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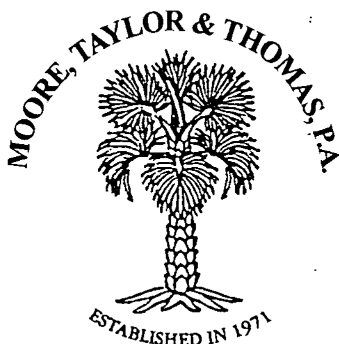

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September 6, 2013

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S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court

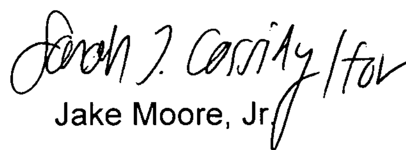
Re: State vs. Michael Long / State vs. Paul Gwinn

Dear Mr. Shearouse:

Enclosed for filing with your office in the above referenced matter are the unbound originals and fourteen copies of the Brief of the Respondents in this case together with Rule 210 and 211 Certificates and Certificates of Service.

With kindest regards, I am,

Yours very truly,



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Enclosures
cc: J. Emory Smith, Jr.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Common Pleas, Lexington County

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Appellate Case No. 2013-001522

State of South Carolina............................ Petitioner,

v.

Paul Gwinn... Respondent.

and

On Writ of Certorari to the Municipal Court of West Columbia, Lexington County

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Appellate Case No. 2013-001519

State of South Carolina............................ Petitioner,

v.

Michal Morris Long............................... Respondent.

BRIEF OF THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..ii

STATE OF ISSUES..1

ARGUMENT..2

I. THE PLAIN MEANING OF ARTICLE V, §24 LIMITS THE ATTORNEY GENERAL'S PROSECUTORIAL AUTHORITY TO "COURTS OF RECORD"..2

A. The Language Of Article V, §24 Is Clear And Unambiguous In Stating That The Attorney General's Prosecutorial Authority Is Limited To Courts Of Record.

B. Much Of The Resources Cited By The State Are Not Primary Or Binding On This Court.

i. *The West Committee Minutes Are Not Primary Or Binding On This Court.*
ii. *The Language Of The Proposed Amendment On The Referendum Ballot Is Not Persuasive.*
iii. *Opinions Of The Attorney General Of South Carolina Are Not Binding On This Court.*

II. A MUNICIPALITY HAS THE POWER TO CHOOSE ITS OWN ATTORNEY FOR PROSECUTORIAL DUTIES..10

III. THE ATTORNEY GENERAL'S AUTHORITY IS LIMITED TO ADMINISTRATIVE AND SUPERVISORY ROLES..13

CONCLUSION..16

ADDENDUM..17

1. New York County Lawyers Association Committee On Professional Ethics Question No. 679 (90-4)

2. Colorado Ethics Handbook, Ethical Considerations In The Dissolution Of A Law Firm Or A Lawyer's Departure From A Law Firm

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Adkins v. Comcar Indus., 323 S.C. 409, 475 S.E.2d 762 (1996) 5

Andersen v. Treat, 172 U.S. 24 (1898) 12

Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005) 4

Bayle v. S.C. DOT, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001) 4, 5

Bd. of Tp. Comm'rs v. Buckley, 82 S.C. 352, 64 S.E. 163 (1909) 11

Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 442 S.E.2d 177 (1994) 4

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Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) 14

Durham v. United Cos. Fin. Corp., 331 S.C. 600, 503 S.E.2d 465 (1998) 5

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Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 612 S.E.2d 719 (Ct. App. 2005) 4

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Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984) 6

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S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989) 4

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S.C. Code Ann. § 1-7-100 6

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STATEMENT OF ISSUES

1. Whether the Attorney General's prosecutorial authority is limited by Article V, §24 of the South Carolina Constitution to "courts of record?"

2. Whether the General Assembly has the authority to override the language of Article V, §24 of the South Carolina Constitution to allow the Attorney General to prosecute in courts not of record?

3. Whether there is legal foundation that the Attorney General must obtain permission from the Town of West Columbia or the Solicitor to prosecute in municipal court?

ARGUMENT

I. THE PLAIN MEANING OF ARTICLE V, § 24 LIMITS THE ATTORNEY GENERAL'S PROSECUTORIAL AUTHORITY TO "COURTS OF RECORD."

A. The Language Of Article V, §24 Is Clear And Unambiguous In Stating That The Attorney General's Prosecutorial Authority Is Limited To Courts Of Record.

Article V, §24 of the South Carolina Constitution reads: "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." S.C. Const. art. V, § 24. Magistrates' and municipal courts are not courts of record, therefore the Attorney General does not have prosecutorial authority in those courts. See State v. Duncan, 269 S.C. 510, 514, 238 S.E.2d 205, 207 (1977).

The purpose of a constitution is to "fix the fundamental principles and limit the powers of government . . . . [It is] the fundamental law of a State, . . . regulating the division of the sovereign powers and directing to what persons each of these powers is to be confined . . . ." Ex parte Lynch, 16 S.C. 32, 35 (1881). Courts apply rules similar to those relating to the construction of statutes when construing a constitutional amendment. McKenzie v. McLeod, 251 S.C. 226, 231, 161 S.E.2d 659, 661 (1968). In determining whether a statute complies with the South Carolina Constitution, the Court will, if possible, construe the statute so as to render it valid. "[E]very presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." Moseley v. Welch, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946).

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005); Ga.-Carolina Bail Bonds, Inc v. Cnty. of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The legislature's intent is determined primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). When a statute's terms are clear and unambiguous a court must apply the statute according to its literal meaning, and courts have no right to look for or impose another meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct. App. 2005); Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language"). The text of a statute is considered the best evidence of the legislative intent or will. Bayle v. S.C. DOT, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory

interpretation are not needed." State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

"In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); Worsley Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. S.C. Tricentennial Com, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001); Hodges at 85, 533 S.E.2d at 581; Bayle, 344 S.C. at 122, 542 S.E.2d at 739; see also Shealy v. Doe, 370 S.C. 194, 199-200, 634 S.E.2d 45, 48 (Ct. App. 2006).

Magistrates' and municipal courts are not courts of record. See In re Richland Cnty. Magistrate's Court, 389 S.C. 408, 699 S.E.2d 161 (2010). The term "courts of record" has been used by South Carolina courts to describe inferior courts as far back as 1787. *See* McMullen v. City Council of Charleston, 1787 WL 67 (July 9 1787) (describing the various courts as having "some incidents common to them all, such as suing and being sued; having a common seal; having courts of limited and confined jurisdiction of certain matters mentioned in their charters. Some of these courts are *courts of record,* some not (emphasis added)). As shown in McMullen, the term "courts of

record" has a long history in the State of South Carolina as being courts separate from magistrates' and municipal courts. Therefore, it was not a term of art meaning the "state court system," as argued by the state. Brief of the State, p. 11.

Since the terms were well understood, the plain meaning controls. *Bayle* at 122, 542 S.E.2d at 740. If the plain meaning controls, then it is important to determine if any statute is in conflict. Statutes in apparent conflict should, if reasonably possible, be construed so as to allow both to stand and to give effect to each. Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984); Stone & Clamp v. Holmes, 217 S.C. 203, 60 S.E.2d 231 (1950). If, however, the statutes are incapable of any reasonable reconcilement, the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy. Newberry v. Pub. Serv. Com., 287 S.C. 404, 339 S.E.2d 124 (1986); Ward v. Cobb, 204 S.C. 275, 28 S.E.2d 850 (1944); Pearson v. Mills Mfg., 82 S.C. 506, 64 S.E. 407 (1909).

The state quotes the following statute as controlling:

> The Attorney General shall consult with and advise the solicitors in matters relating to the duties of their offices. When, in his judgment, the interest of the State requires it he shall:
> (1) Assist the solicitors by attending the grand jury in the examination of any case in which the party accused is charged with a capital offense; and
> (2) Be present at the trial of any cause in which the State is a party or interested and, when so present, shall have the direction and management of such prosecution or suit.

S.C. Code Ann. § 1-7-100 Section 2, the state argues, gives the Attorney General the power to prosecute any criminal case of his choosing. However, it is important to note that this statute was enacted in 1868, long before the constitutional overhaul, and last modified in 1962, also before the constitutional amendment at issue. "The more recent

and specific legislation controls if there is a conflict between two statutes." *Hodges* at 89, 533 S.E.2d at 583.

The more current statute, last modified in 1999, reads as follows:

> He shall appear for the State *in the Supreme Court and the court of appeals* in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes in any other court or tribunal *when required by the Governor or either branch of the General Assembly.*

Id. § 1-7-40(2013) (emphasis added). This latest statute defines additional limitations on the Attorney General's prosecutorial power. First, he is to appear for the State in the courts of appeal. Second, he is only to appear in other courts when directed to do so by the Governor or the legislature. There is no broad power to prosecute in any court. In fact, this statute provides even more limiting language than Article V, § 24. The statute is also entirely consistent with the language of the constitution, which provides that the Attorney General has authority over "courts of record."

"Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Bass at 471-72, 617 S.E.2d at 378. Construing the amendment to include only courts of record would not lead to an absurd result nor would it defeat the purpose. While considering the overhaul of our judicial system, the General Assembly may have thought that inferior courts are best left to local supervision and administration. The General Assembly may have thought that since inferior courts were not required to keep records, the Attorney General should not be involved since no record of his performance would be kept. Nevertheless, the General Assembly had the

opportunity to include "courts of record" in the constitutional amendment of 1973, yet it chose not to do so.

B. Much Of The Resources Cited By The State Are Not Primary Or Binding On This Court.

i. *The West Committee Minutes Are Not Primary Or Binding On This Court.*

The state puts great emphasis on the West Committee meeting minutes to show the legislative intent in drafting the final constitutional amendment in Article V, §24. This emphasis is misplaced.

