AMERICAN BANKRUPTCY INSTITUTE

Mid-Atlantic Bankruptcy Workshop 2021

Ethics: Know Before You Go

CONCURRENT SESSION

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2021

Ethics: Know Before You Go

ABI Mid-Atlantic Virtual Bankruptcy Workshop

August 6, 2021

Overview:

A lawyer's departure from their law firm raises a host of ethical issues. The lawyer must adhere to its duties to the client and the law firm. Those duties may arise under the ethical rules governing the lawyer, as well as, where the lawyer is a partner, the partnership or other governing agreement. Failure to adhere to these obligations could result in disciplinary proceedings and litigation between the departing attorney and their former law firm.

A. Duties to Clients When a Lawyer Departs a Firm

The ethical obligations of both departing attorneys and the firm they are leaving are to the clients. The manner of their departure must protect client confidences, adequately communicate to the client their options, and cannot coerce them into choosing counsel.

Key Ethical Duties to Consider

Communication is key.

Ideally the firm will have written policies to provide guidance to lawyers about the procedures the firm anticipates following when a lawyer leaves the firm.

- **Model Rule 5.1** – partners must make reasonable efforts to ensure the firm has measures in place that assure lawyers within the firm conform to the model rules.
  - **American Bar Association Formal Opinion 489 (Dec. 4, 2019)** – Model Rule 5.1 may require partners to establish departure procedures so they can avoid issues when attorneys leave the firm, assure an ethical and professional transition, and create expectations for the firm, the departing lawyers, and the client.

Clients are adequately protected when there is cooperation between the parties.

The first step in that process is adequate notice to the departing firm.

Conflicts Screening at New Firm

Model Rule 1.10: Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Notice

Source: ABA Formal Opinion 489

- Firms may require some period of advance notice of an intended departure. The period of time should be the minimum necessary, under the circumstances, for clients to make decisions about who will represent them, assemble files, adjust staffing at the firm if the firm

is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession.
- Ethical obligations of departing attorneys include providing the firm with sufficient notice of the intended departure for the firm and departing lawyer to notify clients
- A departing lawyer's and law firm's agreement to cooperate in these matters post-departure is relevant in determining whether notice provided by such lawyer to the firm is consistent with these obligations and with Rule 5.6(a)
- Under the Model Rules, departing lawyers need not wait to inform clients of the fact of their impending departure, provided that the firm is informed contemporaneously.

Source: Restatement of the law governing lawyers section 9, comment i

- A departing lawyer may not solicit clients with whom the lawyer actually worked until the lawyer has either left the firm or adequately informed the firm of the lawyer's intent to contact firm clients for that purpose (Subsection (3)(a)).
- Such notice must give the firm a reasonable opportunity to make its own fair and accurate presentation to relevant clients
- In either event, the lawyer and the firm are in positions to communicate their interest in providing representation to the client on fair and equal terms.
- Goal is to have the departing lawyer and their former firm work together to ensure that the transition of files as directed by clients is orderly and timely.
- **Related Rule – Model Rule 1.4 - Communication**
  - While the departing lawyer and the firm each may unilaterally inform clients of the lawyer's impending departure ***at or around the same time that the lawyer provides notice to the firm***, the firm and departing lawyer should attempt to agree on 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.

A joint communication is preferred for informing clients, but unilateral notice is permitted when the law firm and departing lawyer cannot agree or the departing lawyer reasonably anticipates the firm will not cooperate. Pa. Bar Assn. & Phila. Bar Assn. Joint Formal Op. 2007-300 (June 2007) ("Ethical Obligations When a Lawyer Changes Firms");

ABA Formal Opinion 99-414 (1999) sets forth what information should be put in an announcement or notification to clients:
- Effect of transition:
- Right to Counsel of Choice: the option to remain with the law firm, choose representation by the departing lawyer or choose representation by other lawyers or firms.
- Liability for Existing Fees and Costs
- Refund of Unearned Fees and Costs;
- Transfer of Client File: how transfer of the client's file will be handled and if the client may be charged a reasonable charge for copying the file for a successor lawyer (See ABA Formal Opinion 471, "Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled" (July 1, 2015).

- Accounting of Client Property Held in Trust
- Time for Response

Defines clients as those with active matters for whom the departing lawyer is responsible or plays a principal role in providing legal services, i.e., no obligation to inform firm clients with whom the lawyer had little or no direct contact

Maintaining Confidentiality: confidential client information once shared with the departing lawyer and the law firm must be maintained.

Post-departure Solicitation

Lawyer can contact prospective clients with whom the lawyer has a close personal or "prior professional relationship" See Model Rule 7.3

Former firm clients on whose matters the lawyer worked but had little or no direct contact with the client are treated like the general public for purpose of solicitation. ABA Op. 99-414 at p. 2. The departing lawyer cannot use his former firm's confidential information such as a client list and use only publicly available information or information the lawyer personally knows about the clients' matters. See ABA Formal Op. 99-414 at 7.

Be careful about any post-departure disparaging remarks and claims for tortious interference.

Using Firm Resources For Purposes Contrary to the Interests of the Firm

Source: Restatement of the law governing lawyers section 1, comment i

- The departing lawyer generally may not employ firm resources to solicit the client
- With respect to other firm lawyers and employees, a lawyer may plan mutual or serial departures from their law firm with such persons, so long as the lawyers and personnel do nothing prohibited to either of them (including impermissibly soliciting clients, as above) and so long as they do not misuse firm resources (such as copying files or client lists without permission or unlawfully removing firm property from its premises) or take other action detrimental to the interests of the firm or of clients, aside from whatever detriment may befall the firm due to their departure

Cooperation

Source: ABA Formal Opinion 489

- Cooperation between the departing lawyer the former firm is key
- Departing lawyers also have a duty, pre- or post-departure to cooperate with the firm they are leaving to assist in the organization and updating of client files for clients remaining with the firm, including docketing of deadlines, updating lawyers at the firm who will take over the file and the like, and similarly to cooperate reasonably in billing.

- A departing partner may be required to return or account for firm property, such as intellectual property, proprietary information, and hardware/phones/computers, and to allow firm data to be deleted from all devices retained by the departing attorney, unless the data is part of the client files transitioning with the departing lawyer.
- Client may be contacted by the departing lawyer and by the firm individuals, and the preferred next step is for the departing lawyer and the firm to agree upon a joint communication sent to the clients requesting that the clients elect who will continue representing them.
- The firm and departing lawyer must coordinate to assure that all electronic and paper records for client matters are organized and up to date so that the files may be transferred to the new firm or to new counsel at the existing firm, depending upon the clients' choices.
- Cooperation is key to protecting **confidentiality – Rule 1.6**

Restrictive Covenants

Model Rule 5.6 provides, in relevant part, : 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…."

