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Professional responsibility obligations in the context of lateral movement

In this article, we examine American Bar Association Formal Opinion 489 entitled "*Obligations Related to Notice When Lawyers Change Firms.*" The opinion focuses on the reciprocal duties of lawyers and law firms, both to each other and to clients, that arise when lawyers seek to make a lateral move to another firm. Notably, in an era where it seems that law firms are increasingly seeking to restrict individual lawyers' ability to make lateral moves, the opinion's central theme is that such restrictions may violate both the letter and the spirit of the Rules of Professional Conduct (the Rules). To the contrary, the opinion stresses the affirmative ways in which lawyers and firms should cooperate in the process, expressly for the benefit of clients. It also emphasizes that at all times it is the client's interest that should be paramount. At the outset, the opinion cites three Rules: 1.3 and 3.2, regarding the duty of competent and diligent representation, and central to the theme of the opinion, Rule 1.4—the obligation to communicate relevant information to clients in a timely manner.

Client notification and timing issues

The opinion notes that, while the lawyer and the firm may each unilaterally inform the clients of the lawyer's impending departure, "at or around the same time that the lawyer provides notice to the firm," the better practice is for there to be "a joint communication to firm clients with whom the departing lawyer has had significant contact, giving the clients the option of remaining with the firm, going with the departing attorney, or choosing another attorney."

This is explicitly enshrined in the rules in Virginia and Florida. In any event, "departing lawyers need not wait to inform clients of the fact of their impending departure, provided that the firm is informed contemporaneously" or otherwise learns of the lawyers intended departure.[1]

Client choice

Next, and equally critical, the opinion reinforces the principle on which all its other elements rest, that: clients determine who will represent them, and clients are not property.

The lack of any proprietary interest on the part of a firm in "its" clients was unequivocally resolved in the series of cases that addressed the "unfinished business" doctrine. The bankruptcy trustees claimed that the defunct firms from which the lawyers had departed were entitled to receive from the firms the lawyers had joined the profits from all cases open at the time of the lawyers' departure. The courts comprehensively rejected those claims precisely on the ground that firms do not own clients. And the corollary is that clients have an absolute and unrestricted right to determine who will represent them.

Although perhaps going beyond prior statements in earlier opinions, the opinion next proceeds to make an explicit statement of what law firms may not do in the wake of a lawyer's announcement of her impending departure:

1. Notably, in two opinions issued by state bars in 2020 also dealing with the ethical obligations when lawyers leave their firms, this recommendation was endorsed and emphasized as the best way to achieve client notification; *see* CA Eth. Op. 2020-201 (Cal. St. Bar. Comm. Prof. Resp.), 2020 WL 1318440; Ohio Board of Professional Conduct Opinion 2020-06.

> "Where the departing lawyer has principal or material responsibility in a matter, firms should not assign new lawyers to a client's matter, pre-departure, displacing the departing lawyer, absent client direction or exigent circumstances arising from a lawyer's immediate departure from the firm and imminent deadlines needing to be addressed for the client."

And the Opinion states what should be obvious, namely that "If a departing lawyer is the only lawyer at the firm with the expertise to represent a client on a specific matter, the firm should not offer to continue to represent the client unless the firm has the ability to retain other lawyers with similar expertise."

Notice periods

The opinion addresses the limits placed by Rule 5.6 on a law firm's right to restrict lateral movement. Both Rules provide that:

> "A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement …"

In this context the Opinion confronts the practice among law firms of imposing notice periods on lawyers before they may depart, and again makes explicit that these notice periods may not be

> "fixed or rigidly applied without regard to client direction, or used to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client. If they would affect a client's choice of counsel or serve as a financial disincentive to a competitive departure, the notification period may violate Rule 5.6. A lawyer who wishes to depart may not be held to a pre-established notice period particularly where, for example, the files are updated, client elections have been received, and the departing lawyer has agreed to cooperate post-departure in final billing. In addition, a lawyer who does not seek to represent firm clients in the future should not be held to a pre-established notice period because client elections have not been received."

Again, the client's interest is key. The opinion emphatically affirms that prior to her departure,

> "The lawyer must have access to adequate firm resources needed to competently represent the client during any interim period. For instance, the lawyer cannot be required to work from home or remotely, be deprived of appropriate and necessary assistance from support staff or other lawyers necessary to represent the clients competently, including access to research and drafting tools that the firm generally makes available to lawyers. A lawyer cannot be precluded from using associates or other lawyers, previously assigned to a client matter or otherwise normally available to lawyers at the firm to represent firm clients competently and diligently during the pre-departure period."

In other words, a lawyer cannot be sent out to pasture on "gardening leave" during the notice period. At the same time, it is questionable whether a notice period—unless it stretches into many months—restricts a lawyer's right to practice or injures the client. The opinion recognizes that a departing lawyer must organize her files, complete her billing, brief the firm on any matters that are staying with the firm, and establish a collection plan. As the opinion notes, a wise firm will have established and published written policies to guide lawyers on what is expected of them when they depart.

Issues not addressed

Finally, it should be noted that there are several aspects of lateral movement that are not addressed in this opinion. Most significantly, it does not deal with the question of whether there is—or should be—a duty on lawyers not to solicit other lawyers, whether partners or employees, either prior to or after giving notice of departure, or whether seeking to impose such a duty in a firm's partnership agreement itself violates Rule 5.6. Similarly, the opinion does not address the scope of the exception to the prohibition on restrictive agreements for retirement benefits, or how Rule 5.6 applies to provisions for extended delays in repayment of departing partners' capital.

Further information

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