

NO. 39133-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FILED
APR 11 2013
COURT OF APPEALS
BY *Cm*
CLERK

JAMES ROLLAND, and SUSAN ROLLAND, husband and wife and
the marital community comprised thereof,

Appellant/Cross-Respondents,

v.

WAYNE WILLIAMS, and MELANIE STEWART, husband and wife
and the marital community comprised thereof, DOUGLAS
WYCKOFF and CAROL WYCKOFF, husband and wife and the
marital community comprised thereof, ROLLAND O'MALLEY,
WILLIAMS & WYCKOFF, P.S., a Washington professional services
corporation, and WILLIAMS WYCKOFF & OSTRANDER, PLLC, a
Washington professional services limited liability company,

Respondents/Cross-Appellants

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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INTRODUCTION

The trial court correctly dismissed Rolland's tortious interference and breach of fiduciary duty claims on summary judgment, where Rolland conceded that he could not prove causation or damages, required elements of both tort claims. The trial court also correctly rejected Rolland's argument that the court should presume (1) that a client is tainted if a communication to the client is an improper solicitation; and (2) causation and damages if a client is tainted. The trial court is correct under controlling case law. This Court should affirm.

Rolland's CPA claim also fails due to his acknowledgment that he cannot prove causation or damages, necessary CPA elements. The trial court correctly dismissed the CPA claim on summary judgment, where it is a private cause of action that does not affect the public interest. This Court should affirm.

Finally, this Court should also affirm the summary judgment dismissal of Rolland's unjust enrichment claim. Fees earned by Williams and Wyckoff representing former ROWW clients who hired WWO are not a benefit Rolland conferred, but the product of Williams' and Wyckoff's labor. The court's decision following trial moots this issue, and Rolland does not appeal from that decision.

RESTATEMENT OF ISSUES

1. Did Williams and Wyckoff have a right and an ethical obligation to notify ROWW clients of changes at the firm to allow the clients to make an educated decision about their representation?

2. Did the trial court correctly dismiss, on summary judgment, Rolland's claims for tortious interference with a business expectancy and breach of fiduciary duty, where Rolland conceded that he could not prove factual cause – *i.e.*, that ROWW clients who hired WWO would have hired Rolland but for the notification letter?

3. Did the trial court correctly dismiss Rolland's CPA claim on summary judgment, where (1) Rolland's claim is a private cause of action against Williams and Wyckoff; and (2) (as with the other claims) Rolland concedes that he could not prove causation or damages?

RESTATEMENT OF THE CASE

- A. The trial court dismissed Rolland's tort claims on summary judgment because Rolland admittedly could not prove causation, an element of each of Rolland's claims.**

James Rolland acknowledges that he appeals only from the trial court's partial summary judgment ruling dismissing his claims for tortious interference with a business expectancy, breach of fiduciary duty, unjust enrichment, and CPA violations. BA 1-2, 8. As such, Wayne Williams and Douglas Wyckoff begin by clarifying the trial court's partial summary judgment ruling.

As discussed in Rolland's opening brief and in greater detail below, Rolland's tort claims and CPA claims revolve around the letters Williams and Wyckoff sent to clients they (and Dane Ostrander) represented while at Rolland, O'Malley, Williams & Wyckoff, P.S. ("ROWW"), notifying the clients that Williams and Wyckoff would be starting a new firm, Williams, Wyckoff and Ostrander, PLLC ("WVO"). BA 3-6, *infra* Statement of the Case § D. Although Rolland spends significant time discussing whether the notification letters were an improper solicitation, that was not

the basis of the trial court's summary judgment ruling. *Compare* BA 3-6, 9-18, 21-23 *with* 12/07 RP 22-23.¹

Williams and Wyckoff moved for summary judgment on the ground that Rolland had not shown that the notification letters had caused any damage to Rolland, *i.e.* that the notification letters caused ROWW clients to hire WWO instead of Rolland. CP 456, 473, 474-75; 12/07 RP 7-10. In response, Rolland readily admitted that he could not prove factual causation (12/07 RP 15):

Now we cannot prove to meet counsel's objection head on because it can never be proven . . . that but for the actions, a client of [WWO] – a client who eventually went to [WWO] would instead have gone to [Rolland].

The trial court dismissed Rolland's tort claims because Rolland failed to show causation:

I think that [Rolland] has the burden to come forward [on] each of these causes, each of which involved the element of damages to show that one or more – one client would have gone with Mr. Rolland but for these letters that were sent out and I didn't see that in the record, so, I'm going to grant the motion for summary judgment.

Id. at 23. The court dismissed Rolland's CPA claim on the ground that it was "a private action between individual parties." *Id.*

¹ This brief uses dates to avoid confusion as the RP are not consecutively paginated.

The court expressly noted that there were “arguably” fact questions about whether the notification letters crossed the line into improper solicitations. *Id.* at 23. In other words, whether the content of the letters improperly solicited clients was not the basis of the summary judgment ruling. Yet Rolland spends much of the brief discussing factual issues surrounding the notification letters. BA 3-6, 9-18, 21-23. Williams and Wyckoff provide the following background to supply context and clarity to Rolland’s misleading (and largely irrelevant) factual assertions.²

B. Rolland, Williams, and Wyckoff worked together at ROWW for many, many years before Williams and Wyckoff had to terminate Rolland’s employment.

Rolland began working with Thomas O’Malley in 1980, and the two incorporated Rolland and O’Malley in 1984. CP 84; 479-80. The firm name was changed to add Williams in 1988. CP 480. The firm name was again changed to add Wyckoff in 1992, becoming ROWW. CP 480. O’Malley left the firm in 2000, after which ROWW hired Dane Ostrander. CP 84, 480. Although ROWW shareholders sometimes referred to themselves as “partners,” ROWW is a professional service corporation. CP 479-80, F/F 1.1.

² This statement of facts is based on the summary judgment record not on the trial.

C. Williams and Wyckoff decided to terminate their working relationship with Rolland after unsuccessfully working with him to remedy his drinking problem and other difficult behaviors.

Although Rolland repeatedly accuses Williams and Wyckoff of improper and unfair treatment, he omits the events necessitating his termination. Rolland acknowledges that he suffers from alcoholism. CP 84. Rolland's addiction caused problems at ROWW, coming to a head in November 2004. CP 481-82.