Fiduciary Duties to Law Firms and Other Related Considerations

Partners

- Read your partnership agreement carefully for, among other things provisions regarding:
    - Fiduciary duties
        - Partners in a limited liability partnership owe fiduciary duties to one another and to the partnership. *See* RUPA § 409 (a)-(c); Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989) (stating that **departing partners** have fiduciary obligations).
        - Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 120–21, 653 N.E.2d 1179, 1183–84 (1995) ("At one end of the spectrum, where an attorney is dissatisfied with the existing association, taking steps to locate alternative space and affiliations would not violate a partner's fiduciary duties. That this may be a delicate venture, requiring confidentiality, is simple common sense and well-illustrated by the eruption caused by defendants' announced resignation in the present case. As a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice (New York County Lawyers Assn, Ethics Opn. 679 [1991]; Assn of Bar of City of NY, Ethics Opn. 80–65 [1982]; *see also,* Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary and Disciplinary Liability,* 50 U. Pitt. L. Rev. at 99–106). Ideally, such approaches

would take place only after notice to the firm of the partner's plans to leave (*see,* Davis and Glen, *Practical Issues of Professional Responsibility: Musical Chairs: Key Issues When A Lawyer Makes a Lateral Employment Move,* NYLJ, Nov. 26, 1990, at 1, col 1 [part I] and Dec. 20, 1990, at 1, col 2 [part II]; *Withdrawal and Termination* No. 129, printed in ABA/BNA Lawyers' Manual on Professional Conduct, at 91:720 [1993]). At the other end of the spectrum, secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties (*see, Matter of Silverberg [Schwartz],* 81 A.D.2d 640, 641, 438 N.Y.S.2d 143, *Meehan v. Shaughnessy,* 404 Mass. 419, 535 N.E.2d 1255; *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 482 Pa. 416, 393 A.2d 1175, *appeal dismissed and cert. denied,* 442 U.S. 907, 99 S. Ct. 2817, 61 L.Ed.2d 272).").

        - Notice requirements. *See* Leslie D. Corwin, Response to Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms, 55 Wash. & Lee L. Rev. 1055, 1071 (1998) (noting no case law on enforcement of notice provisions and discussing arguments in favor of and against enforcement).

        - Financial implications of withdrawal, including capital contributions.

    - Fiduciary duties may prevent you from soliciting other attorneys and staff in joining you prior to your departure from the firm.

    - Consider consulting your own counsel.

    - If your law firm goes bankrupt or dissolves, there may be further considerations regarding "unfinished business" and fees. *See* Christine Hurt, The Limited Liability Partnership in Bankruptcy, 89 Am. Bankr. L.J. 567 (2015)

Associates and other non-partner attorneys

- Even non-partner attorneys can owe some duties to their firm under the laws of agency. *See e.g.*, Restatement (Second) of Agency §§ 13, 23, 393, 395 (1958) (stating generally that an agent has a duty not to compete or act adverse to his employer's interests). This may include the obligation not to compete with the firm while still employed at the firm. *Id.*at 392. These obligations would generally terminate when the agency relationship terminates, but employees should carefully review any agreements signed with the firm.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 489 **December 4, 2019**

Obligations Related to Notice When Lawyers Change Firms

Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to approval of a tribunal, when applicable (and conflicts of interest). The ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements. Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm. Firms may require some period of advance notice of an intended departure. The period of time should be the minimum necessary, under the circumstances, for clients to make decisions about who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be so rigid that they restrict or interfere with a client's choice of counsel or the client's choice of when to transition a matter. Firms also cannot restrict a lawyer's ability to represent a client competently during such notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. The departing lawyer may be required, pre- or post-departure, to assist the firm in assembling files, transitioning matters that remain with the firm, or in the billings of pre-departure matters.[1]

I. Introduction

As succinctly noted in ABA Op. 09-455, "Many lawyers change law firm associations during their careers." That opinion addressed the need to disclose to new firms information about clients of a departing lawyer in order to perform a conflict of interest analysis before the departing lawyer joins the new firm. This opinion discusses the ethical obligations of both a departing lawyer and their former firm in protecting client interests during the lawyer's transition. Such ethical obligations include providing the firm with sufficient notice of the intended departure for the firm and departing lawyer to notify clients, work together to ensure that the transition of files as directed by clients is orderly and timely, return firm property, update remaining firm staff/lawyers, and organize files that clients authorize to remain with the firm.[2] A departing lawyer's and law firm's agreement to cooperate in these matters post-departure is relevant in determining whether notice provided by such lawyer to the firm is consistent with these obligations and with Rule 5.6(a) as further discussed below. Ideally the firm will have written policies to provide guidance to lawyers about the procedures the firm anticipates following when a lawyer leaves the firm. This affords everyone some uniform expectations about working together to facilitate transitioning clients.

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414 (1999) at n. 1 (clients should be given the option to stay with a firm, go with a departing attorney, or choose another firm altogether).

Firm partnership/shareholder/member/employment agreements cannot impose a notification period that would unreasonably delay the diligent representation of the client or unnecessarily interfere with a lawyer's departure beyond the time necessary to address transition issues, particularly where the departing lawyer has agreed to cooperate post-departure in such matters. Nor may a firm penalize a client who wants to go with a departing lawyer by withholding firm resources the lawyer needs to continue to represent the client prior to departure. Departing lawyers also have a duty, pre- or post-departure to cooperate with the firm they are leaving to assist in the organization and updating of client files for clients remaining with the firm, including docketing of deadlines, updating lawyers at the firm who will take over the file and the like, and similarly to cooperate reasonably in billing. A departing partner may be required to return or account for firm property, such as intellectual property, proprietary information, and hardware/phones/computers, and to allow firm data to be deleted from all devices retained by the departing attorney, unless the data is part of the client files transitioning with the departing lawyer.[3]

II. Analysis

A. The Lawyer's Obligation to Represent Clients Diligently

Lawyers must represent clients competently and diligently. Rule 1.3 provides:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 3.2 similarly requires:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