The West Committee was charged in 1969 with recommending amendments to the Constitution of 1895. However, not all of the considerations were adopted. For example, the committee considered "a proposal to amend the constitution to allow for direct legislation through initiative petitions and referenda. The proposal was summarily rejected." Joytime Distribs. & Amuse. Co. v. State, 338 S.C. 634, 644, 528 S.E.2d 647, 652 (1999), *citing Minutes of the West Committee,* September 16, 1967, page 72. In addition, there were changes in language from the time of recommendation, to the statewide referendum, to the final ratification by the legislature. Brief of The State, p. 7. Another recommendation was made by the committee to delete the provision requiring ratification by the legislature after the people voted for an amendment. That recommendation was also not adopted. Joytime Distributors & Amusement Co., Inc. at 634, 644, 528 S.E.2d at 652, *citing The Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895,* 123 (1969). "The South Carolina Unified Judicial System adopted in the amendments to article V in 1973...retains vestiges of legislative influence, small county interests, and ancient patterns of judicial rotation that

might offend the pure technocrat." James L. Underwood, *The Constitution of South Carolina: Volume 1*, 66 (1992).

It would be improper to rely on the West Committee Meeting Minutes to determine legislative intent. Not only is this two steps removed from ratification, but the fact that the committee members had one purpose behind their recommendations does not guarantee that the General Assembly had the same frame of mind when crafting the actual amendments. The language of the amendment, as held by this Court, should be the most persuasive indicator of the legislative intent. Hodges at 79, 85, 533 S.E.2d at 581.

ii. *The Language Of The Proposed Amendment On The Referendum Ballot Is Not Persuasive.*

The State argues that "while the West Columbia Municipal Court interpreted Art. V, §24 as a limitation . . ., the people saw it quite differencly, namely as a constitutional expansion of [the Attorney General's] powers." Brief of the State, p. 8. However, this court has held:

> Article XVI, §§ 1 and 2 of our constitution provide that proposed constitutional amendments must be submitted to the voters. However, even in amending the constitution, the people of the state have not retained exclusive power. Although amendments to the constitution must be approved by the people, even if they are approved, the next General Assembly must still ratify the approved amendments by a majority vote before they become effective.

Joytime Distributors & Amusement Co., Inc. at 644, 528 S.E.2d at 652.

The Legislature's function is to decide what legislation is proper. Even if the people were to vote and approve a referendum, the legislature is still charged with the task of making sure the new law is constitutional. Id. at 646, 528 S.E.2d at 653. "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." Hunter v. Erickson, 393 U.S. 385, 392

(1969). Indeed, this Court has held that "our constitution does not give the people the right of direct legislation by referendum." Id. at 646, 528 S.E.2d at 653.

The State argues that the language of the referendum ballot is indicative of the will of the people, and thus translates into the intent of the legislature. As stated above, a referendum is not legislation. Language understood in a popular sense is not necessarily the language employed by the General Assembly.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Morissette v. United States, 342 U.S. 246, 263 (1952). Many times, ballots will make the language in a referendum more understandable for the lay person not familiar with legal terms. The language actually used in an amendment may have technical exclusions and inclusions that do not affect the overall purposed of the amendment. Therefore, a referendum ballot is not a reliable source to determine legislative intent.

iii. *Opinions Of The Attorney General Of South Carolina Are Not Binding On This Court.*

"[T]his Court is not bound by opinions of the Attorney General." Eargle v. Horry Cnty., 344 S.C. 449, 455, 545 S.E.2d 276, 280 (2001) (citing Price v. Watt, 280 S.C. 510, 313 S.E.2d 58 (Ct. App. 1984)). The State places great emphasis on various Opinions of the Attorney General. However, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Courts are not required to follow the opinions of the Attorney General. South Carolina Op. Att'y Gen. No. 4005 (1975). While his opinions are often given

weight, if this Court determines that an opinion is incorrect, it has a duty to correct the error.

II. A MUNICIPALITY HAS THE POWER TO CHOOSE ITS OWN ATTORNEY FOR PROSECUTORIAL DUTIES.

Local governments derive their power from the Constitution and Statutes.

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

S.C. Const. art. VIII, § 17; See also S.C. Code Ann. § 5-7-10 ("The powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities." The General Assembly chose to restore much autonomy to local government by enacting the Home Rule Act, S.C.Code Ann. § 5–7–10, et seq. (1976). Williams v. Town of Hilton Head Island, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993). In fact, local governments only have such rights as the Legislature sees fit to confer upon them. Bd. of Tp. Comm'rs v. Buckley, 82 S.C. 352, 64 S.E. 163, 165 (1909).

One of the powers given to each municipal court was having the jurisdiction to try all cases arising under the ordinances of the municipality. S.C. Code Ann. § 14-25-45 (2009). "In carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining." See Ex parte Littlefield, 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000). This court has held [t]he South Carolina Constitution, South Carolina statutes

and case law place the discretion to prosecute solely in the prosecutor's hands. See State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994) (citing S.C. Const. art. V, § 24); S.C. Code Ann. § 17-1-10 (2009). The prosecutors for the City of West Columbia and Batesburg-Leesville have been chosen. The municipal court has exercised its right given to it under the Constitution and the statutes by appointing a prosecutor of its choosing to try the case. Those prosecutors now have the sole discretion over prosecutions in those municipalities.

To allow the State Attorney General to come in, unannounced, and take over prosecution of the case is depriving the municipality of the right to select its own counsel. The right to select counsel of one's choice, has been regarded as the root meaning of the constitutional guarantee. United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006) (citing Wheat v. United States, 486 U.S. 153, 159 (1988)); Andersen v. Treat, 172 U.S. 24 (1898). See generally W. Beaney, The Right to Counsel in American Courts 18–24, 27–33 (1955). Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. Id. See also William J. Genego, Forfeiture, Legitimation and A Due Process Right to Counsel, 59 Brook. L. Rev. 337, 363-64 (1993).

ABA Model Rule 5.6 refers to the fact that a lawyer may not be restricted in his right to practice after leaving employment. *Model Code of Prof's Conduct* R. 5.6 (2013). The commentary to Model Rule 5.6 explains the purpose behind the Rule: "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." *Id.* at cmt. 1. The New York County Lawyers' Association Professional Ethics

Committee explained that "[a] client is free to choose the lawyer who will provide representation, and may discharge an existing attorney at any time." *New York County Lawyers' Association Committee on Professional Ethics*, Op. 679, https://www.nycla.org/siteFiles/Publications/Publications452_ 0.pdf (last accessed September 3, 2013); *see also* Colorado Eth. Op. 116, http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_116_2011.pdf (last accessed September 3, 2013) (Attached as Addenda). Declaring that the Attorney General has the unfettered right to prosecute any case in the state will deprive a local municipality their choice of attorney. In addition, it may unconstitutionally deprive a local attorney of his livelihood and possibly trigger a Takings action.

Both a Takings Clause cause of action and substantive due process cause of action focus on a party's ability to protect their property from capricious state action. The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. Rick's Amuse., Inc. v. State, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001) . In determining whether a governmental action violates the Takings Clause, the courts consider: (1) the economic impact of the state action; (2) its interference with distinct investment-backed expectations; and (3) the character of the state action. Id.

Substantive due process provides that one may not be deprived of property for arbitrary reasons. Worsley Co. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."). To support a substantive due process

violation, a party must show "he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Id.*

Contractual rights can be defined as property rights. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986). If an attorney has a contract with a municipality for employment as a prosecutor, and the Attorney General chooses to come in and prosecute in his place, there may be an economic impact on the state action by depriving the attorney of pay. This could be an interference with a distinct investment-backed expectation of the attorney. In addition, the Attorney General may have acted arbitrarily and capriciously in determining whether to come and take over the prosecution by choosing the municipality at random.

A local attorney who has been hired by a municipality should not be deprived of his livelihood by the state, nor should the municipality be denied its right to choose its own counsel.

III. THE ATTORNEY GENERAL'S AUTHORTIY IS LIMITED TO ADMINISTRATIVE AND SUPERVISORY ROLES.

Article V, §24 of the South Carolina Constitution reads: "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to *supervise* the prosecution of all criminal cases in courts of record." S.C. Const. art. V, § 24 (emphasis added). "The office of Attorney General exists to properly insure the administration of the laws of this State." Langford v. McLeod, 269 S.C. 466, 473, 238 S.E.2d 161, 164 (1977) (citing State ex rel. Wolfe v. Sanders, 118 S.C. 498, 110 S.E. 808 (1920)).

The State quotes the West Committee *Minutes* in its brief: "In the provision on Attorney General, say that he shall have the administrative powers that the Chief Justice...has." Brief of the State, p. 6. Assuming that the members of the committee had

knowledge of the administrative powers of the Chief Justice, then the powers of the Attorney General should be approximately equal:

> The Chief Justice of the Supreme Court shall be the administrative head of all courts in this State. He shall examine the administrative methods, systems and activities of the courts and their employees, examine the dockets of the several courts and require the courts and their employees to furnish to him such information as may be appropriate to assist in the administration of the courts. Within the framework of the requirements of § 14-3-390, he shall make all assignments of duties for the circuit judges and may, from time to time, transfer a circuit judge from one assignment to another, as such judge's regularly assigned duties will permit and as the need appears. He shall have the right to call additional terms of court, to assign more than one judge to a circuit, if such additional judge's regularly assigned duties will permit and if need appears, and generally to supervise the calendars of trial courts in the interest of the better administration of justice.