Sometime before November 2004, it became apparent that Rolland was intoxicated while at the office. CP 481. He had attended treatment and/or detoxification at least twice, but without success. *Id.* Rolland collapsed in his office during work hours and was taken to the hospital. *Id.* This forced Williams and Wyckoff to confront Rolland. CP 481. They told him that he had to control his alcoholism, and asked him to take time off – with pay – to seek treatment. *Id.* Williams and Wyckoff agreed to handle Rolland's caseload while he was in treatment. CP 84.

Rolland did not immediately seek treatment, instead traveling to Mexico for a vacation. CP 481. When he returned to Olympia, Rolland went through detoxification for several days, after which Williams drove him to a treatment facility in Oregon. *Id.*

After just a few days, Rolland left without completing treatment, telling the facility staff he had to return to Olympia to try a case. CP 481-82. That was untrue. CP 482. Rolland had not handled any litigation for several years. CP 378.

Rolland told Williams and Wyckoff that he wanted to return to ROWW. CP 409. Although Williams and Wyckoff had previously told Rolland that they could not continue practicing law with him until he completed treatment, they allowed him to return to ROWW after consulting with a specialist in treatment for alcoholism. CP 409, 482. Per the specialist's recommendations, Rolland signed an agreement spelling out Williams' and Wyckoff's expectations that Rolland would take detailed steps, including regular Alcoholics Anonymous treatment, to stay sober, and (1) have consistent work hours (defined as from 9:00 a.m. to 4:00 p.m.); (2) follow established office practices when assigning work to staff; (3) document all file activity and use tickle dates; and (4) minimize staff time used for personal reasons. CP 538.

Although Rolland apparently complied with the requirements pertaining to his sobriety, he did not follow the other terms of the agreement. CP 411-13, 482. Rolland did not keep consistent hours. CP 411. He failed to follow established office practices,

document file activity, or establish tickle dates. *Id.* He overused staff time for personal reasons, disrupted the staff, made little or no effort to cooperate with his partners, and generally demonstrated a lack of care regarding the practice of law. CP 411-12.

Williams and Wyckoff held a special meeting on March 19, 2005, at which they decided to terminate Rolland. CP 480, 536-37. They discussed the issue for the first time a day or two before the meeting on the 19th – most likely on March 18. CP 410. They told Rolland about their decision at the next regular meeting, Tuesday March 22, 2005. CP 480.

D. After notifying Rolland and incorporating their new lawfirm, WWO sent letters to their ROWW clients explaining that the clients could hire WWO or Rolland.

When Williams and Wyckoff met with Rolland on March 22, they did not know Rolland's future plans. CP 483. They told Rolland that they needed to notify ROWW's clients that Williams and Wyckoff were leaving ROWW to start a new firm. CP 94, 405, 591. They asked Rolland for input on the language to be used in the notification letter, but received none other than his new contact information.³ CP 405.

³ As discussed below, it took Rolland 10 days to provide contact information.

Although ROWW clients were certainly firm clients – not the clients of any individual attorney – each ROWW attorney handled his own caseload. CP 481. In the years leading up to his termination, Rolland handled only legal tasks that did not involve litigation. *Id.* Williams handled his own caseload as well as most of Rolland’s cases that went to litigation. *Id.* Wyckoff and Ostrander also “pretty much handled all of their own caseloads, from the time the client came in through the door until a final decision was made at some level of the workers compensation system.” *Id.*

Rolland suggests that Williams and Wyckoff agreed to wait until March 28 to send notification letters to all ROWW clients, so that Rolland could first obtain new contact information. BA 4. But Williams and Wyckoff only agreed to wait until March 28 to send notification letters to ROWW clients Rolland represented (*compare* BA 4 *with* CP 14, 94, 591), as Williams and Wyckoff clearly explained in their memorandum to Rolland summarizing the March 22 meeting (CP 14):

We would be happy to wait to send letters to your existing clients until you can get a phone and mailing address. However, we feel we must do something by [March 28]. You can call Qwest and get a new phone in one day. Please get the information to Julie by noon, [the 28th] to be included in our mailing.

Williams and Wyckoff felt that they needed to notify ROWW clients they (and Ostrander) represented as soon as possible because timeliness is “critical” in workers compensation cases, which can move very quickly. CP 481. A claimant has 15-to-60 days to request reconsideration or an appeal before an order becomes final. *Id.* With as little as 15-days to act, WWO could not sit on their hands. *Id.*

To that end, beginning on March 23, WWO sent a form letter to non-pension⁴ ROWW clients Williams, Wyckoff, and Ostrander represented. CP 483-84. This letter notified clients that (1) Rolland, Williams, and Wyckoff would no longer be practicing together as ROWW; (2) Williams, Wyckoff, and Ostrander would continue to practice together at WWO; (3) a WWO attorney had been assigned to handle each client’s case temporarily; and (4) that WWO would contact the clients in the near future to provide Rolland’s contact information and give the clients the option to transfer their case to Rolland. CP 484, 539-40. The notification letter enclosed authorization forms necessary for WWO to access

⁴ As discussed below, many of ROWW’s clients were pension-clients whose cases were complete except that the clients were paid pension checks every month through the Department of Labor and Industries. *Infra*, Statement of the Case § H. These pension clients were still active ROWW clients as ROWW was responsible for processing the pension checks. *Id.*

the Department of Labor & Industries' database. CP 539-40, 633-34. Without such access "clients would drift and potentially have their rights jeopardized." CP 634.

E. Once Williams and Wyckoff had Rolland's new contact information, they sent a notification letter to Rolland's ROWW clients – Rolland sent a letter to all ROWW clients the same day.

Although Williams and Wyckoff told Rolland that they needed to send notification letters to Rolland's ROWW clients by March 28, Rolland subsequently asked them to wait three more days. CP 405-06. Williams and Wyckoff agreed, sending notification letters to Rolland's ROWW non-pension clients on March 31. CP 405-06, 484. That letter, of course, included Rolland's new contact information that WWO had finally received from Rolland. *Id.*

That same day, Rolland sent a letter to all ROWW non-pension clients. *Id.* Rolland's letter enclosed: (1) an election form; (2) an employment contract; (3) an L&I Department authorization to inspect the file; (4) a notice of address change; (5) an authorization for healthcare disclosure; and (6) a power of attorney. CP 484.

