Problem #33- Law Firms: Who Is Responsible? Who Pays?

XYZ is a large firm. It includes Partner Pete, Associates Alice and Andrew, Secretary Sally and Bookkeeper Betty. The firm has some value in its real property, as well as its tangible and intangible personal property. The firm carries malpractice insurance covering all the attorneys and staff. The partners have accumulated personal assets which are now located outside the firm.

Several mistakes have developed and been discovered in recent months:

a) the firm misses a statute of limitation for a client and becomes subject to a malpractice claim.

b) in a dispute over discovery, a partner instructs an associate to shred documents rather than turn them over to the adversary.

c) a secretary innocently disclosed embarrassing information about clients to her friends.

d) the bookkeeper embezzled $50,000 from the firm trust account.

e) a partner overbills clients.

A. DISCIPLINE ISSUES

1) Can a lawyer be professionally disciplined for missing the statute of limitation? See Rule 1.1. See generally Morgan & Rotunda, Problem #33, pages 548-560.

2) Can the firm be professionally disciplined for the omission? See Rule 5.1.

3) Associate Alice failed to file the lawsuit in time. To the unsophisticated clients, she explained that "the law has changed and this lawsuit will not succeed now."

a) When the senior partner discovers this a month later, does he have a duty to tell the clients? Rule 1.4.

b) Does he have a duty to report the young associate Alice to the disciplinary

authorities? Rule 8.3.

c) If he simply fires the young associate, does that solve the problem? See Morgan, page 56-60, 77-78.

4) What is the responsibility of the associate Andrew when ordered to shred the documents? See Rule 5.2, 8.4.

5) Is the firm responsible for the secretary Sally disclosing information? See Rule 5.3.

6) Suppose the office bookkeeper/accountant Betty embezzled $50,000 from the office trust account. Is the partner or the firm subject to discipline?

7) How should the firm handle the partner who has been discovered overbilling? What options does the firm have?

8) Associate Andrew complains to his supervisor that the firm is destroying documents in violation of a court order and he threatens to report the firm to the judge and to the OPC. He is fired. Does he have a cause of action for wrongful discharge? See Morgan, pages 551-554.

B. FINANCIAL ISSUES

1) Ethically, can a lawyer limit his or her liability to a client? See ARPC 1.8(h). See Morgan, pages 77-78.

2) Assume XYZ is a general partnership. See Ark. Code Ann. § 4-46-101. Are the other four partners financially responsible for the negligence of Pete? See Section 305. Are their personal assets (apart from the partnership) at risk? See Goforth, The Revised Uniform Partnership Act: Ready or Not, Here it Comes, 1999 Ark. L. Notes 47.

3) Do the three associates have any financial risk?

C. ALTERNATIVE ARRANGEMENTS

In each of the following, which assets and whose assets can be used to pay the judgment?

1) Suppose XYZ is a limited partnership under Ark. Code Ann. § 4-43-101. See Matthews, A Review of Limited Partnership Law in Arkansas, 41 Ark. L. Rev. 189 (1988); Matthews, The Revised Limited Partnership Act of 1991, 1991 Ark. L. Notes 55. Is a limited partnership desirable or even appropriate for a law firm?

2) Can XYZ ethically organize itself as a corporation? See Ark. R. Prof. Conduct 5.4(d).

3) Suppose XYZ is a professional corporation under Ark. Code Ann. § 4-29-201. See Section 205 in particular.

4) Suppose each of the partners is separately incorporated under Ark. Code Ann. § 4-29-201. See Section 101 in particular. See Note, Professional Corporations: Shareholder Liability and the Saving Clause, 42 Ark. L. Rev. 777 (1989).

5) Suppose XYZ is a limited liability company under Ark. Code Ann. § 4-32-101 (enacted in 1993). See Section 308 in particular. See Beard, The Small Business Tax Entity Pass Through Act - the Birth of a Duck, 1993 Ark. L. Notes 15; Goforth, The Arkansas Limited Liability Company: A Call for Clarification, 1994 Ark. L. Notes 19; Matthews, The Arkansas Limited Liability Company: A New Business Entity is Born, 46 Ark. L. Rev. 791 (1994); Goforth, An Update on Arkansas Limited Liability Companies: New Tax Regulations and New State Laws, 1997 Ark. L. Notes 11. See pages 78-79 of Morgan.

6) In 1997 Arkansas enacted legislation permitting Limited Liability Partnerships (as well as Limited Liability Limited Partnerships). See Ark. Code Ann. § 4-42-703, 706. See Goforth, Limited Liability Partnership: Does Arkansas Need Another Form of Business Enterprise?, 1995 Ark. L. Notes 57.

Consider the following questions:

(1) do clients have to be notified of the change in status?

(2) how extensive is the liability shield? Ark. Code Ann. § 4-46 (204).

(3) when does a partner exercise "direct supervision and control?"

See Goforth, Limited Liability Partnerships: The Newest Game in Town, 1997 Ark. L. Notes 25.

7) If you are organizing a law firm, which business organization do you choose, and why?

solo practitioner

general partnership
limited partnership
professional corporation
LLC
LLP
LLLP

PLLC

8) Do any of the forms contained in (7) violate the policy embodied in Rule 1.8(h) or mislead a client who selects a law firm based on the reputation or experience of the law firm as an entity? See American Bar Association Formal Opinion 96-401; page 220 of Brill; page 78 of Morgan.

9) What is the impact of the malpractice insurance carried by XYZ?

10) Assume the former client has obtained a large malpractice award against the attorney, who has no insurance coverage. Can the attorney discharge the malpractice judgment in bankruptcy? See Flaccus, Attorney Malpractice Judgments, Bankruptcy Discharge, and Professional Responsibility, 4 J. of Bankruptcy Law and Practice, 219-256 (1995).

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