S.C. Code Ann. § 14-1-90. Nowhere in this statute does it say that the Chief Justice has the power to take over cases at will. The duties are largely administrative and not judicial in nature. In addition, it is well established that the Chief Justice hears cases in the Supreme Court, not in local municipal courts. Equating the duties of the Attorney General would mean that he is to prosecute in state courts (which are courts of record), not municipal courts.[1]

In addition, the West Committee felt that the duties of the Attorney General should be limited: "The Committee feels the Attorney General should have *supervisory* control over all *major* prosecutors within the state courts system." *Final Report of the Committee to Make A Study of the South Carolina Constitution of 1895* at 117 (emphasis added). The members of the committee stated that the Attorney General should have

[1] This statute was enacted in 1959. Note that the powers of the Chief Justice extend to "all courts" in the State, not "courts of record," showing that the legislature knew the difference between the terms and applied them where appropriate.

supervisory power and *administrative control* over solicitors. Although Huger Sinkler advocated for the Attorney General to have the "right to prosecute any case," this was not added to the duties spelled out under Article V. *Minutes of the West Committee,* January 19, 1968, p. 845-47 (Attached as Addendum to Brief of the State, pp. 29-32). Allowing for a supervisory role would not re-impose "intolerable conditions," as the state suggests. Brief of the State, p. 9. Rather, the supervisory role would allow the Attorney General to make sure rules of uniformity are followed, while allowing local governments their autonomous rights given to them by the General Assembly.

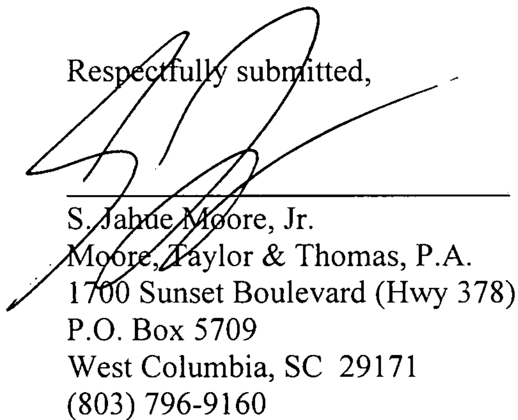
The State also argues that the Attorney General should not be required to ask permission of a town before prosecuting. However, this court has already held that the Attorney General is not all-powerful in prosecutorial duties. In Ex parte McLeod, 272 S.C. 373, 374-75, 252 S.E.2d 126, 126-27 (1979), the Attorney General asked permission from a trial judge the right to enter the grand jury room "for the purpose of assisting the grand jury in their investigation by examining witnesses and providing the grand jury with whatever legal advice that body might request. The Attorney General further requested that a court stenographer, after being sworn to secrecy, be present to record the testimony which would be sealed, subject to being made public only upon court order." The lower court denied this request. Upon review, this Court affirmed the court's decision. Id. at 378, 252 S.E.2d at 128. The same reasoning could have been used by the legislature in drafting the amendment. The General Assembly could have reasoned that a municipal court, being a creature of statute, is necessarily subject to more local control and would suffer in its judicial economy if subjected to the micromanagement of an overzealous Attorney General.

Therefore, even if this Court holds that the Attorney General has authority over court that are not of record, this authority is limited by the plain wording of the amendment to supervisory and administrative authority.

CONCLUSION

For the reasons cited above, this Court should construe the South Carolina Constitution to limit the authority of the Attorney General to "courts of record," as stated in the amendment. In addition, this Court find that the according to the plain words of the amendment and of statutes, the Attorney General has only a supervisory role in courts other than courts of appeal.

Respectfully submitted,



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September 5, 2013

West Columbia, South Carolina

ADDENDUM 1

NEW YORK COUNTY LAWYERS ASSOCIATION
Committee on Professional Ethics

QUESTION NO. 679 (90-4)

TOPIC: ADVERTISING, SOLICITATION, CHANGE OF ASSOCIATION.

DIGEST: (1) A lawyer may send announcements of the opening of an office to any person, including clients of the lawyer's former firm; (2) the lawyer may send letters more fully describing the new law practice to any person, including clients of the former firm, (3) the lawyer may place announcements in trade journals where the clients of the former firm are likely to see them; and (4) in-person solicitation of clients is generally prohibited; however, DR 2-104(B) authorizes a lawyer to accept employment from a former client if the advice that induced such employment is germane to the former employment.

CODE: DR 2-101(A), DR 2-102(A)(2), DR 2-103(A), DR 2-104(A) & (B), DR 2-105.

QUESTION:

A lawyer formerly associated with Firm A leaves to join another firm or to establish a separate law practice. To what extent may the lawyer solicit business from clients of Firm A by (1) sending announcements of the opening of an office, (2) sending letters more fully describing the new law practice, (3) placing announcements in trade journals where the clients of Firm A are likely to see them, or (4) speaking directly to clients of Firm A?

OPINION:

The jurisdiction of this Committee is limited to matters of professional ethics. Consequently, we do not opine on whether any actions taken by the lawyer would constitute tortious interference with the contractual rights of Firm A. See, e.g. Adler, Barish, Daniels, Levin &

Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978), cert. denied 442 U.S. 907 (1979).

The New York State Bar Association addressed certain of the issues presented here in N.Y. State 83 (1968). However, since that opinion was rendered before the Supreme Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), we believe it is appropriate to revisit the subject here.

Professional Announcements

DR 2-102(A)(2) covers the subject of professional announcement cards. It states as follows:

> A lawyer or law firm may use . . . a professional announcement card stating new or changed associations or addresses . . . or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends and relatives. It may state biographical data, the names of members of the firm and associates . . . It shall not state the nature of the practice except as permitted under DR 2-105.

DR 2-105(A) permits a lawyer or law firm to publicly identify one or more areas of law in which the lawyer or firm practices, or to state that the practice is limited to one or more areas of law.

DR 2-102(A)(2) clearly allows a lawyer to send an announcement of changed professional affiliations to former clients. See ABA Inf. Opin. 84-1504 (1984), ABA Inf. Opin. 1466 (1981), ABA Inf. Opin. 1457 (1980). Moreover, although the rule limits the mailing of professional announcements to lawyers, clients, former clients, personal friends and relatives, opinions of several ethics committees and courts in New York have held, since Bates, that information that may be placed in an advertisement allowed under DR 2-101 may be mailed to any person. See, e.g. N.Y. State 505 (1979), Matter of Koffler, 51 N.Y.2d 140 (1980), cert. den. 450 U.S. 1026 (1981). In In re R.M.J., 455 U.S. 191 (1982), the Supreme Court held unconstitutional the limitations on the classes of recipients to whom announcement cards may be mailed in the Missouri version of DR 2-102(A)(2). Indeed, the amendments to the Code approved by the Appellate Divisions on April 5, 1990, to be effective September 1, 1990, eliminate the restriction on the recipients of professional announcements. Accordingly, it would not be improper for the lawyer to send announcements to former clients and others of the opening of an office.

Letters Describing Law Practice

As noted above, DR 2-101(A) permits advertising that is not deceptive or misleading. Moreover, several courts and ethics committees have held that information that may be placed in an advertisement allowed under DR 2-101 may be mailed to any person. Immediately after the Bates case, it was not clear whether such advertisements could be mailed to a

targeted group of recipients who the lawyer has reason to suspect might have use of the lawyer's services. However, this question has now been resolved. In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), the Supreme Court held that a newspaper advertisement directed at a targeted group of people was not improper. Similarly, in Shapero v. Kentucky Bar Association, 108 S. Ct. 1916, 100 L. Ed.2d 475 (1988), the Court upheld the mailing of letters to potential clients against whom foreclosure suits had been filed, stating that such targeted mailings could not be categorically prohibited, and in Matter of von Wiegen, the New York Court of Appeals found that the blanket prohibition of mail solicitation of accident victims violated the lawyer's right of expression under the First and Fourteenth Amendments of the U.S. Constitution. Thus, it would not be improper for the lawyer to send letters fully describing the lawyer's practice, as long as such letters are truthful and not deceptive or misleading.

Advertisements in Trade Magazines

Since a lawyer may use truthful advertisements and may target advertisements or letters to persons with specific legal problems, there is no impropriety in placing advertisements in a trade journal.

In-Person Solicitation

Solicitation by lawyers is prohibited by New York law. Judiciary Law §§ 479, 482. In-person solicitation presents special problems of overreaching in an environment where policing by regulatory authorities is difficult. Accordingly, the Supreme Court has upheld the constitutionality of a ban on such activity. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). As the Court noted:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-evaluation by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

Id. at 457.

Ironically, lawyers have always engaged in a certain amount of in-person solicitation from friends, relatives, business and social acquaintances. This fact was recognized in Matter of Greene, 54 N.Y.2d 118, 444 N.Y.S.2d 883, 429 N.E.2d 390 (1981), where Judge Fuchsberg, in a dissent joined by Chief Judge Cooke, criticized the Court of Appeals' ban on letters sent by a lawyer to real estate brokers asking them to recommend the services of the lawyer to their clients. The dissenters saw no difference between Greene's letter to real estate brokers and "the far more amorphous collection of contacts with the coterie of friends, relatives, business or social acquaintances

and former clients who constitute the main source to which most lawyers engaged in private practice look for referrals." However, neither the courts nor the legislature has seen fit to relax the solicitation rules to comport with the "amorphous collection of contacts" that lawyers may cultivate.

Solicitation is also generally prohibited by the Code. DR 2-103(A) provides that a lawyer may not solicit employment as a private practitioner from a person who has not sought advice regarding employment of a lawyer, in violation of any statute or court rule, other than as permitted by DR 2-101 (governings advertising) or DR 2-104 (denominated "Suggestion of Need of Legal Services". Thus, the answer to our final question depends upon an interpretation of DR 2-104(A) and (B). Those sections provide:

> (A) A lawyer who has given unsolicited advice to an individual to obtain counsel or take legal action shall not accept employment resulting from that advice, in violation of any statute or court rule.
>
> (B) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment) or one whom the lawyer reasonably believes to be a client.

