client is entitled to be sufficiently informed of his, her, or its absolute right to choose whether to continue being represented by the firm, by the departing lawyer, or by new counsel.[6] A joint communication from the firm and the departing lawyer is "highly preferable."[7] Nevertheless, when that is not possible, both the remaining and the departing lawyers are required to notify the client of the change in the firm's or departing lawyer's status, and to offer the client enough information to enable the client's informed selection of counsel.[8]

To that point, in *Moye White LLP v. Beren*, the Colorado Court of Appeals ruled that a client was not entitled to know that one of the attorneys representing him had a history of substance abuse, mental health, and disciplinary problems.[9] In reaching that result,

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the court examined the common law duty to inform a client and concluded that, because the potential impact of the attorney's personal issues was not material to the representation, and the attorney was not "materially impaired" during the representation, the client did not have a right to be informed of the issues the attorney was facing or previously had faced.[10] Critically, the trial court found that the attorney's work product did not suffer at any point during representation due to his personal issues, and this fact was unchallenged on appeal.[11] The firm also had established monitoring programs, the attorney's suspension had been stayed by the Office of Attorney Regulation Counsel, and the firm's nondisclosure was held not to be misleading to the client.[12] Consequently, there was no common law, statutory, or fiduciary duty to inform the client of the attorney's past disciplinary history, mental illness, alcoholism, or arrests.[13]

The decision leaves unresolved, however, related questions concerning what disclosures are permissible in connection with an attorney's withdrawal and the client's choice of counsel. For example, where concerns exist, can or should a firm disclose to a client that the departing lawyer may lack the experience or resources necessary to effectively continue the client's representation? Or should a departing attorney disclose to a client a law firm's history of billing disputes or practices with other clients? From *Beren*, it appears that such disclosures may be required where they are material to the client's choice of counsel or the effective continuation of the representation.

In their zeal to retain clients, however, the lawyers must also remember their duty of candor[14] and their duty to refrain from misrepresentation, fraud, deceit, and dishonesty.[15] A client who receives misleading or false information about a departing lawyer could potentially make a claim for relief based on fraud, and the defamed attorney could bring an action against his or her previous firm for slander, defamation, tortious interference with contract, or other ethical violations.[16]

Proper Accounting Among Firms

Pursuant to Colo. RPC 1.15A(b), a client is also entitled on request to a full and accurate accounting of all amounts received by or due to an attorney.[17] Again, however, in cases of transition, issues may arise concerning how amounts received by an attorney should be applied between current and former counsel.

For example, in *LaFond v. Sweeney*, the Colorado Court of Appeals held that a pending contingent fee case is a type of executory contract or "unfinished business" owned by a law firm.[18] Therefore, upon the firm's dissolution, the right to receive the fee at the conclusion of the matter remains an asset of the dissolved firm.[19]

In *LaFond*, the firm was organized as a limited liability company with two members who agreed to share equally the firm's profits. One of the members represented the client in a contingent fee matter and, upon the firm's dissolution, the client elected to continue with that attorney through the conclusion of the case. After the firm's dissolution, the attorney invested additional time in the matter and, ultimately, settled the case. Based on applicable corporate law, however, the Court of Appeals held that the attorney was entitled to no compensation for his post-dissolution work on the case beyond his independent entitlement to a share of the contingent fee.[20]

The Colorado Supreme Court granted *certiorari* of the *LaFond* decision on the issues of: (1) whether the Court of Appeals' decision is inconsistent with Colorado law limiting discharged contingent fee attorneys to *quantum meruit* recovery and public policy protecting the client's unfettered right to freely choose counsel; and (2) whether the firm completing a contingency case should receive compensation for the reasonable value of its services in resolving the case. Nevertheless, on the current state of the law, the result in *LaFond* raises the possibility that a successor law firm will receive funds upon resolution of a contingent fee matter in which a previous law firm has an interest.