After WWO's and Rolland's notification letters went out, WWO became aware that some former ROWW clients had signed

employment contracts with both WWO and Rolland. CP 484. Williams contacted the WSBA, who instructed Williams that it would be appropriate for WWO to contact the clients to clarify their choice of representation. *Id.* Of eight such clients, five chose WWO and three chose Rolland. *Id.*

F. WWO forwarded calls to Rolland and provided callers with his contact information.

WWO's office manager⁵ Julie Hatcher did not recall any phone calls for Rolland immediately after WWO sent out the March 23 and 24 notification letters to ROWW clients represented by Williams, Wyckoff, and Ostrander. CP 539, 626. Rather, Hatcher's recollection was that WWO started getting phone calls for Rolland after the March 31 notification letters to ROWW clients Rolland had represented. CP 626. WWO staff told the callers that Rolland was no longer with the firm, and asked if they wanted his contact information. *Id.* WWO also arranged for a message to be left at ROWW's telephone number giving callers the option to forward their calls to WWO or to Rolland. CP 250, 484.

Williams and Wyckoff never instructed the staff to tell callers that they did not know where to reach Rolland. CP 626. Hatcher

⁵ Formerly ROWW's office manager. CP 539.

was not aware of any staff member telling a caller that they did not know where Rolland was located. CP 626-27. They “tried to get clients to [Rolland] that wanted to talk with him.” CP 627.

Rolland claims that around March 23 and March 24, WWO told clients, who called asking for Rolland, that they did not know how to reach him, despite the fact that they knew his home telephone number. BA 5. Rolland refers to two ROWW clients, Allan Duckworth who states that Ostrander told him that WWO did not have a forwarding address for Rolland, and Susan Martin who states that whoever answered the phone at WWO told her that they did not know how to contact Rolland. CP 543, 615. It appears that both clients contacted WWO before Rolland provided new contact information on March 31. *Id.* In any event, both of these clients ultimately hired Rolland. CP 543, 615, 652-53.

G. Although Rolland had only 31 clients when Williams and Wyckoff started WWO, he obtained 52 former ROWW clients.

The trial court found, and Rolland does not challenge⁶, that:

- ◆ “All ROWW clients were notified of the change in ROWW’s status.”

⁶ Rolland does not challenge any of the trial court’s findings. BA 1-2.

- ◆ “All former ROWW clients chose the firm they wished to represent them.”
- ◆ “No evidence was presented concerning the comparative value of cases of those clients who chose to be represented by WWO and [Rolland’s] law firm.”

CP 1203, FF 1.8-1.10.

Rolland claims that he was able to “recapture only approximately 30 former ROWW clients” after he and Williams and Wyckoff sent out the notification letters in March. BA 6 (citing CP 584, 701, 714). But Rolland previously identified 52 former ROWW clients who hired him. CP 652-53, 700. Thus, Rolland “recaptured” 52 ROWW clients, but was apparently able to keep only 30. BA 6. Rolland also neglects to mention that he was representing only 31 clients at ROWW.⁷ CP 440, 700-01, 714.

H. Williams and Wyckoff immediately gave Rolland a portion of ROWW’s cash on hand and began paying him his percentage of income from completed pension fund cases.

When Williams and Wyckoff decided to terminate Rolland, ROWW’s practice was primarily workers compensation. CP 480. Often ROWW was paid from monthly pension fund checks the Department of Labor & Industry issued to a particular client. CP

⁷ These 31 clients had 42 L&I claims. CP 440, 700-01, 714.

482-83. ROWW had two major assets – fixed assets such as furniture and computers, and pension notes receivable. CP 483.

In pension cases, ROWW deposits each Department of Labor and Industry check and divides the payment between the client and the firm's fee under the terms of a Promissory Note. CP 482. ROWW had about 115 pension clients whose claims were finalized before Rolland was terminated on March 22, 2005. *Id.*

After terminating Rolland, Williams and Wyckoff began immediately paying Rolland his one-third portion of ROWW's pension fee income. CP 482. ROWW initially deducted a 10% administrative fee before paying Rolland, but later reduced the fee to 5%, which is less than WWO's actual administrative costs and less than the administrative fee another local workers compensation firm charges its retired partners. CP 483.

Williams and Wyckoff also immediately gave Rolland one-third of all ROWW's cash on hand, placing the rest in the bank. CP 537. They paid him a salary for the month of March (*id.*) and divided the fixed assets one-third to Rolland and two-thirds to

Williams and Wyckoff.⁸ CP 483. They provided Rolland with inventories and appraisals. *Id.*

Between March 22, 2005, and October 19, 2006, ROWW's total payments to Rolland totaled \$236,445.93. CP 482. Rolland has continued to receive similar monthly cash distributions since then. *Id.*

I. Procedural History.

Rolland filed suit on October 5, 2005. CP 7. As discussed above, the trial court granted Williams' and Wyckoff's motion for summary judgment, dismissing Rolland's claims for: (1) winding up or judicial dissolution; (2) breach of fiduciary duty; (3) tortious interference with a business expectancy; (4) CPA violations; and (5) unjust enrichment. CP 749-50. Rolland moved for reconsideration (CP 751-59, 764-66) and the trial court denied Rolland's motion in part and granted it in part, allowing Rolland's claim for judicial dissolution to go to trial. CP 792-93.

Rolland states that the only issue remaining for trial was the "distribution of ROWW corporate assets." BA 8. Specifically, the court tried the following issues:

⁸ The parties agreed at trial that ROWW's fixed assets had been equitably divided. CP 1164.

- ◆ Work in progress – Rolland's claim that he was entitled to one-third of all fees WWO collected for work WWO performed on behalf of former ROWW clients who hired WWO;
- ◆ Buy/Sell Agreement – Rolland's claim that the trial court should enforce ROWW's Buy/Sell Agreement, applicable only when a shareholder departs ROWW, even though Rolland, Williams, and Wyckoff remain shareholders of ROWW;
- ◆ Judicial Dissolution – Rolland's request that the trial court forcibly dissolve ROWW and liquidate its assets;
- ◆ Excess distributions to Rolland – Williams and Wyckoff's counterclaim for reimbursement for over \$30,000 in distributions mistakenly overpaid to Rolland;
- ◆ Vacation time paid to former ROWW employees – Williams' and Wyckoff's counterclaim for reimbursement from ROWW for the expense of accrued vacation time WWO bore for former ROWW employees;
- ◆ Disputed pensions: Williams' and Wyckoff's claims (1) that Rolland owed them their share of fees Rolland collected on four pension cases that were finalized before March 22, 2005; and (2) for reimbursement of the one-third share of six pension cases ROWW paid to Rolland, where the six clients hired WWO and were finalized after March 22, 2005;
- ◆ Administrative fee for pension funds – Rolland's claim that the administrative fee WWO charged for processing the pension fees was too high;
- ◆ Insurance policies – the parties' dispute about how to transfer a life insurance policy ROWW maintained for Rolland to Rolland's new firm; and
- ◆ Indemnification – Williams' and Wyckoff's claim for two-thirds reimbursement of their attorney fees from ROWW.