In addition to the duty to represent clients diligently, lawyers have an obligation to communicate relevant information to clients in a timely manner, according to Rule 1.4. This would include promptly notifying a client if a lawyer is changing law firm affiliations.[4] Law firms may not restrict a lawyer's prompt notification of clients, once the law firm has been notified or otherwise learns of the lawyer's intended departure. As noted in ABA Op. 99-414, "informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him."[5] While the departing lawyer and the firm each may unilaterally inform clients of the lawyer's impending departure at or around the same time that the lawyer provides notice to the firm, the firm and departing lawyer should attempt to agree on 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.[6] In

[3] *See* State Bar of Ariz., Formal Op. 10-02 (2010) ("When a lawyer's employment with a firm is terminated, both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued representation and avoid conflicts. These ethical obligations can best be satisfied through cooperation and planning for any departure.").
[4] *See* D.C. Bar Op. 273 (1997) (A lawyer has an obligation under Rule 1.4 to notify a client "sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue representation by the departing lawyer and, if not, to make other representation arrangements.").
[5] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414, *supra* note 2, at 2.
[6] *Id.* at n. 2 & 5; State Bar of Ariz., Formal Op. 99-14 (1999).

the event that a firm and departing lawyer cannot promptly agree on the terms of a joint letter, a law firm cannot prohibit the departing lawyer from soliciting firm clients.[7]

Some states, such as Florida and Virginia, have a specific Rule of Professional Conduct regarding such situations. For instance, Florida Rule of Professional Conduct 4-5.8(c)(1) provides:

> *Lawyers Leaving Law Firms*. Absent a specific agreement otherwise, a lawyer who is leaving a law firm may not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful.

Under the Model Rules, departing lawyers need not wait to inform clients of the fact of their impending departure, provided that the firm is informed contemporaneously. Law firm management and lawyers remaining at the firm may also contact clients to inform them of the lawyer's impending departure. The preferred next step is for the departing lawyer and the firm to agree upon a joint communication sent to the clients requesting that the clients elect who will continue representing them.

Departing lawyers should communicate with all clients with whom the departing lawyer has had significant client contact that the lawyer intends to change firms. "Significant client contact" would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client.[8] A departing attorney would not have "significant client contact," for instance, if the lawyer prepared one research memo on a client matter for another attorney in the firm but never spoke with the client or discussed legal issues with the client. Similarly, remaining members of the firm may communicate with these clients, offering for the client to be represented by the firm, another firm, or the departing lawyer. Neither the departing lawyer nor the firm may engage in false or misleading statements to clients.[9]

B. Clients Determine Who Will Represent Them

Clients are not property. Law firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm. Subject to conflicts of interest considerations, clients decide who will represent them going forward when a lawyer changes firm affiliation.[10] 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

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[7] *See* Ill. State Bar Ass'n, Advisory Op. 91-12 (1991); Iowa Bd. of Prof'l Ethics Op. 89-48 (1990); State Bar of Mich., Inf. Op. RI-86 (1991); Tex. Comm. on Prof'l Ethics Op. 422 (1985); Va. State Bar, Legal Ethics Op. 1403 (1991); Wash. State Bar Ass'n, Advisory Op. 2118 (2006); RESTATEMENT OF THE LAW THIRD, THE LAW GOVERNING LAWYERS § 9(3)(a) (2000).

[8] *See* State Bar of Ariz., Formal Op. 99-14 (1999), *see also* RESTATEMENT, *supra* note 7, at § 9(3)(a)(i) (limiting solicitation by departing lawyer to "firm clients on whose matters the lawyer is actively and substantially working").

[9] *See, e.g.*, Va. Rules of Prof'l Conduct R. 5.8; MODEL RULES OF PROF'L CONDUCT R. 7.1.

[10] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414, *supra* note 2; *see also* Heller Ehrman LLP v. Davis Wright Tremaine LLP, 411 P.3d 548, 555 (Cal. 2018) (noting "the client's right to terminate counsel at any time, with or without cause" and that "[t]he client always owns the matter") (citations omitted).

firm and imminent deadlines needing to be addressed for the client. Thus, clients must be notified promptly of a lawyer's decision to change firms so that the client may decide whether to go with the departing lawyer or stay with the existing firm and have new counsel at the firm assigned.

C. Firm and Departing Lawyer Obligations for Orderly Transitions

Law firm management also has obligations to establish reasonable procedures and policies to assure the ethical transition of client matters when lawyers elect to change firms.

Rule 5.1 provides:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Firms may require that departing lawyers notify firm management contemporaneously with the departing lawyer communicating with clients, employees of the firm, or others about the anticipated departure so that the firm and departing lawyer may work together to assure a professional transition of the client matters. The orderly transition of a client matter may require the firm to assess if it has the capacity and expertise to offer to continue to represent the clients. 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.[11]

The firm and departing lawyer must coordinate to assure that all electronic and paper records for client matters are organized and up to date so that the files may be transferred to the new firm or to new counsel at the existing firm, depending upon the clients' choices. A departing lawyer who does not continue to represent a client nevertheless has the obligation to take "steps to the extent reasonably practicable to protect a client's interests."[12] This duty includes the departing lawyer updating files and lawyers at the firm who take over the representation, when possible. If exigent circumstances cause a lawyer's immediate departure from the firm, either voluntarily or involuntarily, relevant clients of that lawyer still must be notified of the departure and the firm should provide the lawyer with a list of their current and former clients for conflict-checking purposes. The departed lawyer and firm should endeavor to coordinate after the departure, if necessary, to protect client interests.

Firm management should establish policies and procedures to protect the confidentiality of client information from inadvertent disclosure or misuse.[13] The duty of confidentiality requires that departing attorneys return and/or delete all client confidential information in their possession, unless the client is transferring with the departing attorney. The exception to this requirement is for a departing lawyer to retain names and contact information for clients for whom the departing lawyer worked while at the firm, in order to determine conflicts of interests at the departing lawyer's new firm and comply with other applicable ethical or legal requirements. Rule 1.6(b)(7)

[11] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1.
[12] *Id.* at R. 1.16(d).
[13] *Id*. at R. 1.6(c).

provides that a lawyer may disclose confidential information "to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." Firms should have policies that require the deletion or return of all electronic and paper client data in a departing lawyer's possession, including on a departing lawyer's personal electronic devices, if the clients are remaining with the firm. Personal electronic devices may include, for instance, cell phones, laptop computers, tablets, home computers, jump drives, discs, cloud storage, and hard drives.