Consequently, a lawyer may engage, in person, in soliciting employment of himself or herself if the person solicited is (1) reasonably believed by the lawyer to be a client already,[1] (2) a former client, if the advice to obtain counsel or take legal action is germane to the former employment,[2] or (3) a close friend or relative.

The language of DR 2-104(B) raises two issues: (1) when does a lawyer have reason to believe that a person is or was a client, and (2) when is advice to a former client germane to the former employment. We have found few ethics opinions which are helpful in answering these

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1. Because a lawyer may solicit further employment from a person he or she reasonably believes is already a client, if a lawyer who works on a client's matters leaves a firm, we believe representatives of the firm ethically may communicate in person with the client to inform the client that the client may choose to continue to be represented by the firm.

2. We note that MR 7.3(a) of the ABA Model Rules of Professional Conduct would allow a lawyer to engage in in-person solicitation of a person with any prior professional relationship with the lawyer. The comment to that section explains that a lawyer is less likely to engage in abusive practices against an individual with whom he or she has a prior professional relationship. We agree with this conclusion and would support an amendment to DR 2-104 to that effect. However, we are constrained to interpret the Disciplinary Rule as currently in effect in New York, which requires that the lawyer's advice be germane to the prior employment.

questions. Several opinions have allowed a lawyer to recommend to clients that they review their wills. See N.Y. State 188 (1971), ABA 210 (1941). These are consistent with DR 2-104(B)'s authorization to advise a current client to take legal action. However, we found no opinions dealing with former clients.

The Code does not define when a person is a client. It is generally true that lawyers do not "own" clients. A client is free to choose the lawyer who will provide representation, and may discharge an existing attorney at any time. Teichner v. W&J Holsteins, Inc., 64 N.Y.2d 977, 489 N.Y.S.2d 36, 478 N.E.2d 177 (1985). In one sense, a client is any person to whom a lawyer provides representation. Thus, if the lawyer worked on client matters while at Firm A, he may reasonably believe that the client is a "client". In ABA Informal Opinions 1457 and 1466, supra, the ABA's Ethics Committee opined that it would be appropriate for a lawyer to send a notice to clients for whose active, open and pending matters the lawyer was directly responsible as a partner or associate, and that such announcement could emphasize that the client had the right to decide how and by whom the pending matters would be completed. We believe that, consistent with DR 2-104(B), the lawyer could ethically make the same statements in person. However, we note that this is the very conduct that the Supreme Court of Pennsylvania found objectionable in Adler, supra, citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 412 (1978).

In some cases, it may be clear that the client is a client of the firm and not of particular lawyers in the firm. For example, a notice of appearance may state that the firm represents the client. Moreover, a partnership agreement may set forth which lawyers are responsible for the client relationship. If this is the case, clients of the firm may constitute "former clients" of the departing lawyer. Under DR 2-110(A) the withdrawing lawyer is required to take reasonable steps to avoid foreseeable prejudice to the rights of the client. This may include advising the former client of things that must be done to accomplish the client's objectives. Since such advice would be "germane" to the former employment under any definition, if the client asked the lawyer to continue the representation, DR 2-104(B) would allow acceptance of such employment.

The Code does not explain when advice is "germane" to the prior employment. Accordingly, we believe the word must be given its ordinary meaning of "closely related" or "relevant". See Random House Dictionary (Unabridged ed. 1967). We believe employment or advice may be closely related because it concerns the prior matter or because the subject matter or issues are the same. This test is similar to the one that has been used under Canon 5 to determine when two representations are "substantially related".

CONCLUSION:

A lawyer formerly associated with a Firm A who leaves the firm to establish a separate law practice may solicit business as follows: (1) the lawyer may send announcements of the opening of an office to any person, including clients of Firm A; (2) the lawyer may send letters more fully describing the new law practice to any person, including clients of Firm A,

but we do not opine of whether statements made in letters to clients of Firm A might constitute tortious interference with the contractual rights of Firm A; (3) the lawyer may place announcements in trade journals where the clients of Firm A are likely to see them; and (4) in-person solicitation of clients is generally prohibited; however, DR 2-104(B) authorizes a lawyer to accept employment from a former client if the advice that induced such employment is germane to the former employment.

May 25, 1990

ADDENDUM 2

116 ETHICAL CONSIDERATIONS IN THE DISSOLUTION OF A LAW FIRM OR A LAWYER'S DEPARTURE FROM A LAW FIRM

Adopted March 17, 2007.

Intoduction and Scope

Many ethical issues arise in connection with the dissolution of a law firm or a lawyer's departure or withdrawal from a firm. Such issues often arise in the context of determining who will represent particular clients following the break-up. The departing lawyer and the responsible members of the firm with which the lawyer has been associated have ethical obligations to clients on whose legal matters they worked.[1] These ethical obligations sometimes can be at odds with the business interests of the law firm or the departing lawyer. In such circumstances, all involved lawyers must hold the obligations to the client as paramount. The ethical considerations discussed in this opinion include the duty to keep the client reasonably informed about the status of the legal matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, pursuant to Colo. RPC 1.4(a) and (b); the duty to provide competent representation to the client, pursuant to Colo. RPC 1.1; avoiding neglect of client matters because of a break-up, in violation of Colo. RPC 1.3; taking appropriate steps upon withdrawal from representation, in accordance with Colo. RPC 1.16(d); ensuring that any funds in which a client or a third party may claim an interest are maintained separate from the lawyers' own property, in accordance with Colo. RPC 1.15(a); refraining from any solicitation or efforts to retain clients that would violate the provisions of Colo. RPC 7.1 or Colo. RPC 7.3; restrictions on a lawyer's right to practice after leaving a firm that might violate Colo. RPC 5.6(a); and generally refraining from any conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Colo. RPC 8.4(c).

The primary focus of this opinion is on the ethical obligations of lawyers to the *clients* they represent at the time of the dissolution or the lawyer's departure. The opinion also touches upon the actions of lawyers toward each other in these circumstances. The ethical obligations of the lawyers involved are the same whether the departing lawyer is a partner/shareholder, an associate, or some other category of lawyer such as one designated as of counsel. However, the opinion does not address the *legal* obligations owed to clients, or the legal duties arising from the relationship between and among the lawyers. It also does not address circumstances in which lawyers who are not in the same firm represent, as co-counsel, a common client.

This opinion substantially adopts and endorses Formal Opinion 99-414 (1999) issued by the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA). [editor's note: ABA Formal Opinion 99-414 was attached to this opinion as Appendix A as printed in the May 2007 issue of *The Colorado Lawyer*, by permission of the ABA] The remainder of this opinion focuses on application of the Colorado Rules of Professional Conduct to these circumstances and on issues that warrant comment beyond that in ABA Formal Opinion 99-414.

Analysis

The Client's Right to Choose Counsel

It is now uniformly recognized that the client-lawyer contract is terminable at will by the client.[2] Colo. RPC 1.16(a)(3) codifies this principle.[3] 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.[4] Neither the firm nor any of its members may claim a possessory interest in clients.[5] In other words, clients do not *belong* to lawyers.[6]

A lawyer or law firm may not, therefore, take action that impermissibly impairs a client's right to choose counsel. For example, a dispute between attorneys in a law firm over a fee that is due or may come due should not impact the client's right to freely choose counsel.

Nevertheless, the client's right to choose is subject to certain limitations. Generally, a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client, if the representation will result in violation of the Rules of Professional Conduct or other law[7] or if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.[8] For example, the departing lawyer may be the only lawyer in the firm with experience in a specialized area of law applicable to a particular client matter. In such circumstances, the law firm from which the lawyer is departing may be unable to continue the representation, except on a limited basis.[9] On the other hand, the departing lawyer may lack the support and resources necessary to handle a complex matter properly after leaving the firm. The departing lawyer may also be prohibited from representing the client if he or she is associating with a firm that would be precluded from representation due to a conflict of interest. In some situations, the right of a client to select the lawyer may be limited under the provisions of an insurance contract.[10]

In any event, a client represented by a particular lawyer or law firm will have to choose counsel again if the firm breaks up or the responsible lawyer departs from the firm during the course of the representation. In order to make appropriate choices, the client must have sufficient information.

Notice to Clients

In Colorado, a lawyer has a duty to keep a client reasonably informed about the status of a matter[11] and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[12] When a lawyer plans to cease practice at a law firm, or when a law firm plans to terminate the lawyer's association with the firm, both the lawyer and the firm have responsibility for providing timely notification to clients affected by the lawyer's departure and providing such clients with information sufficient to allow informed choice.

Not only are the remaining and departing lawyers *permitted* to contact clients about an impending change in personnel, they are *required* to provide the client with at least enough information to determine the future course of the representation.[13] It is highly preferable that any affected client be notified by a joint communication from the departing lawyer and the firm and that the joint notice be transmitted sufficiently in advance of the lawyer's anticipated departure to allow the client to make decisions about who will represent it and communicate that decision before the lawyer departs. An "affected client" is one for whose active matters the departing lawyer currently is responsible or plays a principal role in the current delivery of legal services.[14] The joint and advance notice helps ensure an orderly transition that will best protect the interests of the affected client. Attached to this Opinion as Appendix B is a form of letter that, if given in a timely manner, should satisfy the ethical requirements of notice to affected clients.