CP 1162-66. Rolland does not appeal from the trial court's resolution of any of these issues decided after trial. BA 1-2, 8.

Rather, Rolland appeals only from the summary judgment dismissal

of his claims for tortious interference, breach of fiduciary duty, CPA violations, and unjust enrichment. *Id.*

ARGUMENT

A. Standard of review.

This Court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court. ***Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC***, 152 Wn. App. 388, 394, 216 P.3d 1055 (2009). Summary judgment is appropriate when there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. ***Roe***, 152 Wn. App. at 394.

To avoid summary judgment the non-moving party must “make out a prima facie case concerning the essential element of its claim.” ***Boguch v. The Landover Corporation***, Slip Op. # 62446-6 at 12 (Div. I, Dec. 21, 2009). A failure of proof regarding an essential element “renders all other facts immaterial.” ***Boguch***, Slip Op. # 62446-6 at 12 (quoting ***Young v. Key Pharms., Inc.***, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))).

B. Williams and Wyckoff had a right and an obligation to notify clients of the changes to ROWW, so that clients could make educated choices regarding their representation. (BA 8-18).

Rolland spends 10 pages of his brief discussing tortious interference and breach of fiduciary duty before addressing the basis of the trial court's decision – Rolland's failure to prove causation and damages, elements of both of his tort claims. BA 8-18. These arguments forget that Williams and Wyckoff had a right and an ethical obligation to notify ROWW clients about firm changes affecting their representation. Williams and Wyckoff respond to Rolland's largely irrelevant arguments only briefly.

When a lawyer leaves a lawfirm to practice at another firm, he has an "ethical obligation" to assure that clients are informed of his departure if he is "responsible for the client's representation" or "plays a principal role" in his representation. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 at 2⁹ (1999). This ethical obligation arises from the client's right to choose the lawyer who will continue to represent her, and the lawyer's ethical obligation to take steps to protect his client's interest when

⁹ ABA opinions do not have pagination in their online format. Pin cites are to the page numbers on the attached copy of the opinion.

terminating representation. *Id.* at 2; RPC 1.16(d). A lawyer may provide written notification to clients he was not responsible for representing. ABA Comm. on Ethics and Prof'l Responsibility, 99-414 at 2-3.

While it is plainly clear that a departing lawyer may – and in fact, must – notify his existing clients, it is unclear exactly what a lawyer can permissibly say. The Rules of Professional Conduct and the Model Rules (largely adopted by the RPCs) do not expressly govern a lawyer's obligations regarding communications with existing clients when a lawyer leaves a lawfirm. See Geoffrey C. Hazard at al., The Law of Lawyering, 57-11 (2008 Supplement). Rather such obligations are “extrapolate[d]” from Rules 7.1 though 7.3, governing a lawyer's communications regarding his services (7.1), advertising (7.2), and contact with prospective clients (7.3).
Id.

Generally speaking, a departing lawyer may:

- ◆ “Solicit work” orally or in writing from those clients he represented;
- ◆ Contact, in writing, firm clients he did not represent; and
- ◆ Indicate the lawyer's willingness and ability to continue representing the client.

Supra, Law of Lawyering at 57-12; *supra* ABA opinion at 4. A departing lawyer must avoid false and misleading statements and may not disparage his old lawfirm. *Id.*

The trial court did not resolve whether the notification letters went beyond proper notice to ROWW clients, and this Court need not address the issue. *Supra*, Statement of the Case § A. It is clear, however, that Williams, Wyckoff, Ostrander, and Rolland had an ethical obligation and a right to notify ROWW clients they represented, and a right to notify ROWW clients they did not represent.

C. Rolland asks this Court to create a new standard for tortious interference and breach of fiduciary duty claims, under which the trial courts would presume causation and damages upon finding that a departing attorney improperly solicited clients. (BA 18-26).¹⁰

1. Causation and damages are undeniably elements of tortious interference and breach of fiduciary duty.

Controlling Washington precedent requires Rolland to establish factual causation – that the notification letters caused clients who would have otherwise selected Rolland to select WWO.

¹⁰ This brief addresses both tortious interference and breach of fiduciary duty in the same argument section as Rolland's argument does not differentiate between these two torts. BA 8-18.

To prevail on a claim for tortious interference, the claimant must prove the following five elements:

1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;
3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant damages.

Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 28, 829 P.2d 765 (1992) (citing ***Pleas v. City of Seattle***, 112 Wn.2d 794, 800, 804, 774 P.2d 1158 (1989)). ***Sintra*** reiterates that there must be a “causal relationship” between the wrongful interference and the damages alleged. 119 Wn.2d at 28. If the claimant makes a *prima facie* case of all five elements of tortious interference, then the defendant can raise the affirmative defense that their actions were privileged or justified. ***Pleas***, 112 Wn.2d at 803-04.

In ***Pleas***, the Court actually rejected the assertion that damages could be presumed if the claimant successfully proved wrongful interference (elements three and four). 112 Wn.2d at 800, 803-04. There, developer Parkridge sued the City of Seattle for tortious interference with a business expectancy after the City

“intentionally prevented, blocked, and delayed” the building project at the behest of a local neighborhood group opposed to Parkridge’s proposed project. 112 Wn.2d at 799, 804-05. The issue in *Pleas* was whether a party claiming tortious interference had to prove that the interference was intentional *and* wrongful. *Id.* at 802-03.

The Court held that tortious interference can be based on “the defendant’s pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff’s contractual or business relationships.” *Id.* at 803-04. The Court summarized this approach as requiring proof that the interference was wrongful, either by showing improper motives, or improper means. *Id.* In other words:

A claim for tortious interference is established when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. . . .

Id. at 804 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365, 1368 (1978)).

Finding sufficient evidence of wrongful interference, the Court went on to address the Court of Appeals holding that “Parkridge is not automatically entitled to damages merely because the City was found to have acted arbitrarily and capriciously.” *Pleas*, 112 Wn.2d at 805. The Court held that damages could not

be “automatic[,],” but concluded that Parkridge had not really claimed as much. *Id.* The Court then continued on to analyze proximate cause (*id.* at 807):

Having found that Parkridge presented sufficient evidence to support its claim for tortious interference, we must next determine whether the City’s actions were the proximate cause of Parkridge’s damages.