D. Reasonable Notice Periods Cannot Restrict Client's Choice of Counsel or the Right of Lawyers to Change Firms

Model Rule 5.6 prohibits restraints on a client's choice of counsel. The Rule provides:

> 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 . . .

Firms have an ethical obligation to assure that client matters transition smoothly and therefore, firm partnership/shareholder/member/employment agreements may request a reasonable notification period, necessary to assure that files are organized or updated, and staffing is adjusted to meet client needs. In practice, these notification periods cannot 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.

Case law interpreting Rule 5.6 supports the conclusion that lawyers cannot be held to a fixed notice period and required to work at a firm through the termination of that period. Financial disincentives to a competitive departure have routinely been struck down by the courts and criticized in ethics opinions. In *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989), the Court of Appeals of New York held that any provision that imposes a "significant monetary penalty" on an attorney who remains in private practice is the functional equivalent of a restriction on the practice of law, even though there is no express prohibition on competitive activities imposed on the withdrawing partner.[14] Courts routinely refuse to enforce provisions in partnership agreements or the like that restrict the right of a lawyer to practice law by means of financial disincentives to competitive departures. "[C]ourts will not enforce contract terms that violate

[14] *See* Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1238 (Mass. 1997) (reduction in payments based on the net worth of the firm); Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 741 (Tex. App. 1995) (same); Jacob v. Norris McLaughlin & Marcus, 607 A.2d 142, 146 (N.J. 1992) (reduced payments based on annual draws); Gray v. Martin, 663 P.2d 1285 (Or. Ct. App. 1983) (reduced share of future firm profits).

public policy . . . the foundation for Rule 5.6 rests on considerations of public policy, and it would be inimical to public policy to give effect" to provisions inconsistent with the rule.[15]

There is no meaningful distinction for the purposes of Rule 5.6 between an agreement provision that imposes a financial disincentive to a competitive departure irrespective of the pre-departure notice requirements and a provision that imposes a financial disincentive for the failure to comply with a fixed, pre-established notice period that extends beyond the time necessary, generally or in a particular case, to ensure an appropriate transition, as discussed above. "Although 'reasonable' notice provisions may be justified to ensure clients are protected when firm lawyers depart, what is 'reasonable' in any given circumstances can turn on whether it is truly the client's interest that is being protected or simply a thinly disguised restriction on the right to practice in violation of RPC 5.6(a)."[16] Moreover, to the extent that a firm routinely waives the full notice requirement, enforcement in a particular instance is problematic when used to penalize a lawyer who leaves to compete with the firm.[17]

E. Access to Firm Resources During Transition Period

After the firm knows that a lawyer intends to depart but such lawyer has not yet, in fact, left the firm, 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

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[15] Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 370 (Ill. 1998); *see also* Stevens v. Rooks Pitts and Poust, 682 N.E.2d 1125, 1130 (Ill. App. Ct. 1997) ("courts have overwhelmingly refused to enforce provisions in partnership agreements which restrict the practice of law through financial disincentives to the withdrawing attorney"); *Pettingell*, 687 N.E.2d at 1239 ("[t]he strong majority rule . . . is that a court will not give effect to an agreement that greatly penalizes a lawyer for competing with a former law firm"); Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston, 678 So.2d 765, 767 (Ala. 1996); *Gray*, 663 P.2d at 1290. *But see* Howard v. Babcock, 863 P.2d 150 (Cal. 1993). The Supreme Court of California reviewed a partnership agreement which provided that departing partners who competed in the Los Angeles area in the field of insurance defense during the year following their departure forfeited their entitlement to withdrawal benefits other than their capital accounts. The court upheld the forfeiture provision: "[a]n agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law." *Id.* at 156. The *Babcock* decision has been rejected by courts outside of California that have considered it. *Pettingell*, 687 N.E.2d at 1239 ("[c]ourts have not been attracted to the contrary view expressed in *Howard v. Babcock*"); *see also Stevens*, 682 N.E.2d at 1130–33; Zeldes, Needle & Cooper v. Shrader, 1997 WL 644908, at *6 n.6 (Conn. Super. Ct. 1997); *Whiteside*, 902 S.W.2d at 744 ("[w]e are unwilling to follow this distinctly minority position and abandon the concept of client choice that we believe remains the premise underlying DR 2-108"); RESTATEMENT, *supra* note 7, at § 13 RN to cmt. b. ("Only in California . . . are restrictive covenants in law-firm agreements enforced"); *but see* Capozzi v. Latasha & Capozzi, P.C., 797 A.2d 314, 320-322 (Pa. Sup. Ct. 2002) (holding that forfeiture for competition provisions were enforceable but striking down the clause at issue as unreasonable).

[16] Mark J. Fucile, *Moving On: Duties Beyond the RPCs When Changing Law Firms*, OR. ST. B. BULL. (June 2013); *see also* Borteck v. Riker, Danzig, Scherer, Hyland & Perretti LLP, 179 N.J.246, 260–261 (N.J. 2004) ("firms must guard against provisions that unreasonably delay an attorney's orderly transition from one firm to another").

[17] *See* Angela Morris, *Are Law Firms Invoking Obscure Contractual Clauses to Delay Lateral Moves? Or Does It Just Seem That Way?*, ABA J., Apr. 1, 2019.

to lawyers at the firm to represent firm clients competently and diligently during the pre-departure period.

Similarly, firms cannot prohibit or restrict access to email, voicemail, files, and electronic court filing systems where such systems are necessary for the departing attorney to represent clients competently and diligently during the notice period. Once the lawyer has left the firm, the firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries. A supervising lawyer at the firm should review the departed lawyer's firm emails, voicemails, and paper mail in accordance with client directions and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer.

F. New Matters Coming in During Transition Period

During the notification period the lawyer and firm should determine how any new matters or new clients coming into the departing attorney will be treated—as a new client (or matter) of the existing firm or the new firm. To avoid client confusion and disputes, the firm and departing lawyer should discuss and clarify how new client matters will be addressed at the time that the departing lawyer notifies the firm of the impending departure.