In that circumstance, Colorado law and Colo. RPC 1.15 require that the client not be drawn into any dispute among the attorneys regarding application of fees due. Instead, the funds must be held until there is an accounting and "when necessary, a severance" of the interests of the claimants.[21] Such severance typically takes place through identification and agreement to the amounts due to each of claimant. Following the accounting, there must be a prompt distribution to the client of undisputed funds to which the client is entitled. Any remaining amount in dispute must be held separate until the dispute is resolved and may be the subject of an interpleader action if necessary.[22]

Surrender of the File

In cases of a transition, protecting a client's ability to efficiently and effectively continue with the matter at hand may also depend on obtaining the benefit of prior counsel's work represented by the case file. Accordingly, upon termination of representation, Colo. RPC 1.16(d) requires an attorney to surrender upon request all "papers and property to which the client is entitled."[23] The rule imposes an affirmative obligation on a departing attorney that may not be ignored, and that is not excused by the fact that copies of the same records previously may have been provided to the client.[24]

Colo. RPC 1.16 does not, however, identify specific types of "papers and property" to which the client is entitled, and the Colorado Bar Association (CBA) Ethics Committee has likewise declined to adopt a definitive list of the types of property subject to surrender upon request. Instead, CBA Formal Ethics Opinion 104 suggests a pragmatic approach "not completely defined by traditional concepts of property and ownership," but guided by the attorney's "primary ethical obligation" to take steps reasonably necessary to protect the client's interests. Therefore, with few exceptions, an attorney is ethically obliged to provide a client upon request anything in the file that may be necessary to protect the client's interests.[25] This logically includes copies of pleadings, contracts, or other operative documents; correspondence with the client, other counsel, or parties; original records received from the client; and document productions received from other parties.

The continuation of effective representation often will depend on a new attorney obtaining the benefit of prior counsel's legal and factual analysis. However, in most if not all cases, the obligation to surrender such papers necessary to protect the client's interests will also include delivery of legal research, internal memoranda and communications concerning the matter, and an attorney's notes.[26]

As electronic storage and filing become the norm, questions concerning the expense of delivering the file and the format in which it should be provided also are predictable. In that regard, if the attorney chooses to retain copies of papers to which the client is entitled, the attorney generally must bear the expense of duplication absent an express contractual arrangement to the contrary.[27] Even where the client has agreed to pay the cost of duplication, the

amount billed is subject to an attorney's general obligation not to charge an unreasonable fee.[28]

Similarly, delivery of portions of the file in an accessible electronic format also may be a "reasonably practicable" step that an attorney should take to protect a client's interests. Neither Colorado case law nor the CBA Ethics Committee has addressed this issue comprehensively. However, in response to an inquiry regarding whether Colo. RPC 1.16(d) requires an attorney to deliver estate planning documents in an "accessible electronic format," the Ethics Committee concluded:

> Under the limited facts presented . . . providing wills, codicils, and related estate planning documents in accessible electronic format is a reasonably practical step that [an attorney] should take to enable the continued protection of [a] former client's interests within the meaning of C.R.P.C. 1.16(d).[29]

In that case, the attorney had already delivered to the client hard copies of all of the requested records, and the only purpose of the client's request was to minimize the expense of another attorney's modification of the documents. Therefore, the Ethics Committee's use of the phrase "accessible electronic format" may be understood to require delivery of documents in modifiable formats such as Microsoft Word, Excel, or other native, editable file formats. By the same reasoning, delivery of static or imaged electronic formats (for example, a scanned PDF file) would not suffice.

In reaching that conclusion, the Ethics Committee noted that "downloading or transmission of accessible electronic format materials is both easy and efficient," and never questioned whether the client's economic interest in minimizing expense was, standing alone, an interest sufficient to implicate the attorney's ethical obligations under Colo. RPC 1.16. Therefore, while the ease and efficiency of delivering materials in editable electronic formats may vary from case to case, where delivery of all or portions of the file in accessible electronic formats is not unreasonably burdensome, the client has a right to such materials and an attorney is ethically obliged to comply with a request for their delivery.