Rolland mentions both *Sintra* and *Pleas* in passing, but fails to mention their agreement that proximate cause is a required tortious interference element, and fails to mention the *Pleas* Court’s holding that damages do not “automatically” follow from a showing that the interference alleged was wrongful. BA 10. Rolland’s request for a presumption is plainly inconsistent with *Pleas*. The *Pleas* Court rejected a request for a presumption of causation and damages when the claimant proves wrongful interference. *Pleas*, 112 Wn.2d at 805. Yet Rolland asks this Court for the same presumption, *i.e.* to presume causation and damages based on Rolland’s allegation that Williams and Wyckoff wrongfully interfered via the allegedly improper notification letters to ROWW clients. This Court should reject Rolland’s claim under *Pleas*.

Proximate cause is also a necessary element of a breach of fiduciary duty claim. *McCormick v. Dunn & Black, P.S.*, 140 Wn.

App. 873, 894, 167 P.3d 610 (2007), *rev. denied*, 163 Wn.2d 1042 (2008); ***Interlake Porsche + Audi, Inc. v. Blackburn***, 45 Wn. App. 502, 728 P.2d 597 (1986), *rev. denied*, 107 Wn.2d 1022 (1987) (“Once the breach of a fiduciary duty has been established, the plaintiff must prove the damage resulting from the breach”). To establish liability for a breach of fiduciary duty, the claimant must show that the defendant breached a fiduciary duty owed to the claimant and that “the breach was a proximate cause of the losses sustained.” ***McCormick***, 140 Wn. App. at 894. This Court noted that Washington courts have not defined the scope of the fiduciary duty a shareholder owes his fellow shareholders in a close corporation “beyond the common sense prohibition against retaining personal profit owing to the corporation.” *Id.*

2. Rolland asks the Court to presume that the notification letter tainted ROWW clients and to presume causation and damages based on the allegedly improper solicitation.

Despite controlling authority requiring proof of causation and damages (***Sintra***, ***Pleas***, and ***McCormick***, *supra*), Rolland asks this Court (and asked the trial court) to adopt two legal presumptions to alleviate his burden to prove causation and damages. First, Rolland argues for a presumption that improper solicitation necessarily “taints” the client. BA 14-18; CP 70-71, 573-

76, 790. Second, Rolland argues for a presumption that the “taint” proximately causes damages. *Id.*

Arguing for a presumption of taint, Rolland asserts that a wrongful solicitation necessarily taints a client, such that the client cannot freely choose the lawyer who will represent him:

When a breach of fiduciary duty occurs by way of a clear solicitation of the client prior to any public announcement of departure,¹¹ any “choice” later made by the client is tainted. Then, it is not a choice of the client but a solicitation by the departing lawyer.

BA 16 (emphasis Rolland’s); CP 70, 573. Rolland never offers any proof that ROWW clients were actually tainted by Williams’ and Wyckoff’s notification letters. Rolland provided only two client declarations, and neither client even suggested that they were tainted by Williams’ and Wyckoff’s notification letter. CP 543-44 (Duckworth) and CP 614-15 (Martin). In fact, Duckworth did not receive a letter – he was never an ROWW client, but hired Rolland after the breakup. CP 641. Martin received Williams’ and Wyckoff’s letter, but sought out and hired Rolland anyway, never expressing that the letter influenced her in any way. CP 614-15.

¹¹ It is unclear what Rolland means by a solicitation “prior to any public announcement of departure.” BA 16. The notification letters Williams and Wyckoff sent announced their departure after they informed Rolland of their departure. These letters are the only “solicitation” Rolland alleges.

Rolland apparently made no effort to talk to ROWW clients who hired WWO, instead just assuming that they would not talk to him, or would not disclose that the notification letters had influenced their decisions. BA 16; CP 70-71, 573-76, 790. He did not put on an expert who might have testified that the language in the notification letters could have the effect of tainting a client. *Id.* Instead, he argued that the trial court and this Court should presume taint just from the notification letters' language. *Id.*

Rolland's argument for a presumption of causation and damages rests on his argument for a presumption of taint. He argues that taint (presumed from a wrongful solicitation) presumptively causes damages:

[T]he wrongful solicitation taints the selection by the client, and the one toward whom the fiduciary duty has been violated need not show that but for the wrongful solicitation the client would have chosen differently, i.e., Rolland over WWO.

BA 24-25. Rolland made precisely the same argument to the trial court:

[C]hoices made by clients under circumstances of breach by a departing lawyer of fiduciary duty are tainted, and the issue is most certainly not one requiring the non-breaching lawyers being required to show that "but for" the violations, the client would have stayed.

CP 790. Rather, Rolland argues that if he proves that Williams and Wyckoff breached their fiduciary duty by sending the notification letters, then the burden shifts to Williams and Wyckoff to prove that causation is lacking. CP 757-58.

Rolland makes a similar claim with respect to damages:

[THE COURT] Is there no point at which [Rolland has] to show damages? Is that what you're telling me?

[COUNSEL FOR ROLLAND] Well, what I'm telling you is the – is the case law says that the choice of the client is tainted and that, therefore . . . that's exactly correct. . . .

01/25 RP 8-9. Rolland claimed that if he proved that a solicitation was improper, then the burden of proof on damages shifted to Williams and Wyckoff to show that the solicitation had not damaged Rolland. *Id.* In other words, if the notification letter was improper, then Rolland argues that he would never have to prove damages of any kind. *Id.*

3. Rolland offers no good reason to presume causation and damages – elements of a cause of action for tortious interference and breach of fiduciary duty.

Rolland offers no reason to presume causation and damages, except his unsupported assertion that it is impossible to prove that a client would have hired Rolland but for the notification letters. CP 790; 12/07 RP 15. We require tort plaintiffs to prove

causation of damages in virtually all cases, even if proof is difficult. For example, this Court recently affirmed summary judgment dismissal of a home seller's negligence claim, where the seller failed to prove that his realtor's error in listing the property proximately caused any damages. **Boguch**, Slip Op. # 62446-6 at 15. There, the realtor mistakenly listed the property on the internet showing the wrong boundaries. *Id.* at 2-3. The seller claimed that he would have sold the property sooner or at a higher price, but for the realtor's error. *Id.* at 15.

This Court affirmed summary judgment, where the seller failed to identify any prospective buyer who was actually dissuaded from purchasing the property due to the realtor's negligence. *Id.* at 19. The Court analogized to cases involving clients' claims of professional negligence against their attorneys, in which our Supreme Court has held that principles of proof and causation do not vary from ordinary negligence cases. *Id.* at 16.