In some limited circumstances joint, advance notice is not practicable.[15] If either the departing lawyer or the firm fails or refuses to participate in providing timely and appropriate joint notice, unilateral notice is necessary. If unilateral notice is given, it should impartially and fairly provide the same type of information as would have been included in the joint notice.[16]

Consistent with Colo. RPC 7.1, 7.3 and 7.4, as applicable, both the departing lawyer and the firm may solicit professional employment from clients or former clients of the firm. In doing so, however, the departing lawyer should be mindful that such solicitation may give rise to a civil claim for damages or other relief under the substantive law, especially while the departing lawyer is still employed by or associated with the law firm.[17] Pursuant to Colo. RPC 7.3, departing lawyers may solicit professional employment through written or electronic communications. Departing lawyers having a "family or prior professional relationship with the prospective client" are not subject to the 30-day waiting period for soliciting clients in personal injury or wrongful death matters as provided in Colo. RPC 7.3(c), and also may solicit clients in person or by telephone without running afoul of Colo. RPC 7.3.[18]

If a client or potential client inquires of the firm seeking to contact a lawyer who has departed the firm, the firm must provide the lawyer's new business address and telephone number, if known. Failure to do so may be a violation of Colo. RPC 1.4 or may reflect a lack of candor.[19] However, after providing information as described above, the firm may inquire whether the call is regarding a legal matter and, if so, may ask whether someone at the firm may help instead.[20]

Proper and Continuous Handling of Client Matters

Amid the turmoil of a firm break-up, attorneys should never forget that they have clients and that they continue to owe those clients ethical and legal duties.[21] While an affected client is choosing between the departing lawyer and the law firm, both have a duty to ensure that the client's matter is handled properly. A lawyer shall act with reasonable diligence and promptness in representing a client, and shall not neglect a legal matter entrusted to that lawyer.[22] Unless the relationship between a lawyer and client is terminated as provided in Colo. RPC 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.[23]

Absent a special agreement, the client employs the firm and not a particular lawyer, and the firm has responsibility, along with the departing attorney, for the cases being handled by the departing attorney.[24] Therefore, subject to the contrary wishes of an affected client, a law firm is obligated to continue to handle matters that were handled by a departing lawyer.[25] The affected client, however, may continue to view the departing lawyer as the client's representative despite the lawyer's withdrawal from the firm. The attorney-client relationship is an ongoing relationship that gives rise to a continuing duty to the affected client unless and until the client clearly understands, or reasonably should understand, that the relationship is one on which he, she or it can no longer depend.[26]

Withdrawal by the Law Firm or Attorney

A lawyer's departure from a law firm generally leads to withdrawal of either the firm or the departing lawyer as counsel for one or more affected clients. In matters in which a lawyer or firm has entered an appearance in a court proceeding, a formal motion to withdraw may be required.[27] Colo. RPC 1.16(d) provides that 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.

When the law firm and the departing lawyer provide proper notice as discussed above, the affected client's matter is handled with diligence and competence during the withdrawal and selection of counsel, and the client chooses to be represented by one or the other (or chooses another lawyer or firm), the interests of the client will have been protected to a large extent. However, client papers and property still can be an issue. In any client matter, files generally are created while the departing lawyer is associated with the firm. The proper handling of these client files is discussed below.

The affected client may have paid an advance retainer for representation in a particular matter. Typically, such retainers are paid to the firm rather than an individual lawyer. These funds must be held separate from the lawyers' own property.[28] If the lawyer or law firm holding the client funds is withdrawing from representation, and neither the lawyer nor any third person claims any interest in the funds, the lawyer or firm holding the funds must promptly pay the remaining trust balance to the client or otherwise apply the funds as directed by agreement with the client.[29] If the departing lawyer will be representing the affected client, the client funds held by the firm may, with the client's consent, be transferred to an appropriate trust account established by the departing lawyer.

In some circumstances neither the departing lawyer nor the law firm wants to continue representing the affected client. In this situation, the obligations of the lawyers are no different than in any other situation in which a lawyer wishes to withdraw from representation. The departing lawyer and the firm must bear in mind the responsibilities imposed under Colo. RPC 1.3 (diligent representation), Colo. RPC 1.4 (communication), and Colo. RPC 1.16 (termination of representation).

Client Files

With limited exceptions, the client is entitled to the client file.[30] The departing lawyer may remove client files only with the consent of the affected client. If the affected client so requests, the firm must provide the files to the departing lawyer, subject to the limitations discussed in CBA Formal Opinion 104. Pending receipt of instructions from the client, both the departing lawyer and the law firm should have reasonable access to the file in order to protect the interests of the client, which remains the paramount obligation of both.[31] Even if the client has requested that the file be transferred to the departing lawyer, the file should not be removed without giving the firm notice and opportunity to copy the file. Likewise, if the affected client requests that the firm continue the representation, the departing lawyer should be given the opportunity to copy the file.[32] The contents of such client files remain confidential pursuant to the provisions of Colo. RPC 1.6.

In some circumstances, a client wishing to have a file transferred to the departing lawyer may owe the firm for past services or for costs advanced on the client's behalf. It is this Committee's view that such situations should be treated the same as any other in which a client discharges a lawyer without fully satisfying his or her financial obligations to the lawyer. The firm may, under certain limited circumstances, assert a retaining lien against client property in its possession.[33]

The law firm may possess client files in legal matters that are inactive or have been closed. Both the departing lawyer and the firm should consider any ethical obligations they may have with respect to such files insofar as they pertain to client matters for which the departing lawyer was responsible or played a principal role.[34]

Conflicts of Interest Arising Out of the Departing Lawyer's New Affiliation

The departing lawyer must also be aware of and avoid conflicts of interest that may arise out of his or her affiliation with another law firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Colo. RPC 1.7, 1.8(c), 1.9 or 2.2.[35] The rule of imputed disqualification flows from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client.[36] Thus, when the departing lawyer brings clients to his or her new firm, they become the new firm's clients. Likewise, the new firm's clients become the departing lawyer's clients.

Because of the rules concerning imputed disqualification, the departing lawyer and the new firm must perform a thorough conflicts check. This conflicts check should be designed to determine whether the departing lawyer's association with the new firm may involve conflicts of interest based on consideration of the departing lawyer's current *and* former clients.[37] The process of checking for conflicts of interest may, in some circumstances, be undertaken prior to the departing lawyer's affiliation with the new firm.[38]

Restrictions on the Right to Practice

Colo. RPC 5.6(a) provides that a lawyer shall not participate in offering or making a "partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or as permitted by Rule 1.17 [regarding the sale of a law practice]." The comment to Rule 5.6 provides that such an agreement "not only limits the lawyer's professional autonomy but also limits the freedom of clients to choose a lawyer."

In Colorado, an agreement prohibiting a departing lawyer from soliciting clients after departure from a firm impermissibly impairs the client's right to discharge and choose counsel, and may lead to discipline for the offending attorney.[39] Courts in many other jurisdictions have refused to enforce agreements between lawyers and law firms that they viewed as anti-competitive.[40] While a departing lawyer must be mindful of the lawyer's fiduciary obligations to the firm and of the existing contractual relations between the firm and affected clients, the lawyer may not agree to, and the firm must not impose, conditions that might inhibit a client's right to choose counsel.

Duty of Candor

Regardless of the nature of the departure, a departing lawyer and firm each have a duty to act with candor toward the other.[41] Colo. RPC 8.4(c) states that, "it is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The duty of candor, as well as Rule 8.4(c), may be breached by a lawyer who misrepresents the lawyer's status or intentions to others at the firm, and vice versa.

While a discussion of the legal, as opposed to ethical, duties of lawyers is beyond the scope of this opinion, lawyers and firms contemplating a dissolution or departure should give careful consideration to their respective legal duties, including potential obligations based on their contractual, agency, or fiduciary relationships. A departing lawyer should consider the consequences that may arise from contacting clients and attempting to obtain consent to transfer matters to the departing lawyer in advance of notifying the firm, or in denying to the firm the lawyer's intention to depart. Firms likewise should consider the consequences of similar actions prior to the contemplated departure of a lawyer who is not yet aware of impending change.[42] Such actions by a departing lawyer or a firm may reflect a lack of candor.

NOTES

1. The Colorado Rules of Professional Conduct apply to lawyers as individuals and not to law firms as separate entities. Any references to the duties and obligations of a law firm within this opinion are to the responsible members of the firm.

2. Charles W. Wolfram, *Modern Legal Ethics,* § 9.5.2, at 545 (1986). The Colorado Supreme Court recognized the client's right to terminate the attorney-client relationship as a matter of public policy in *Olsen & Brown v. City of Englewood,* 889 P.2d 673, 676 (Colo. 1995).

3. Colo. RPC 1.16(a)(3) provides that except when a lawyer is ordered to do so by a tribunal, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged, subject to the approval of the tribunal where applicable.

4. Robert W. Hillman, *Hillman on Lawyer Mobility,* ("Hillman"), Chapter 2, § 2.3.1 (2000 Supplement).

5. *Id.*

6. In expressing this view, the committee is aware that the Restatement of the Law Governing Lawyers suggests that clients belong to the firm and not an individual lawyer. Rest. (3d) Law Governing Lawyers, § 9(3), cmt. i. The Committee disagrees with any characterization of clients as property.

7. Colo. RPC 1.16(a)(1).

8. Colo. RPC 1.16(a)(2).

9. The comment to Colo. RPC 1.1 provides in pertinent part:

> While the licensing of a lawyer is evidence that the lawyer has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which the lawyer is not qualified. However, a lawyer may accept such employment if in good faith the lawyer expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to clients. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which the lawyer is not and does not expect to become so qualified should either decline the employment or, with the consent of the client, accept the employment and associate with a lawyer who is competent in the matter.