G. Conclusion

Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to the approval of a tribunal, when applicable (and conflicts of interest). The ethics rules do not allow non-competition clauses in partnership or employment agreements. Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm. Firms may require some period of advance notice of an intended departure to provide sufficient time to notify clients to select who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be fixed or pre-determined in every instance, cannot restrict or interfere with a client's choice of counsel, and cannot hinder or unreasonably delay the diligent representation of a client. Firms also cannot restrict a lawyer's ability to represent a client competently during any pre-departure notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. Firms should not displace departing lawyers before departure by assigning new lawyers to a client's matter, absent client direction or exigent circumstances requiring protection of clients' interests. A firm's reliance on a fixed notice period set forth in an agreement either to attempt to require the lawyer to stay at the firm for that period or to impose a financial penalty for an early departure must be justified by particular circumstances related to the orderly transition of client matters and must account for the departing lawyer's offer to cooperate post-departure in these and other matters. Otherwise, a firm's imposition of a fixed notice period may be inconsistent with Rule 5.6(a).

Abstaining: Hon. Goodwin Liu.

ABA Formal Opinion No. 99-414
September 8, 1999

Ethical Obligations When a Lawyer Changes Firms

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

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

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[1] This Opinion addresses mainly the obligations of the departing lawyer. Nevertheless, the firm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, and may have obligations as well under other law, to assure to the extent reasonable practicable that the withdrawal from the firm is accomplished without material adverse effect on any clients' interests, especially clients on whose active matters the departing lawyer currently is working. *Cf.* ABA Informal Opinion 1428 (1979), decided under the former Model Code of Professional Responsibility, and California Bar Ethics Op. No. 1985-86, 1985 WL 57193 *2 (Cal. St. Bar. Comm. Prof. Resp. 1985), both of which place the responsibility of notifying clients upon the departing lawyer and her firm. Among remaining firm members'ethical obligations are to make reasonable efforts to ensure that there are in effect measures: (1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure of a lawyer having substantial responsibility for the clients' active matters; (2) to make clear to those clients and others for whom the departing lawyer has worked and who inquire that the clients may choose to be represented by the departing lawyer, the firm or neither(*see Restatement (Third) of the Law Governing Lawyers* § 26 cmt. h (Proposed Official Draft 1998);(3) to assure that active matters on which the departing lawyer has been working continue to be managed by remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that, upon the firm's withdrawal from representation of any client, the firm takes reasonable steps to protect the client's interests pursuant to Rule 1.16(d). *See infra*, n.4 and accompanying text. This Opinion does not address the issue of a division of fees between the departing lawyer and her law firm.

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

Notification to Current Clients Is Required

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

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[2] Rule 1.4 (Communication) states:

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

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

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

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

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

Notification of Current Clients is Not Impermissible Solicitation

Because she has a present professional relationship with her current clients, a departing lawyer does not

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

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[5] Model Rule 7.3(a) states:

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

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

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

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

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[8] Model Rule 1.16(d) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

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

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

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

The Initial Notice Must Fairly Describe the Client's Alternatives

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

1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);

2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;

3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters;and

4) the departing lawyer must not disparage the lawyer's former firm.[11]

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

The Departing Lawyer Should Provide Additional Information

In order to provide each current client with information he needs to make a choice of counsel, the departing lawyer also may inform the client whether she will be able to continue the representation at her new law firm.[12] If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future representation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter.[13] The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the firm, the departing lawyer and her new firm, or some other lawyer will continue the representation.

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

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

Joint Notification By the Lawyer and the Firm is Preferred

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

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

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

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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 to assist her in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.[16]

[16] *See, e.g.*, Siegel v. Arter & Hadden, 85 Ohio St. 3d 171, 707 N.E.2d 853 (Ohio 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) ("breakaway" lawyers tortiously interfered with contract between their former firm and its clients by taking 400 client files, making scurrilous statements about the firm, and sending misleading letters to firm clients). In a joint opinion, the Pennsylvania and Philadelphia Bars warned that notice to clients before advising the firm of her intended departure "may be construed as an attempt to lure clients away in violation of the lawyer's fiduciary duties to the firm, or as tortious interference with the firm's relationships with its clients." Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Joint Op. No. 99-100, 1999 WL 239079*2. (Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. 1999). The Committee also noted that the "prudent approach" is for the departing lawyer not to notify her clients before advising the firm of her intention to leave to join another firm. *Id.*

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

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

[18] *See, e.g.*, In the Matter of Cupples, 979 S.W.2d 932, 935 (Mo. 1998); *In re* Cupples, 952 S.W.2d 226, 236-37 (Mo. 1997) (separate disciplinary proceedings against involving the same 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 "[a]lthough 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.[19] A departing lawyer who is not continuing the representation may, nevertheless, retain copies of client documents relating to her representation of former clients, but must reasonably ensure that the confidential client information they contain is protected in accordance with Model Rules 1.6 and 1.9.

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

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.

ABA Formal Opinions

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FILED: NEW YORK COUNTY CLERK 01/06/2016 02:19 PM INDEX NO. 650053/2016
NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 01/06/2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DAVID M. POSNER,

Plaintiff,

- against -

OTTERBOURG P.C.,

Defendant.

Plaintiff designates New York County as the place of trial.

Venue is based on Defendant's Principal Office

Index No. _____

SUMMONS

TO: OTTERBOURG P.C.
230 Park Avenue
New York, New York 10169

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your Answer, or if the Complaint is not served with this Summons, to serve a notice of appearance, on the undersigned counsel for the Plaintiff herein, Hinshaw & Culbertson LLP, 800 Third Avenue, 13th Floor, New York, New York, 10022, within twenty (20) days after service of this Summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
January 6, 2016

HINSHAW & CULBERTSON LLP

By: _____
Philip Touitou

800 Third Avenue, 13th Floor
New York, New York 10022
Tel: (212) 471-6200
Fax: (212) 935-1166
Attorneys for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DAVID M. POSNER,

Plaintiff,

- against -

OTTERBOURG P.C.,

Defendant.

Index No. _____

VERIFIED COMPLAINT

Plaintiff David M. Posner ("Posner" or Plaintiff"), as and for his verified complaint against Defendant Otterbourg P.C., formerly known as Otterbourg, Steindler, Houston & Rosen, P.C. ("Otterbourg," "Defendant" or "Firm"), alleges as follows:

SUMMARY OF ACTION

This action seeks the return of $382,880 in capital payments made by the Plaintiff, an attorney, shareholder and former member of the Defendant law firm. In defiance of New York's Rules of Professional Conduct and applicable law, Defendant has retained and refuses to *begin* returning any portion of Plaintiff's capital until the year 2029 – a period of *more than fourteen (14) years from Plaintiff's withdrawal from the Firm.* Defendant does so in purported reliance on provisions of an Amended and Restated Shareholders Agreement (the "Shareholders Agreement") that tie the Firm's obligations under its long term office lease to the right of its shareholders to a return of their capital. Because those provisions improperly single out shareholders that voluntarily withdraw from the Firm and are in competition with it for clients from those who do not, they violate Rule of Professional Conduct 5.6(a)(1) and are unenforceable as against public policy under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989). Plaintiff seeks a declaration that the provisions of the Shareholders Agreement are

unenforceable, and an order awarding him the full amount of his capital retained by the Firm, damages resulting from the Firm's wrongful retention of his capital since his withdrawal, plus interest, costs and attorneys' fees.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the parties pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 301 and 302. Venue is proper in this County because Defendant's principal offices are located at 230 Park Avenue, New York, New York 10169-0075.