There could be cases in which clients would testify that they were persuaded to choose lawyer A instead of lawyer B after an improper solicitation letter. Finding such a witness would be no more difficult than finding the prospective home buyer the Court demanded in **Boguch**. But Rolland has never even attempted to

prove that this letter caused any client to choose WWO instead of ROWW.

Moreover, applying Rolland's proposed presumptions to this case would be completely unreasonable. Four-to-five days after the notification letters Williams and Wyckoff sent out, Rolland sent out letters to all ROWW clients stating his willingness and ability to represent them. CP 419. Williams' and Wyckoff's notification letters to Rolland's ROWW clients went out the same day as Rolland's letters. Thus, many ROWW clients received the two letters on or about the same day, and all received them within one week of one another. *Supra*, Statement of the Case § D-E.

Of Rolland's 31 ROWW clients, 19 hired Rolland. *Compare* CP 440-41 *with* CP 652-53. Thirty-three clients who had been represented by Williams, Wyckoff, or Ostrander while at ROWW chose to hire Rolland, for a total of 52 former ROWW clients. *Id.* Rolland's clientele increased by 60%. 63% of Rolland's clients were previously represented by Williams, Wyckoff, or Ostrander. These facts simply do not give rise to a presumption (even if one were ever appropriate) that Williams' and Wyckoff's notification letters caused clients to hire WWO when they would have otherwise hired Rolland.

Finally, these two presumptions would elevate the ethical rules to a civil liability standard. Rolland repeatedly asserts that if the notification letter is an improper solicitation, then it is a breach of fiduciary duty imposing civil liability, even absent proof of causation and damages. BA 14-18, 24-25. But the RPCs expressly provide that a violation of an ethical obligation should not give rise to a presumption that a lawyer breaches a legal duty:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.

RPC Preamble ¶ 20.

4. The cases Rolland relies upon are inapposite and/or simply do not stand for the contention Rolland asserts.

All but ignoring *Pleas* and *Sintra*, controlling Washington authority (*supra*, Argument § C 1), Rolland attempts to support his argument for presumptions of taint and causation with four foreign cases. BA 18-20 (citing *Dowd & Dowd Ltd. v. Gleason*, 352 Ill. App. 3d 365, 816 N.E.2d 754, *rev. denied*, 211 Ill.2d 573 (2004); *Jewel v. Boxer*, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13, 17 (1984)); *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983), *overruled by Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 28 Cal. Rptr.2d 475

(1994); and *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 493 A.2d 1175 (1978)).

Contrary to Rolland's argument, neither *Rosenfeld* nor *Jewel* creates a "rule" that a solicitation taints client choice, much less a rule that a solicitation amounts to a presumption of causation and damages, such that a showing of factual causation is not required. BA 18. Neither case even involves a solicitation by a departing attorney.

Jewel did not involve allegations of improper solicitation or claims of tortious interference or breach of fiduciary duty. In *Jewel*, the lawfirm dissolved amicably. 156 Cal. App. 3d at 174. Two partners created one firm, and two created a different firm. *Id.* The partners all sent an announcement letter to the clients whose cases they were handling at the former firm, and all of the clients elected to stay with the attorneys who had represented them at the former firm. *Id.* at 174-75.

The sole issue in *Jewel* was the proper allocation of fees. *Id.* at 175. The *Jewel* court held that a client's right to choose his or her attorney did not dictate the allocation of fees. *Id.* at 178. Rolland apparently extrapolates from this limited holding the "rule" that an improper solicitation automatically taints client choice, giving

rise to a presumption of causation and damages. BA 16. That is a *non-sequitur*.

Like *Jewel*, *Rosenfeld* did not involve a claim that the departing attorneys improperly solicited firm clients. In *Rosenfeld*, the lawfirm at issue was a partnership-at-will. Two attorneys handled a large antitrust case for client “Rectifier” for five years. 146 Cal. App. 3d at 208-09. The vast majority of the firm’s compensation was contingent. *Id.* Partners were paid based on their partnership percentage regardless of their work on any particular matter. *Id.* at 209. Thus, in the five years that the departing attorneys worked on Rectifier, they received \$800,000 in compensation despite producing almost no income for the firm. *Id.*

When the departing attorneys became convinced that the Rectifier case would soon go to trial, producing between \$20 million and \$100 million, they demanded that the other partners double their partnership percentage to be paid from the Rectifier case, threatening to withdraw from the firm if they refused. *Id.* at 209-10. As the partners attempted to negotiate, the departing attorneys made more demands, stated that they would never settle the dispute, and stated their belief that Rectifier would hire the

departing attorneys to complete the case if they left the firm. *Id.* at 210.

When the firm notified Rectifier of the dispute, Rectifier asked that the departing attorneys continue representing it. *Id.* at 210. The departing attorneys left the firm two weeks later. *Id.* Rectifier fired the firm and hired the departing attorneys one month after they left the firm. *Id.*

In ***Rosenfeld***, there was no suggestion that the departing attorneys solicited Rectifier's business. Rather, the claims – and liability – for tortious interference were based on their attempts to extract an increased fee from their partners under the threat of leaving the lawfirm with the reasonable expectation that their departure might cause Rectifier to leave as well. Like ***Jewel***, ***Rosenfeld*** is inapposite – it simply does not create the “rule” Rolland proposes. BA 18.

Rolland next relies on ***Dowd***, in which a departing attorney was held liable for tortious interference, where she surreptitiously solicited the firm's largest client before leaving the firm. 352 Ill. App. 3d at 382-83. In 1975 or 1976, one of Allstate's subsidiaries (“Allstate”) retained the Dowd law firm to provide advice on claims being made against Allstate's policyholders for asbestos-related

injuries. *Dowd*, 352 Ill. App. at 369. Nancy Gleason, an attorney at Dowd, spoke daily with Lynn Crim, the head of Allstate's claims department, between 1987 and 1990. 352 Ill. App. at 369. Crim "rarely" spoke with anyone else at Dowd. On December 31, 1990, Gleason and others resigned from Dowd and started their own firm together. *Id.* at 369.

Dowd sued Gleason and the others for tortious interference. *Id.* at 370. The trial court ruled in Dowd's favor, finding that the departing lawyers surreptitiously solicited Allstate before leaving the firm. *Id.* at 374-75.