The client's virtually unfettered right to access to the file, however, is tempered in a few respects. First, an attorney is not obliged to surrender papers in which a third party may have a confidentiality interest. Most often, such papers consist of forms prepared for another client and adapted to the requesting client's matter. In that case, an attorney need not deliver the original form in any format.

Second, an attorney is not obliged to deliver so-called "personal attorney work product." The material that may be withheld, however, should not be confused with the "confidential attorney work product" that is generally protected from discovery in civil proceedings and may include anything that would disclose an attorney's mental impressions regarding a pending matter. Instead, when transitioning a file to new counsel, a departing attorney may withhold only such "work product" that relates to the operation of the attorney's business. For example, internal communications concerning staffing or assignments, firm administration, and conflicts checks are presumed to be unnecessary to protect the client's interests and, therefore, may be withheld.

Finally, Colorado law recognizes an attorney's right to decline a client's request for delivery of materials when the attorney claims a retaining lien against the file.[30] A retaining lien is possible only

when there is a general balance of compensation due to the attorney, and the client has the financial ability to pay the balance but refuses to do so.[31] More important for protecting the client's interests, however, are the many circumstances in which an attorney may not ethically assert a retaining lien against the file. These include, for example: (1) when the lawyer has been suspended, disbarred, or is guilty of misconduct in the particular matter at issue; (2) when the matter is an ongoing contingent fee case; (3) when surrender of the file is essential to preservation of an important personal liberty interest; (4) when the attorney has withdrawn without just cause or reasonable notice, or has been terminated for professional misconduct or violation of the Rules of Professional Conduct; or (5) the client provides adequate security for payment of the balance due.[32] Under any of these circumstances, if a balance remains due, an attorney cannot hold the client's file hostage as a means of forcing payment, and an attempt to do so may result in disciplinary action.[33]

Conclusion

Like any other consumer of goods or services, an attorney's clients are entitled to protection from misleading, deceptive, or otherwise improper business practices, and acknowledgment and protection of a client's rights are seldom more critical than in cases of transition among attorneys. Indeed, when attorneys are involved, consumer protection rises to the level of an ethical mandate that requires an attorney to put aside personal interests in favor of protecting the client's interests and ability to efficiently and effectively conclude a pending matter. An attorney's ethical obligations may require a range of actions to avoid prejudice to the client's case or related interests. At a minimum, however, the attorney's primary ethical obligation to take reasonably practicable steps to protect the client's interests includes proper notice and full disclosure upon a responsible attorney's departure, complete and accurate accounting, and prompt delivery upon request of anything from the file necessary to continue the protection of the client's interests during the transition.

Notes

1. *See Olsen & Brown v. City of Englewood*, 867 P.2d 96, 99 (Colo.App. 1993) (a client has an unfettered right to discharge freely its attorney without incurring liability under ordinary breach of contract principles and any contractual provision that constrains that right is unenforceable); Colo. RPC 1.16, Comment [4] ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."); CBA Formal Ethics Op. 116: Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure from a Law Firm (March 17, 2007) ("When a lawyer who has had primary responsibility for a client matter withdraws from a law firm, the client's power to choose or replace the lawyer borders on the absolute.").

2. Colo. RPC 1.16(c) (describing circumstances in which a lawyer may withdraw from a representation).

3. *See* CBA Formal Ethics Op. 116, *supra* note 1.

4. *Moye White LLP v. Beren*, 320 P.3d 373 (Colo.App. 2013); *cert. denied*, 2014 WL 621724 (Colo. 2014).

5. *See Olsen*, 867 P.2d at 99. *See also* Colo. RPC 1.16; CBA Formal Ethics Op. 116, *supra* note 1.

6. *Id.*

7. CBA Formal Ethics Op. 116, *supra* note 1.

8. *See* ABA Formal Op. 99-414; Rothrock, *Essays on Legal Ethics and Professional Conduct* § A4.2.1 (CLE in Colorado, Inc., 2005).