FACTS GIVING RISE TO ALL CAUSES OF ACTION

A. Background

2. Posner is an attorney licensed to practice in the State of New York. His practice focuses on bankruptcy and insolvency matters.

3. The Firm is New York professional service corporation organized under Article 15 of the New York Business Corporation Law. It is engaged in the practice of law including bankruptcy and insolvency matters.

4. Posner was admitted as a shareholder (collectively with other shareholders, the "Shareholders") of the Firm as of January 1, 2011.

5. As a Shareholder of the Firm, Posner acquired three classes of stock in the Firm's professional service corporation:

a. 10 shares of Voting Common Shares (the "Voting Shares") for which he paid the Firm $262,880;

b. 50 Class One Preferred Shares (the "Preferred Shares") for which he paid the Firm $5,000; and

c. 1150 Non-Voting Redeemable Common Shares (the "Redeemable Shares") for which he paid the Firm $115,000.

6. To finance the purchase of some or all of the shares, Posner obtained a personal loan in the amount of $230,000.

7. Under the terms of the loan, Posner is obligated to repay the balance due on or before January 31, 2016.

8. At all times relevant hereto, the Firm knew that Posner obtained a person loan to finance the purchase of his shares.

B. Posner's Voluntary Withdrawal from the Firm

9. On April 3, 2015, Posner gave notice to the Firm that he intended to withdraw from the Firm.

10. By agreement with the Firm, the notice period concluded as of June 19, 2015.

11. Plaintiff remained employed at the Firm through and including June 19, 2015.

12. Following his withdrawal from the Firm, Posner joined another law firm.

13. Posner continues to practice in the areas of bankruptcy and insolvency matters.

14. The Firm continues to practice in the areas of bankruptcy and insolvency matters.

C. Refusal of Firm to Return Plaintiff's Capital

15. Following his withdrawal, Posner requested that Firm return a portion of his capital prior to the repayment deadline on his capital loan.

16. The Firm refused that request and instead offered to return his capital over a period beginning only in 2029 and ending in 2031.

17. According to the Firm, the Shareholders Agreement binds Plaintiff to keep his capital with the Firm for the duration of the fixed term of its office lease, which ends on or about February 28, 2029.

18. According to the Firm, Plaintiff was not entitled to an "early repayment" of his capital because the Shareholders Agreement only authorized such payments to shareholders that are retired, permanently disabled, or deceased.

19. According to the Firm, a repayment of Plaintiff's capital that begins prior to the year 2029 would require a modification of the Shareholders Agreement.

20. On or about June 19, 2015, the Firm delivered a draft letter and promissory note to Plaintiff under which it proposed to make payment of $382,880 in four installment payments, the first of which would made on May 29, 2029.

21. Under the terms of the draft letter and promissory note, the remaining installment payments would be made on the first, second and third anniversary dates of the first installment payment, in 2030, 2031 and 2032.

22. Under the terms of the draft letter and promissory note, the Firm proposed a closing to be held on the same day they were delivered to Plaintiff, June 19, 2015, at which time Plaintiff was to accept delivery of the proposed promissory note and surrender his shares in the Firm.

23. The terms of the draft letter and promissory note were not accepted. Accordingly, no closing took place.

24. By letter dated July 31, 2015, Plaintiff requested that the Firm reconsider its proposed payment terms and its reliance on the provisions of the Shareholders Agreement in light of the requirements of Rule of Professional Conduct 5.6(a)(1) and decisional law under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

25. Rule of Professional Conduct 5.6(a)(1) states in relevant part:

(a) A lawyer shall not participate in offering or making:

> (1) a partnership, shareholder, 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 . . ."

26. In Cohen v. Lord, Day & Lord, the Court of Appeals held, in substance, that a provision in a partnership agreement that exacts "a significant monetary penalty" against a withdrawing partner who practices competitively with the former firm "constitutes an impermissible restriction on the practice of law" and conflicts with public policy as reflected in DR 2-108(A) [now codified as Rule 5.6(a)(1)]. Cohen, 75 N.Y.2d 95, 97-101 (1989).

27. By letter dated August 18, 2015, the Firm denied the applicability of Rule of Professional Conduct 5.6(a)(1) and decisional law under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989) and refused to return Plaintiff's capital any earlier than proposed by the draft letter and promissory note.

28. By letter dated September 24, 2015, the Firm unilaterally attempted to schedule a closing on October 2, 2015 at which it would deliver a final promissory note with the same seventeen year installment payment provision previously rejected by Plaintiff and Plaintiff would surrender his shares in the Firm.

29. The terms of the September 24, 2015 letter and final promissory note were not accepted. Accordingly, no closing took place.

30. The Firm remains in possession of $382,880 in capital paid by Posner for his shares in the Firm.

31. The Firm has continued to use Plaintiff's capital as collateral for its lease or other obligations without his authorization and without adequate consideration.

32. Posner remains a shareholder of the Firm but has not been afforded a right to vote at meetings of the shareholders.

33. The Firm has refused all efforts by Plaintiff to amicably resolve this dispute.

34. The parties' dispute is not arbitrable under the Shareholders Agreement.

FIRST CAUSE OF ACTION
Declaratory Relief

35. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 34 as if more fully set forth herein.

36. Defendant is ethically obligated to comply with the rules of conduct set forth in the New York Rules of Professional Conduct, 22 NYCRR Part 1200.