The comment further provides:

> In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

10. *See* CBA Formal Op. 91, "Ethical Duties of Attorney Selected by Insurer to Represent Insured" (Jan. 16, 1993). 11. Colo. RPC 1.4(a)

12. Colo. RPC 1.4(b).

13. Alexander R. Rothrock, *Essays on Legal Ethics and Professional Conduct* ("Rothrock") § A4.2.1, CLE in Colorado, Inc. (2005).

14. *See* ABA Formal Op. 99-414, Appendix A hereto, which provides a similar definition for the term "current clients." In determining whether or not the departure of a lawyer from a firm triggers the requirement to notify a client on whose matter the lawyer has been working (that is, whether the client is an "affected client"), the lawyer and the firm also should consider whether the client reasonably would believe itself to be affected by the lawyer's departure, for example, where a lawyer is specifically named in an engagement letter as being expected to provide services to the client. Even if a client is not an affected client, the departing lawyer may choose to notify the client of his or her departure if such notification complies with Colo. RPC 7.1 and 7.3. Restrictions purporting to prohibit such contact likely would violate the prohibition of Colo. RPC 5.6 on restrictions of the right of a lawyer to practice after termination of his or her relationship with a firm.

15. There will be situations in which a departing lawyer will be unable to represent the client, and the notice to the client would not present representation by the departing lawyer as an option. For example, the departing lawyer would be unable to represent the client if the lawyer were suspended from the practice of law or placed on disability inactive status. However, a difference of opinion between the firm and the departing lawyer regarding the competence or ability of one or the other to represent the client does not, standing alone, justify failure or refusal to extend to the client a choice in representation.

16. Kentucky Bar Assn. Ethics Op., KBA E-424 ("KBA E-424"), n. 4 (2005).

17. *See e.g., Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989) (addressing an employee's duty of loyalty, generally). *See also* additional cases cited in ABA Formal Op. 99-44, Appendix A hereto, at n.16, 17.

18. The Committee concurs with the ABA view that a lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter along with other lawyers in a way that afforded little or no direct contact with the client. "Prior professional relationship" also may apply to the constituents of an organizational client with whom the lawyer has had substantial contact, who in their individual capacity never were clients of the firm or lawyer. *See* 2 G. Hazard & W. Hodes, *The Law of Lawyering*, § 57.7, n. 4, p. 57-25 (3d ed. 2001).

19. Colo. RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. To the extent such inquiries are handled by non-lawyers employed or associated with the firm, partners or principals in the firm, or those lawyers having direct supervisory authority over the non-lawyer, shall make reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that the non-lawyer's conduct will be compatible with the professional obligations of the lawyer, or shall make reasonable efforts to insure that the person's conduct is compatible with those professional obligations. Colo. RPC 5.3(a) and (b).

20. Phila. Bar Assn./Pa. Bar Assn. Joint Ethics Op. 99-100 (April 1999).

21. Rothrock § A4.2.1.

22. Colo. RPC 1.3.

23. Comment, Colo. RPC 1.3. Even after the attorney-client relationship has terminated, the firm and the departing lawyer have an obligation to avoid harming the client's interests. For example, where a client has terminated the client's relationship with a firm, the firm nonetheless has the obligation to make sure that communications coming to the client through the firm are promptly communicated to the client. *See* Restatement (Third) The Law Governing Lawyers, § 33(2)(c).

24. ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1428 (Feb. 16, 1979).

25. Wisconsin Ethics Op. E-97-2, State Bar of Wisconsin CLE Books (July 1998).

26. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (quoting *In re Weiner*, 120 Ariz. 349, 352, 586 P.2d 194, 197 (1978)). In *People v. Bennett*, the Colorado Supreme Court held that whether an attorney-client relationship exists turns on the reasonable, subjective view of the client, and an important factor is whether the client believes that the relationship existed. "The attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client until the client understands, or reasonably should understand, that the relationship is no longer to be depended on." Id.

27. C.R.C.P. 121, §1-1(4), applicable to attorneys practicing in the district courts in Colorado, seems to indicate that when an attorney enters an appearance as a member of a firm, it is the firm as a whole that becomes counsel of record. Thus, if the departing lawyer will not be continuing the representation after leaving the firm, a formal motion to withdraw may not be necessary if the firm will continue representing the client. In

contrast, the local rules of the United States District Court for the District of Colorado state that the law firm is not counsel of record. D.C. Colo. L. R. 83-5(B). Thus, in a matter pending in certain federal courts, it may be necessary for the departing lawyer to withdraw from representation and for a different lawyer with the firm, who will take over responsibility for the case, to enter an appearance.

28. Colo. RPC 1.15(a).

29. *See* Colo. RPC 1.15(b). For proper handling of funds in a lawyer's possession in which the lawyer or another person claims an interest, *see* Colo. RPC 1.15(c).

30. *See* CBA Formal Op. 104, "Surrender of Papers to the Client Upon Termination of the Representation," (April 17, 1999).

31. ISBA Op. 95-02, n. 4; Utah Ethics Op. 132 (1993).

32. *See* KBA E-424 (recognizing that both the firm and the departing lawyer may have legitimate interest in the content of a client file because, among other reasons, it would be essential in defending a later malpractice action). *See also,* D.C. Bar Legal Ethics Comm. Op. 168 (1986) (concluding that a firm may copy transferred files at its own expense).

33. *See* CBA Formal Op. 82, "Assertion of Attorney's Retaining Lien on Client's Papers," (April 15, 1989; Addendum Issued 1995).

34. For general discussion regarding client files in closed legal matters, *see* Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan-Part I," 30 *The Colorado Lawyer* No. 10, p. 147 (October 2001); Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan-Part II," 30 *The Colorado Lawyer* No. 11, p. 77 (November 2001).

35. Colo. RPC 1.10(a).

36. Colo. RPC 1.10, Comment.

37. Even if the departing lawyer did not personally represent a particular client at the prior firm, a conflict of interest can exist if the lawyer's new firm represents a client in the same or a substantially related matter, the interests of the prior firms's client are materially adverse to those of the new firm's client, and the departing lawyer acquired information protected by Rule 1.6 that is material to the matter. Colo. RPC 1.9(b).

38. The Committee recognizes that there is an inherent tension between the new firm's need to obtain information concerning the departing lawyer's former and current clients in order to comply with the conflict rules, and the departing lawyer's obligations under Colo. RPC 1.6(a) not to reveal information relating to representation of clients. The Colorado Supreme Court is currently considering a proposed new comment to Colo. RPC 1.6, which would generally recognize a departing lawyer's implied authorization to disclose certain limited non-privileged information protected by Colo. RPC 1.6 in order to conduct a conflicts check. *See* Proposed Amendments to Colorado Rules of Professional Conduct (Dec. 30, 2005), Colo. RPC 1.6, Comment [5A], available at http://www.courts.state.co.us/supct/committees/profconductdocs/sc-appendixa-1205.pdf. In addition, the departing lawyer may seek the consent of former or current clients to disclose information to permit a conflict check and under some circumstances it may be possible to check for conflicts of interest without disclosing information relating to the representation of former clients. For a more thorough discussion of such situations, *see* Marcy Glenn, "Conflict Issues When Attorneys Switch Jobs," 27 *The Colorado Lawyer* No. 5, p. 49 (May 1998).

39. In *People v. Wilson*, 953 P.2d 1292 (Colo.1998), the Colorado Supreme Court disciplined a lawyer for attempting to enforce an employment agreement prohibiting departing lawyers from soliciting clients and providing for forfeiture of all fees earned by departing lawyers through such solicitation. The court held that such conduct violated Colo. RPC 8.4(g), which prohibits conduct in violation of accepted standards of legal ethics.

40. For a thorough discussion of agreements discouraging competition among lawyers, *see* Hillman, § 2.3.4 (2004 Supplement).

41. This committee agrees with the Oregon Bar Association and the Oregon Supreme Court that a lawyer has a duty of candor to her or his firm. Or. Bar Assn. Formal Op. No. 2005-70. ("Regardless of contractual, fiduciary, or agency relationship between Lawyer and Firm A, however, it is clear under Oregon RPC 8.4(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm A. *See In re Smith*, 315 Or. 260, 843 P.2d 449 (1992); *In re Murdock*, 328 Or. 18, 968 P.2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is a duty of candor toward that law firm)").

42. *See, e.g., Meehan, et al. v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1998); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978); *In re Smith, supra; In re Murdock, supra*, at n. 7.

Appendix A

September 8, 1999

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 99-414
Ethical Obligations When a Lawyer Changes Firms

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September 8, 1999

A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients' interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him. The departing lawyer and the responsible members of her firm who remain must take reasonable measures to assure that the withdrawal is accomplished without material adverse effect on the interests of clients with active matters upon which the lawyer currently is working. 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. The departing lawyer and responsible members of the law firm who remain also have ethical obligations to protect client information, files, and other client property. The departing lawyer is prohibited by ethical rules, and may be prohibited by other law, from making in-person contact prior to her departure with clients with whom she has no family or client-lawyer relationship. After she has left the firm, she may contact any firm client by letter.