During the trial, the court sustained an objection to testimony from Allstate's George Riley in answer to the question: would Allstate have left its files with Dowd if Dowd had fired Gleason. *Id.* at 381. As an offer of proof, the departing lawyers asked Riley if he would have allowed the 200 Allstate files to remain at Dowd absent Gleason, to which he answered, "No." *Id.*

On appeal, the departing associates argued that there could be no damages caused by their solicitation of Allstate because Allstate's Riley testified that Allstate would have followed Gleason "in any event." *Id.* at 383. The appellate court summarily rejected

this argument, refusing the reverse the trial court's ruling that Dowd "has proved damages with a reasonable degree of certainty." *Id.*

Dowd is easily distinguishable in a number of ways:

- ◆ Gleason solicited Allstate while she was still representing clients as an attorney at Dowd – Williams and Wyckoff contacted ROWW clients after starting VVO and after telling Rolland of their plans to start the new firm;
- ◆ Gleason surreptitiously solicited Allstate – Williams and Wyckoff notified Rolland that they needed to contact ROWW clients and asked for his input on the notification letter;
- ◆ In **Dowd**, the trial court found that Dowd had proved damages – Dowd did not ask the court to presume causation and damages. Here, Rolland conceded that he could not prove damages;
- ◆ The trial court's decision in Dowd was based in large part on its determination that Allstate's Crim and Riley were not credible, such that the court apparently doubted the veracity of Riley's statement that Allstate would have hired Gleason even if she had not solicited Allstate. Of course, no such credibility determination was at issue here.

Rolland also relies on **Adler Barish**, in which a departing attorney was found liable for tortious interference, where the departing attorney contacted firm clients and sent them contingent fee agreements and form letters discharging Adler, Barish. **Adler, Barish, Daniels, Levin & Creskoff v. Epstein, supra.** **Adler Barish** is based on the repealed Code of Professional Responsibility DR 2-103 (A), which prohibited any solicitation of a "non-lawyer who has not sought his advice regarding employment

as a lawyer.” 482 Pa. at 425, 434. The current Rules of Professional Conduct have no such prohibition. To the contrary, a lawyer can solicit business from a client with whom the lawyer has a prior professional relationship, even if the communication is not in writing. RPC 7.3(a)(2). A lawyer may generally solicit business in writing from any prospective client who has not asked the lawyer not to solicit business, so long as the solicitation does not involve coercion, duress, or harassment (RPC 7.3(b)), provided that the solicitation is not misleading. RPC 7.1.

Nothing is left of ***Adler Barish*** after the adoption of the RPC. Nor does ***Adler Barish*** have any precedential value following ***Shapiro v. Kentucky Bar Ass’n***, 486 U.S. 466 (1988) in which the United States Supreme Court ruled that communications like those in ***Adler Barish*** are protected commercial speech. The Law of Lawyering, *supra*, at 57-27 endnote 57-2 1 (2008 Supplement).

Finally, Rolland relies on a handful of authorities for the general proposition that an employee may not solicit clients from a rival business or, while currently employed, solicit clients in direct competition with his employer. BA 11-14. These authorities are inapposite – Williams and Wyckoff contacted ROWW clients after they severed their relationship with Rolland and started WWO.

Supra, Statement of the Case § D. Notably however, one such authority Rolland relies on actually supports Williams' and Wyckoff's position:

The defendant is . . . permitted to interfere with another's contractual relations to protect his own present existing economic interests, such as . . . a prior contract of his own, or the financial interest in the affairs of the person persuaded. *He is not free, under this rule, to induce a contract breach merely to obtain customers or other prospective economic advantage; but he may do so to protect what he perceives to be existing interests. . .*

Deep Water Brewing, LLC v. Fairway Res., Inc., 152 Wn. App. 229, 215 P.3d 990 (2009) (quoting W. Page Keeton, et. al., Prosser and Keaton on The Law of Torts, §129, at 986 (5th ed. 1984)) (italics in case) (cited at BA 11-12). Since Williams and Wyckoff plainly had a "present existing economic interest" in ROWW clients, their "interference" was not wrongful under the pattern instruction.

In sum, controlling precedent rejects presumptions of taint, causation, or damages. Rolland provides no good reason to depart from these cases.

D. The trial court correctly dismissed Rolland's CPA claim on the ground that it is a private cause of action. (BA 26-28).

Rolland's claims do not give rise to a CPA cause of action because they are private and do not impact the public interest.

Rolland claimed interference with his business expectations and breach of a fiduciary duty owed to him, resulting from the break-up of his business relationship with Williams and Wyckoff. This one-time event does not impact the public. Rolland also fails to establish the fourth and fifth CPA elements – causation and damages. This Court should affirm.

To establish a CPA violation, the plaintiff must prove all of the following five elements:

(1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) and causes injury to the plaintiff in her business or property, and (5) the injury is causally linked to the unfair or deceptive act.

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 602, 200 P.3d 695 (2009) (citing **Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.**, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). Related to the third element, a “private plaintiff must show that his lawsuit would serve the public interest.” **Michael**, 165 Wn.2d at 605 (citing **Lightfoot v. MacDonald**, 86 Wn.2d 331, 544 P.2d 88 (1976)). Where a dispute is private, “it may be more difficult to show that the public has an interest in the subject matter.” 165 Wn.2d at 605 (quoting **Hangman Ridge**, 105 Wn.2d at 790). The court evaluates the following four factors when a dispute is private (*id.*):

(1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others; (4) whether the plaintiff and defendant have unequal bargaining positions.

The trial court correctly dismissed Rolland's CPA claim on summary judgment based on the third CPA element, ruling that Rolland's claim is private and does not serve the public interest. 12/07 RP 23; CP 748-50. Rolland sued his former law partners, alleging tortious interference with his business expectations and breach of fiduciary duties owed to Rolland. For damages, Rolland sought a portion of fees collected from former ROWW clients who selected WWO. Rolland's claims plainly derive from a one-time occurrence – the termination of his relationship with Williams and Wyckoff as law partners. The damages he sought are plainly the product of the same private relationship.

Only one of the four *Hangman Ridge* factors evaluated in private disputes is present. *Michael*, 165 Wn.2d at 605; *Hangman Ridge*, 105 Wn.2d at 790. As to the first factor, Williams and Wyckoff arguably terminated their relationship with Rolland and notified ROWW clients in the "course of [their] business." *Id.* But as to the second factor, Williams and Wyckoff did not "advertise to

the public in general” – they contacted only ROWW clients. *Id.* The third factor – whether the defendant actively solicited the particular plaintiff, indicating potential solicitation of others – is inapplicable because Rolland is not a member of the general public who was “solicited.” *Id.* And as to the fourth factor, the parties – equal partners in ROWW – had equal bargaining positions. *Id.*

Moreover, Rolland’s CPA claim fails as a matter of law on the additional ground that Rolland could not show the fourth and fifth CPA elements – causation and damages. ***Michael***, 165 Wn.2d at 602; ***Hangman Ridge***, 105 Wn.2d at 602. As discussed above, Rolland conceded that he could not prove these elements. *Supra*, Statement of the Case § A; Argument § C.2.