9. *Moye White LLP*, 320 P.3d 373.

10. *Id.* at 378-79.

11. *Id.*

12. *Id.* at 380.

13. CO-JICIV 15:18 (2014).

14. Colo. RPC 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false.

15. Colo. RPC 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

16. Colo. RPC 8.4(d) and (h) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . . [and to] engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.").

17. Colo. RPC 1.15A(b), as repealed and readopted effective June 17, 2014 ("Upon receiving funds or other property of a client or third person, a lawyer shall . . . promptly upon request by the client or third person, render a full accounting regarding such property.").

18. *LaFond v. Sweeney*, __ P.3d __, 2012WL503655 at *7 (Colo.App. 2012), *cert. granted* 2013WL4008757 (2013) ("a contingent fee case that is pending at the time a law firm dissolves is a form of executory contract between the law firm and the client.").

19. *Id.*

20. *Id.* at *13-14. Although not addressed in *LaFond*, its conclusion that fees due pursuant to executory contracts with law firms remain the property of the firm in dissolution would have no less application to a flat fee case or any other matter in which the client agrees to pay the firm a defined fee for accomplishment of a specified result.

21. *See* Colo. RPC 1.15A(c).

22. For further discussion of an attorney's ethical responsibilities concerning distribution of property in which a third-party may claim an inter-

est, *see* CBA Formal Ethics Opinion 94: Ethical Duties Relating to a Client's Property Held by a Lawyer in Which a Third Party has an Interest (Nov. 20, 1993).

23. Colo. RPC 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.").

24. CBA Ethics Committee Formal Op. 104: Surrender of Papers to the Client Upon Termination of the Representation (April 17, 1999).

25. Ethics Opinion 104 also recognizes that a client may be poorly positioned to determine what is in the file and/or whether any specific portions of the file are necessary to protect the client's interests. Therefore, when evaluating a request for surrender of a client's file, attorneys are cautioned to define the client's needs "liberally" and that an ambiguous request should be met with inquiry to determine the client's specific needs.

26. *Id.*

27. *Id.*

28. Colo. RPC 1.5(a) ("a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses").

29. *See* Abstracts of Responses to Letter Inquiries, Abstract No. 2007-2, www.cobar.org/index.cfm/ID/393/CETH/Abstracts-of-Responses-to-Letter-Inquiries.

30. CRS § 13-22-119 ("All attorneys and counselors-at-law shall have a lien on any money, property, choses in action, or claims and demands in their hands, on any judgment they may have obtained or assisted in obtaining, in whole or in part, and on any and all claims and demands in suit for any fees or balance of fees due or to become due from any client."). A detailed discussion of the many legal and ethical considerations confronted by attorneys in connection with the assertion of a retaining lien is outside the scope of this article. For that discussion, s*ee* O'Rourke, "Ethical Considerations of Attorney's Liens," 31 *The Colorado Lawyer* 51 (April 2002).

31. *See, e.g.*, CBA Ethics Committee Formal Op. 82: Assertion of Attorneys' Retaining Lien on Client's Papers (April 15, 1989); CBA Ethics Committee Formal Op. 110: Assertion of Attorneys' Charging Lien and Taking Security Interest in Client Property to Protect Fees (Jan. 19, 2002).

32. *Id*. Colo. RPC 1.4(a)(4) also requires an attorney to "promptly comply with reasonable request for information," and comment [7] to the Rule specifies that "a lawyer may not withhold information to serve the lawyer's own interests or convenience of the interests or convenience of another person."

33. *See, e.g., People v. Hodge*, 752 P.2d 533 (Colo. 1988). In *Hodge*, the Colorado Supreme Court addressed, among other things, an attorney's failure to surrender the client's file for two years after a request that it be delivered to new counsel. Although the attorney had claimed a "general lien" for compensation due, the Court noted that withholding the file had prejudiced the client's attempt to obtain new counsel's evaluation of her case and described the attorney's conduct as "a callous disregard of his professional responsibility." ■