When a lawyer ceases to practice at a law firm, both the departing lawyer and the responsible members of the firm who remain have ethical responsibilities to clients on whose active matters the lawyer currently is working to assure, to the extent reasonably practicable, that their representation is not adversely affected by the lawyer's departure. In this Opinion, the Committee addresses obligations under the Model Rules of Professional Conduct that a lawyer has when she leaves one law firm for another, including the following: (1) disclosing her pending departure in a timely fashion to clients for whose active matters she currently is responsible or plays a principal role in the current delivery of legal services (sometimes referred to in this Opinion as "current clients"); (2) assuring that client matters to be transferred with the lawyer to her new law firm do not create conflicts of interest in the new firm and can be competently managed there; (3) protecting client files and property and assuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal; (4) avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; and (5) maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the lawyer's former firm.[1]

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1. This Opinion addresses mainly the obligations of the departing lawyer. Nevertheless, the firm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, and may have obligations as well under other law, to assure to the extent reasonable practicable that the withdrawal from the firm is accomplished without material adverse effect on any clients' interests, especially clients on whose active matters the departing lawyer currently is working. *Cf.* ABA Informal Opinion 1428 (1979), decided under the former Model Code of Professional Responsibility, and California Bar Ethics Op. No. 1985-86, 1985 WL 57193 *2 (Cal.St.Bar.Comm.Prof.Resp. 1985), both of which place the responsibility of notifying clients upon the departing lawyer and her firm. Among remaining firm members' ethical obligations are to make reasonable efforts to ensure that there are in effect measures: (1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure

The departing lawyer also must consider legal obligations other than ethics rules that apply to her conduct when changing firms, as well as her fiduciary duties owed the former firm. The law of agency, partnership, property, contracts, and unfair competition impose obligations that are not addressed directly by the Model Rules. These obligations may affect the permissible timing, recipients, and content of communications with clients, and which files, documents, and other property the departing lawyer lawfully may copy or take with her from the firm. Although the Committee does not advise upon issues of law beyond the Model Rules, we must take account of other law in construing the Rules; so must the departing lawyer before determining an appropriate course of action.

Notification to Current Clients Is Required

The impending departure of a lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter (i.e., the lawyer's current clients), is information that may affect the status of a client's matter as contemplated by Rule 1.4.[2] A lawyer who is departing one law firm for another has an ethical obligation, along with responsible members of the law firm who remain, to assure that those clients are informed that she is leaving the firm. This can be accomplished by the lawyer herself, the responsible members of the firm, or the lawyer and those members jointly. Because a client has the ultimate right to select counsel of his choice,[3] information that the lawyer is leaving and where she will be practicing will assist the client in determining whether his legal work should remain with the law firm, be transferred with the lawyer to her new firm, or be transferred elsewhere. Accordingly, informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him.[4]

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of a lawyer having substantial responsibility for the clients' active matters; (2) to make clear to those clients and others for whom the departing lawyer has worked and who inquire that the clients may choose to be represented by the departing lawyer, the firm or neither (*see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. h (Proposed Official Draft 1998); (3) to assure that active matters on which the departing lawyer has been working continue to be managed by remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that, upon the firm's withdrawal from representation of any client, the firm takes reasonable steps to protect the client's interests pursuant to Rule 1.16(d). *See infra*, n.4 and accompanying text. This Opinion does not address the issue of a division of fees between the departing lawyer and her law firm.

2. Rule 1.4 (Communication) states:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

Comment [1] to Rule 1.4 provides that "the client should have sufficient information to participate intelligently in decisions concerning . . . the means by which they [the objectives of the representation] are to be pursued . . . ."

3. Rule 1.16 (Declining Or Terminating Representation) in paragraph (a)(3) states in pertinent part that a lawyer "shall withdraw from the representation of a client if . . . the lawyer is discharged." *See also* Comment [4]; Restatement § 26 cmt h, *supra* n.1.

4. State ethics opinions also have determined that, under the Model Rules, a departing lawyer has an ethical duty to inform current clients that she is leaving the firm. *See, e.g.*, District of Columbia Bar Legal Ethics Committee Op. No. 273 (1997); State Bar of Michigan Std. Com. on Prof. and Jud. Ethics Op. No. RI-224, 1995 WL 68957 (Mich.Prof.Jud.Eth. 1995). *See also* Rule 1.16(d), *infra* n.8. The ABA Committee gave approval under the former Model Code of Professional Responsibility for a partner or associate who is leaving one firm for another to send an announcement soon after departure to those clients for whose active, open, and pending matters the lawyer had been directly responsible immediately before resignation. Informal Opinions 1457 (1980) and 1466 (1981). These opinions did not, however, address the question whether the departing lawyer might send notices to any clients *before* resigning.

Notification of Current Clients is Not Impermissible Solicitation

Because she has a present professional relationship with her current clients, a departing lawyer does not violate Model Rule 7.3(a)[5] by notifying those clients that she is leaving for a new affiliation. Under Rule 7.3(a), the departing lawyer is, however, prohibited from making in-person contact with firm clients with whom she does *not* have a prior professional or family relationship. A lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client.[6] The departing lawyer nevertheless may contact the client through written or oral recorded communication pursuant to Rule 7.2(a), subject to the limitations in Rules 7.1, 7.3(b), and 7.3(c), at least after the lawyer has departed the firm and joined the new firm.[7]

The Committee also is of the opinion that a departing lawyer must, under Rule 1.16(d),[8] take steps to the extent practicable to protect her current clients' interests. Moreover, the responsible members of the former firm must themselves comply with Rule 1.16(d) respecting all clients who select the departing lawyer to represent them, whether or not they are current clients of the departing lawyer.[9]

A lawyer's duty to inform her current clients of her impending departure is similar to a lawyer's obligation to inform clients if the lawyer will be unavailable to provide legal services to them for an extended period

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5. Model Rule 7.3(a) states:

> A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

6. The rationale for the prohibition is that "there is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to be in need of legal services." Rule 7.3, Comment [1]. The rationale for the exception is that "there is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal (*sic*) or professional relationship . . . ." Rule 7.3, Comment [4]. The Committee views the exception under Rule 7.3(a) to permit in-person solicitation *only* of those current clients of the firm with whom the lawyer personally has had sufficient professional conduct to afford the client an opportunity to judge the professional qualifications of the lawyer and as not extending beyond the text of the Rule to apply to firm clients with whom her relationship is solely personal and not professional. *See, e.g.*, N.C. Bar Opinion 200, 1994 WL 899607 (N.C.St.Bar 1994) (lawyer after departure may contact clients of firm for whom he has been responsible); Arizona Comm. on Rules of Professional Conduct Op. No. 91-17 (June 10, 1991) (permissible before departure to notify clients with whom he had a personal, professional relationship); Kentucky Bar Opinion E-317 (1987) (permissible before departure to notify clients whom he personally represented of his impending departure).

7. Lawyers are permitted, subject to certain limitations, "to make known their services not only through reputation but also through organized information campaigns. Rule 7.2, Comment [1]. Rule 7.2 permits not only general advertising, but also targeted "written or recorded communication."

8. Model Rule 1.16(d) states:

> 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 other law.

9. If a current client chooses to remain with the firm or to move with the departing lawyer to her new firm, the lawyer(s) selected must continue the representation unless withdrawal is necessary under Rule 1.16(a) or permissible under Rule 1.16(b). In the Committee's opinion, "other good cause for withdrawal" does not exist under Rule 1.16(b)(6) solely because the client's matter is difficult or time consuming or has little chance of success, so long as no other enumerated predicate for withdrawal exists.

because of major surgery or an extended vacation.[10] In all of these situations, the clients have a right to know of the impending absence so that they can make informed decisions about future representation, even though the lawyer who temporarily will be unavailable is likely to believe that other lawyers in the firm are fully capable of handling the clients' matters during her absence.

The Initial Notice Must Fairly Describe the Client's Alternatives

Any *initial* in-person or written notice informing clients of the departing lawyer's new affiliation that is sent before the lawyer's resigning from the firm generally should conform to the following:

1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);
2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
4) the departing lawyer must not disparage the lawyer's former firm.[11]

The Departing Lawyer Should Provide Additional Information

In order to provide each current client with the information needed to make a choice of counsel, the departing lawyer also may inform the client whether she will be able to continue the representation at her new law firm.[12] If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future represen-

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10. *Cf.* Passanante v. Yormack, 138 N.J.Super. 233, 238, 350 A. 2d 497, 500 (N.J. 1975), *cert. denied*, 704 N.J. 144, 358 A.2d 199 (N.J. 1976) (lawyer has implicit obligation to inform clients of failure to act for whatever cause to permit clients to engage another lawyer).

11. ABA Informal Opinion 1457 (1980) found consistent with the Model Code of Professional Responsibility the timing, content, and choice of recipients of a form letter announcement by a lawyer that he had resigned from a law firm to become a member of another firm sent "soon after making the change to clients (and only those clients) for whose active, open, and pending matters he was directly responsible as a member of the ABC law firm immediately before his resignation." The form letter stated that the client had a right to decide how and by whom the pending matters would be handled and did not urge the client to choose the departing lawyer over the firm. In ABA Informal Opinion 1466 (1981), Opinion 1457 was extended to include associates, assuming the same fact pattern. The Committee there noted it "does not determine or advise upon issues of law," but then distinguished the facts presented to the Committee from the facts shown in Adler v. Epstein, 393 A.2d 1175 (Pa. 1978), *cert. denied*, 442 U.S. 907 (1979) (departing group of associates enjoined from actively soliciting clients of old firm as part of pre-departure efforts to borrow money on the basis of the clients). Today we reject any implication of Informal Opinions 1457 or 1466 that the notices to current clients and discussions as a matter of ethics must await departure from the firm.

12. The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation. When discussing an association with another firm, the departing lawyer also must be mindful of potentially disqualifying conflicts of interest in her old firm if the new firm currently represents any client with interests adverse to a client of the old firm. Should such a client be identified, the departing lawyer may need to be screened within the old firm no later than the commencement of serious discussions with the new firm. *See* ABA Formal Opinion 96-400. Lastly, the departing lawyer also might find that her work in her former firm would, upon her arrival at the new firm, create a conflict of interest under Rule 1.9 with one of her new firm's clients requiring the creation of a screen that, subject to the affected clients' consents in most jurisdictions, would avoid imputation of her individual conflict of interest to her new firm under Model Rule 1.10(a).

tation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter.[13] The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the firm, the departing lawyer and her new firm, or some other lawyer will continue the representation.