Rolland’s only argument that his claims serve the public interest is that it “goes without saying” that the notification letters Williams and Wyckoff sent to ROWW clients affects the public interest. BA 27. Rolland is incorrect under the ***Hangman Ridge*** factors discussed above. ***Michael***, 165 Wn.2d at 605; ***Hangman Ridge***, 105 Wn.2d at 790. The notification letters did not advertise to the public in general, and did not “solicit” Rolland. *Id.* And since Williams and Wyckoff only needed to notify ROWW clients, the

complained of actions will not be repeated. Rolland's claims simply do not serve the public interest.

In sum, Rolland fails to satisfy three of the five necessary CPA elements. This Court should affirm the trial court's correct ruling.

E. WWO was not unjustly enriched by way of compensation for the work it performed for former ROWW clients, and the trial court's decision moots this issue in any event. (BA 28-29).

Contrary to Rolland's claims, legal fees Williams and Wyckoff earned for providing legal services to former ROWW clients who hired WWO do not constitute unjust enrichment. These fees are not a benefit Rolland conferred on Williams and Wyckoff – they are the product of Williams' and Wyckoff's labor. Williams and Wyckoff are entitled to compensation for their legal services. This Court should affirm.

A party who is "unjustly enriched at the expense of another," may be liable to make restitution. ***Dragt v. Dragt/DeTray, LLC***, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), *rev. denied*, 163 Wn.2d 1042 (2008). The party claiming unjust enrichment must prove the following three elements:

(1) there must be a benefit conferred on one party by another, (2) the party receiving the benefit must have an

appreciation or knowledge of the benefit, and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.

Dragt, 139 Wn. App. at 576.

Unjust enrichment “encompasses” quantum meruit, a remedy for restitution for a reasonable amount of work performed. 139 Wn. App. at 576. A party who proves that he should be compensated in quantum meruit may generally recover the reasonable value of the benefit of the services conferred upon the defendant. *Id.* at 576-77.

It is not unjust for Williams and Wyckoff to retain fees they earned for legal services they provided to former ROWW clients who hired WWO. *Id.* Rolland did not show that anything Williams and Wyckoff did caused its clients to choose WWO over Rolland. Williams and Wyckoff are entitled to be paid for their work.

Moreover, the doctrine of unjust enrichment does not even really apply to the facts of this case. Unjust enrichment applies when the plaintiff conferred a benefit on the defendant, such that it would be unjust for the defendant to retain the benefit without compensating the plaintiff for the reasonable value of the benefit he conferred. **Dragt**, 139 Wn. App. at 576-77. Rolland seeks as

restitution a portion of all of the fees Williams and Wyckoff collected from former ROWW clients who hired WWO. BA 29. But the fees Williams and Wyckoff collected are compensation for legal services they provided – not a benefit that Rolland conferred on Williams and Wyckoff. 139 Wn. App. at 576-77.

Finally, the trial court's decision moots this argument. The trial court tried the issue of "work in progress" – ROWW's active cases (as opposed to completed pension cases). 11/19 RP 57-58. Williams and Wyckoff immediately began distributing to Rolland one-third of all pension cases completed before they formed WWO. *Supra*, Statement of the Case § H. The court awarded Rolland one-third of five more pension cases completed before WWO formed, but finalized after. CP 1207, FF 4.5-4.8. Remaining clients fall under work-in-progress, but the court ruled against Rolland on that issue. CP 1207, FF 4.9. Rolland's unjust enrichment claim is nothing more than a claim for a percentage of the work in progress that he did not obtain after a trial, and he did not appeal from that decision.

In sum, Williams and Wyckoff were not unjustly enriched by way of the legal fees paid for services they performed. This Court should affirm.

CROSS-APPEAL

Not wanting to prolong this already protracted litigation, Williams and Wyckoff will move to dismiss their cross-appeal along with this brief.

CONCLUSION

This Court should reject Rolland's request to presume causation and damages on Rolland's tortious interference and breach of fiduciary duty claims, and affirm the trial court's summary judgment dismissal of these tort claims. Controlling precedent Rolland fails to address already rejected the same request for a presumption, and the foreign cases upon which Rolland relies are inapposite.

This Court should also affirm the summary judgment dismissal of Rolland's CPA claim. Rolland's CPA claim is a private cause of action that does not affect the public interest. Again, Rolland also failed to show causation and damages. Thus, he failed to establish three of the five CPA elements.

Finally, this Court should also affirm the summary judgment dismissal of Rolland's unjust enrichment claim. The compensation Williams and Wyckoff earned representing former ROWW clients is not a benefit Rolland conferred. In any event, the trial court's

decision after trial moots this issue, and Rolland does not appeal from that decision.

RESPECTFULLY SUBMITTED this 30th day of December, 2009.

WIGGINS & MASTERS, P.L.L.C.

A handwritten signature in black ink, appearing to read "Charles K. Wiggins", is written over a horizontal line.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 30th day of December 2009, to the following counsel of record at the following addresses:

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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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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. n1

n1 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 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 in-

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terests 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.

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. n2 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, n3 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. n4

n2 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"

n3 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.

n4 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) n5 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. n6 The departing lawyer nevertheless may contact

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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. n7

n5 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.

n6 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).

n7 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."

The Committee also is of the opinion that a departing lawyer must, under Rule 1.16(d), n8 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. n9

n8 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.

n9 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.

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 because of major surgery or an extended vacation. n10 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.

n10 *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).

The Initial Notice Must Fairly Describe the Client's Alternatives

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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. n11

n11 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.

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. n12 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 representation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter. n13 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.

n12 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).

n13 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."

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. n14 Unfortunately, this is not always feasible when the depar-

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ture 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. n15

n14 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).

n15 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.

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. n16

n16 *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* n17 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). n18

n17 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

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permissible. *Id.* at 1183. A departing lawyer should, of course, consult all case law applicable in the practice jurisdiction.

n18 *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.").

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. n19 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.

n19 *See* Model Rule 1.16(d), *supra*, n.8. Pending client instructions, client property must be held in accordance with Model Rule 1.15.

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.

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.

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