37. Defendant is legally obligated to comply with the law governing the practice of law in New York.

38. Defendant's failure and continued refusal to return Plaintiff's capital within a reasonable time period constitutes an impermissible restriction on the practice of law in violation of New York Rule of Professional Conduct 5.6(a)(1) and New York decisional law under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

39. The provisions of the Shareholders Agreement restricting or limiting the return of Plaintiff's capital until the termination of the fixed term of its office lease violates New York Rule of Professional Conduct 5.6(a)(1) and New York decisional law under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

40. The provisions of the Shareholders Agreement restricting or limiting the return of Plaintiff's capital until year 2029 or later violates New York Rule of Professional Conduct 5.6(a)(1) and New York decisional law under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

41. The provisions of the Shareholders Agreement restricting or limiting the return of Plaintiff's capital for an excessive and unreasonable length of time violates New York Rule of

Professional Conduct 5.6(a)(1) and New York decisional law under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

42. The provisions of the Shareholders Agreement restricting or limiting the return of Plaintiff's capital for an excessive and unreasonable length of time are unenforceable as a matter of public policy in New York.

43. Plaintiff seeks judgment declaring and adjudging that:

a. Defendant is obligated to return Plaintiff's capital in the principal amount of $382,880;

b. The provisions of the Shareholders Agreement purporting to delay the return of Plaintiff's capital until the termination of the fixed term of its office lease are unenforceable;

c. Plaintiff shall recover from Defendant damages resulting from the Firm's wrongful retention of his capital since his withdrawal to the date of the entry of judgment herein in an amount to be determined; and

d. Plaintiff shall recover from Defendant interest on the principal amount of his capital at the statutory rate from the date of his withdrawal from the Firm to the date of entry of judgment herein.

44. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION
Breach of Fiduciary Duty

45. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 44 as if more fully set forth herein.

46. Plaintiff is a Shareholder in Otterbourg.

47. Defendant owes a fiduciary duty to Plaintiff.

48. Defendant's obligations to Plaintiff are governed by and subject to the requirements of Rule of Professional Conduct 5.6(a)(1).

49. Defendant's obligations to Plaintiff are governed by and subject to decisional law under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

50. Defendant breached its fiduciary duty to Plaintiff by failing and refusing to return his capital to him within a reasonable time following his withdrawal from the Firm.

51. Defendant breached its fiduciary duty to Plaintiff by seeking to apply provisions of a Shareholders Agreement that violate New York Rule of Professional Conduct 5.6(a)(1) and are unenforceable under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

52. Defendant breached its fiduciary duty to Plaintiff by deferring his right to a return of his capital in a manner that is excessive and unreasonable, and that imposes an improper financial disincentive to voluntarily withdraw from the Firm and to continue practicing law following such withdrawal in competition with the Firm.

53. Defendant breached its fiduciary duty to Plaintiff by restricting and limiting his right to a return of his capital in a manner that is excessive and unreasonable, and that is not applied to other Shareholders who do not compete with the Firm for clients.

54. Defendant breached its fiduciary duty to Plaintiff by continuing to use Plaintiff's capital as collateral for its lease or other obligations without his authorization and without payment to him of any interest or other consideration.

55. Defendant breached its fiduciary duty to Plaintiff by restricting and limiting his right to a return of his capital in a manner that is excessive and unreasonable, and that it knew or should have known caused him injury.

56. Defendant breached its fiduciary duty to Plaintiff by not giving notice to Plaintiff of meetings of the Shareholders following his withdrawal from the Firm.

57. Defendant breached its fiduciary duty to Plaintiff by not giving notice to Plaintiff of elections held by the Shareholders following his withdrawal from the Firm.

58. As a direct and proximate result of Defendant's conduct, it has breached its duty of good faith and undivided loyalty to Plaintiff.

59. As a direct and proximate result of Defendant's breaches of duty to Plaintiff, Plaintiff has lost and continues to lose the use the principal amount of his capital retained by the Firm and has incurred financial damages in an amount to be determined.

THIRD CAUSE OF ACTION
Conversion

60. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 59 as if more fully set forth herein.

61. Plaintiff's capital is specifically identifiable and subject to an express obligation owed by Defendant to be returned to Plaintiff.

62. Plaintiff's capital is held in one or more bank accounts maintained by the Firm.

63. Upon his withdrawal from the Firm, Plaintiff had a right to a return of his capital in a reasonable time period.

64. Defendant has refused the return of Plaintiff's capital within a reasonable time period.

65. Defendant has refused to begin returning Plaintiffs' capital prior to the year 2029.

66. Defendant has retained possession and control over Plaintiff's capital with knowledge that the provisions of the Shareholders Agreement restricting or limiting the return of

such capital violate New York Rule of Professional Conduct 5.6(a)(1) and are unenforceable under Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989).

67. Defendants' retention and control over Plaintiffs' capital is in derogation of Plaintiff's right to return of such capital within a reasonable time period.

68. Defendant has converted to its use Plaintiffs' capital without authorization and without a superior legal right thereto.

69. As a result of Defendant's conduct, Plaintiff has lost and continues to lose the use the principal amount of his capital retained by the Firm and has incurred financial damage in an amount to be determined.

FOURTH CAUSE OF ACTION
Breach of Covenant of Good Faith and Fair Dealing

70. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 69 as if more fully set forth herein.

71. Plaintiff is a party to the Shareholders Agreement.

72. Defendant is obligated to abide by New York Rule of Professional Conduct 5.6(a)(1) and Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989) in its interpretation and application of the Shareholders Agreement.

73. Plaintiff reasonably and justifiably expected that his capital would be returned by Defendant within a reasonable time period without regard to whether he continued to practice law following his withdrawal from the Firm.

74. Plaintiff reasonably and justifiably expected that his capital would be returned by Defendant within a reasonable time period without subjecting him to disparate treatment because he has continued to practice law following his withdrawal from the Firm.

75. Plaintiff reasonably and justifiably expected that the Firm would not seek to impose financial restrictions to defer the return of his capital that were not imposed on other Shareholders.

76. Defendant's refusal to promptly return Plaintiff's capital constitutes an improper and illegal financial restraint that impairs a client's right to select counsel.

77. Defendant's refusal to promptly return Plaintiff's capital constitutes an improper and illegal financial restraint that seeks to restrict competition with the Firm.

78. The provisions of the Shareholders Agreement purporting to authorize the Firm to defer the return of Plaintiff's capital for more than ten years from his withdrawal is a breach of the covenant of good faith and fair dealing implied in the Shareholders Agreement.

79. The provisions of the Shareholders Agreement purporting to authorize the Firm to retain Plaintiff's capital for more than ten years from his withdrawal is a breach of the covenant of good faith and fair dealing implied in the Shareholders Agreement.