Joint Notification By the Lawyer and the Firm is Preferred

Far the better course to protect clients' interests is for the departing lawyer and her law firm to give joint notice of the lawyer's impending departure to all clients for whom the lawyer has performed significant professional services while at the firm, or at least notice to the current clients.[14] Unfortunately, this is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt her immediate termination. When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services, in the manner described above, and preferably should confirm the conversations in writing so as to memorialize the details of the communication and her compliance with Model Rules 7.3 and 7.1.[15]

Law Other Than the Model Rules Applies to the Departure

In addition to satisfying her ethical obligations, the departing lawyer also must recognize the requirements of other principles of law as she prepares to leave, especially if she notifies her current clients before telling her firm she is leaving. For example, the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.[16]

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13. In this respect, we agree with D.C. Bar Legal Ethics Opinion 273 (1997), "Ethical Considerations of Lawyers Moving From One Private Firm to Another."

14. Cal. Bar Ethics Op. No. 1985-86, 1985 WL 57193 at * 2, *supra*, n.1, interprets the California Rule to require both the departing lawyer and the law firm to provide fair and adequate notice of the withdrawal to the client sufficient to allow a client an opportunity to make an informed choice of counsel, and states that, where practical, the notice should be made jointly. ABA Informal Opinion 1428 (1979) suggested that, under the Model Code, both the departing lawyer and the law firm had an obligation to give the client "the choice as to whether or not the client wishes the firm to continue handling the matter or whether the client wishes to choose another lawyer or legal services firm." *See also* Cleveland Bar Opinion 89-5 (under the Model Code, either the departing lawyer or the law firm must give due notice to those clients of the former firm for whose active, open, and pending matters the lawyer is directly responsible).

15. The responsible members of the law firm must not take actions that frustrate the departing lawyer's current clients' right to choose their counsel under Rule 1.16(a) and Comment [4] by denying access to the clients' files or otherwise. To do so may violate the responsible members' ethical obligations under Rules 1.16(d) and 5.1.

16. *See, e.g.*, Siegel v. Arter & Hadden, 85 Ohio St. 3d 171, 707 N.E.2d 853 (Oho. Sup. Ct. 1999) (unresolved fact issues precluded summary judgment on unfair competition and trade secret counts because of departing lawyer's use of client list with names, addresses, telephone numbers and matters and fee information, despite notice to firm before notice to clients). *See also* Shein v. Myers, 394 Pa. Super. 549, 552, 576 A.2d 985, 986 (Pa. 1990), *appeal denied*, 533 Pa. 600, 617 A.2d 1274 (Pa. 1991) ("break-away" lawyers tortiously interfered with contract between their former firm and its clients by taking 400 client files, making scurrilous statements about the firm, and sending misleading letters to firm clients). In a joint opinion, the Pennsylvania and Philadelphia Bars warned that notice to clients before advising the firm of her intended departure "may be construed as an attempt to lure clients away in violation of the lawyer's fiduciary duties to the firm, or as tortious interference with the firm's relationships with its clients." Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Joint Op. No. 99-100, 1999 WL 239079 * 2. (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.1999). The Committee also noted that the "prudent approach" is for the departing lawyer not to notify her clients before advising the firm of her intention to leave to join another firm. *Id.*

Charges of breach of fiduciary and other duties owed the former firm also might be avoided if the departing lawyer and her new firm go no further than the permissible conduct noted in *Graubard Mollen v. Moskovitz*[17] and avoid the conduct the court found actionable, such as secretly attempting to lure firm clients to the new firm (even when the departing lawyer originated and had principal responsibility for the clients' matters) and lying to clients about their right to remain with the old firm and to partners about the lawyer's plans to leave. Although that case involved civil litigation, other courts have imposed discipline on lawyers for similar conduct because it involved dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).[18]

Entitlement to Files, Documents, and Other Property Depends on The Model Rules and Other Law

A lawyer moving to a new firm also may wish to take with her files and other documents such as research memoranda, pleadings, and forms. To the extent that these documents were prepared by the lawyer and are considered the lawyer's property or are in the public domain, she may take copies with her. Otherwise, the lawyer may have to obtain the firm's consent to do so.

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.[19] 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.

Conclusion

Both the lawyer who is terminating her association with a law firm to join another and the responsible members of the firm who remain have ethical obligations to clients for whom the departing lawyer is providing legal services. These ethical obligations include promptly giving notice of the lawyer's impending departure to those current clients on whose matters she actively is working.

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17. 86 N.Y.2d 112, 653 N.E.2d 1179 (1995). The Court stated that a departing lawyer's efforts to locate alternative space and affiliations would not violate his fiduciary duties to his firm because those actions obviously require confidentiality. Also, informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible. *Id.* at 1183. A departing lawyer should, of course, consult all case law applicable in the practice jurisdiction.

18. *See, e.g.*, In the Matter of Cupples, 979 S.W.2d 932, 935 (Mo. 1998); *In re* Cupples, 952 S.W.2d 226, 236-37 (Mo. 1997) (in separate disciplinary proceedings involving a lawyer in connection with his departure from two different law firms, the court held that the lawyer's conduct, which included secreting client files as he prepared to withdraw from a firm, removing files without client consent, failing to inform client of change in nature of the representation, and other actions constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Missouri's counterpart to Model Rule 8.4(c)). *See also In re* Smith, 853 P.2d 449, 453 (Or. 1992) (Before leaving law firm, lawyer met with new clients in his office, had them sign retainer agreements with him, and took files from the office. In imposing a four (4) month suspension from practice of law, the Court stated that "although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR 1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation.").

19. *See* Model Rule 1.16(d), *supra*, n.8. Pending client instructions, client property must be held in accordance with Model Rule 1.15.

The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.

Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm's information or other property.

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312)988-5300 CHAIR: Donald B. Hilliker, Chicago, IL; Loretta C. Argrett, Washington, DC; Jackson M. Bruce, Jr., Milwaukee, WI; William B. Dunn, Detroit, MI; James W. Durham; Mark I. Harrison, AZ; Daniel W. Hildebrand, Madison, WI; William H. Jeffress, Jr., Washington, DC; Bruce Alan Mann, San Francisco, CA; M. Peter Moser, Baltimore, MD. CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel.

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Appendix B

Form Letter Announcing Departure of a Lawyer from a Firm
Joint Announcement

[Date]

[Client Name]
[Client Address 1]
[Client Address 2]

Re: [Matter Reference]

Dear [Client Salutation],

Effective [Date], Susan Q. Lawyer will no longer be a member of Frip & Frap, LLP. Effective that date, she will be a member of Lawyer & Doe, PC. While a member of [or employed at] Frip & Frap, Ms. Lawyer provided legal representation to you. In light of her departure, you may choose whether you want to have Ms. Lawyer continue to represent you as a member of Lawyer and Doe, P.C.; have another lawyer from Frip & Frap continue to represent you; or engage another lawyer of your choosing.

In order to facilitate a smooth transition, please advise Ms. Lawyer and Melville Frip of Frip & Frap in writing at your earliest convenience of your choice of attorney. You may respond by noting your choice below, and signing and faxing this letter to Ms. Lawyer and Mr. Frip at 303-XXX-XXXX.

If you have any questions, please call either of us at 303-XXX-XXXX. Thank you for your prompt attention to this request.

Sincerely,

____
Susan Q. Lawyer

____
Melville Frip
Frip & Frap, LLC

☐ I wish to be represented by Susan Q. Lawyer and authorize the transfer of all paper and electronic files to Ms. Lawyer at her new firm, Lawyer & Doe, PC.

☐ I wish to be represented by Frip & Frap, LLC and would like to be contacted by Frip & Frap to discuss its continuing representation of me.

☐ I wish to be represented by ______________________________ and authorize the transfer of all paper and electronic files to her/him at the firm of ______________________________.

____
[Client Name]

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Common Pleas, Lexington County

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Appellate Case No: 2013-001522

State of South Carolina..Petitioner,

v.

Paul Gwinn....................................Respondent.

and

On Writ of Certiorari to the Municipal Court of West Columbia, Lexington County

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Appellate Case No: 2013-001519

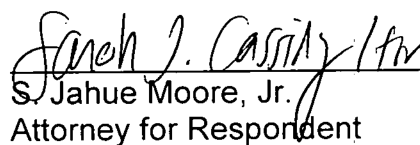
State of South Carolina ....Petitioner,

v.

Michael Morris Long, ... Respondent.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I hereby certify that the Final Brief of the Respondents complies with Rule 211(b), SCACR.



S. Jahue Moore, Jr.
Attorney for Respondent

September 9, 2013

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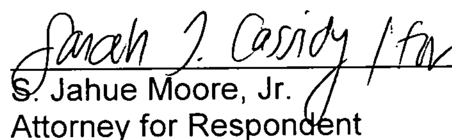
CERTIFICATE OF COMPLIANCE WITH RULE 210 (g)

I hereby certify that the Record on Appeal complies with Rule 210(g), SCACR, in that it contains all of the materials proposed required to be included by this Court's Order of August 8, 2013 and no any other material.



S. Jahue Moore, Jr.
Attorney for Respondent

September 9, 2013

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State of South Carolina ....Petitioner,

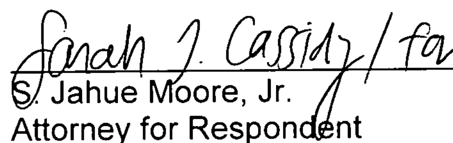
v.

Michael Morris Long, ... Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the Respondent's Brief upon counsel for the Petitioner by mailing copies to him at the address via the United States Mail this 9th day of September, 2013:

J. Emory Smith, Jr.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



S. Jahue Moore, Jr.
Attorney for Respondent

September 9, 2013