80. The provisions of the Shareholders Agreement purporting to authorize the Firm to use Plaintiff's capital for more than ten years from his withdrawal is a breach of the covenant of good faith and fair dealing implied in the Shareholders Agreement.

81. Plaintiff's rights under the Shareholders Agreement have been impaired by reason of Defendant's breach of the covenant of good faith and fair dealing implied in the Shareholders Agreement.

82. Plaintiff has been injured by reason of Defendant's improper refusal to return his capital within a reasonable period of time following his withdrawal from the Firm.

83. As a result of Defendant's breach, Plaintiff has lost and continues to lose the use of the principal amount of the capital retained by the Firm and has incurred financial damage in an amount to be determined.

WHEREFORE, judgment is respectfully requested in Plaintiff's favor against Defendant as follows:

a. On the First Cause of Action, declaring and adjudging that:

   (i) Defendant is obligated to return Plaintiff's capital in the principal amount of $382,880;

   (ii) The provisions of the Shareholders Agreement purporting to delay the return of Plaintiff's capital until the termination of the fixed term of its office lease are unenforceable;

   (iii) Plaintiff shall recover from Defendant damages resulting from its retention of Plaintiff's capital from the date of Plaintiff's withdrawal from the Firm to the date of entry of judgment herein in an amount to be determined; and

   (iv) Plaintiff shall recover from Defendant interest on the principal amount of his capital and resulting damages at the statutory rate from the date of his withdrawal from the Firm to the date of entry of judgment herein, plus costs and attorneys' fees;

b. On the Second Cause of Action, adjudging Defendant liable to Plaintiff for:

   (i) the return of his capital in the principal amount of $382,880;

   (ii) damages resulting from its retention of Plaintiff's capital the from the date of Plaintiff's withdrawal from the Firm to the date of entry of judgment herein in an amount to be determined; and

   (iii) statutory interest on the principal amount of $382,880 from the date of his withdrawal to the entry of judgment herein, plus costs and attorneys' fees;

c. On the Third Cause of Action, adjudging Defendant liable to Plaintiff for:

   (i) the return of his capital in the principal amount of $382,880;

   (ii) damages resulting from its retention of Plaintiff's capital the from the date of Plaintiff's withdrawal from the Firm to the date of entry of judgment herein in an amount to be determined; and

(iii) statutory interest on the principal amount of $382,880 from the date of his withdrawal to the entry of judgment herein, plus costs and attorneys' fees;

d. On the Fourth Cause of Action, adjudging Defendant liable to Plaintiff for:

(i) the return of his capital in the principal amount of $382,880;

(ii) damages resulting from its retention of Plaintiff's capital the from the date of Plaintiff's withdrawal from the Firm to the date of entry of judgment herein in an amount to be determined;

(iii) statutory interest on the principal amount of $382,880 from the date of his withdrawal to the entry of judgment herein, plus costs and attorneys' fees; and

e. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 6, 2016

HINSHAW & CULBERTSON LLP

By: _____

Philip Touitou
800 Third Avenue, 13th Floor
New York, New York 10022
(212) 471-6200
Attorneys for Plaintiff

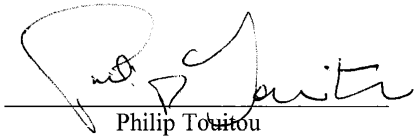
VERIFICATION

I, the undersigned, am an attorney admitted to practice in the courts of New York, affirm under penalties of perjury as follows:

I am a member of Hinshaw & Culbertson LLP, attorney of record for the plaintiff herein, and have read the annexed Complaint. I know the contents thereof and the same are true to my knowledge, except those matters therein which are stated upon information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following: files, records and information provided by Plaintiff.

The reason I make this affirmation instead of plaintiff is: plaintiff resides outside the County in which my office is located.

Dated: New York, New York
January 6, 2016



Philip Touitou

PENNSYLVANIA BAR ASSOCIATION COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

PHILADELPHIA BAR ASSOCIATION PROFESSIONAL GUIDANCE COMMITTEE

JOINT FORMAL OPINION

2007-300

June 2007

ETHICAL OBLIGATIONS WHEN A LAWYER CHANGES FIRMS

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I. Introduction

In April, 1999, this Committee and the Philadelphia Bar Association's Professional Guidance Committee issued Joint Opinion No. 99-100. In that Opinion we summarized key concerns that arise under then applicable Pennsylvania Rules of Professional Conduct (sometimes, "RPC") when a lawyer moves from one firm to another. Given the passage of time since the issuance of Joint Opinion No. 99-100, and the numerous inquiries this Committee receives regarding ethical obligations relating to lawyers changing firms, this Committee concluded that it was appropriate to revisit this subject matter in the light of decided and published authorities since Joint Opinion No. 99-100 was issued. On the whole, despite the passage of time and the existence of new authorities, the Committee is of the view that the conclusions reached in the prior opinion remains valid and well grounded.

This Opinion both adds to and departs from our prior pronouncement. Accordingly, this Opinion is now our operative Opinion and supersedes all prior opinions on the subject.

II. Summary of Conclusions

- The client chooses the lawyer. The client may chose to stay with the old firm, go with the departing lawyer or hire another lawyer.
- In order to exercise its choice, the client must be informed that its lawyer is leaving the old firm.
- Both the departing lawyer and the old firm have independent ethical obligations to inform the client that its lawyer is leaving the old firm.
- The clients entitled to notice are those for whom the departing lawyer is currently handling active matters or plays a principal role in the current delivery of legal services.
- The law firm should preferably be notified before the clients are notified.
- Joint notification of clients is preferable.

III. Preliminary Observations

Over the course of recent decades the legal profession has undergone a sea change in terms of the mobility of lawyers. What once was an unusual occurrence, a lawyer's departure from one firm to join another, is now an everyday event in the practice of law. See, e.g., Hillman on Lawyer Mobility 2d Ed., (hereinafter "Hillman"), § 1.1, p 1:7 ("The era of the mobile lawyer began in the 1980s and shows little indication of subsiding").[1] Underlying many such departures is a competition for clients -- a type of competition not traditionally seen in the practice -- between the departing lawyer and the firm from which the lawyer is departing (sometimes, "old firm").

Increased mobility has thrust upon the profession a variety of difficult legal and ethical issues that had not, prior to this period of change, been the subject of extensive consideration by judicial and ethical authorities. In some instances, the difficult practicalities of the potentially differing interests at stake -- the interests of the departing lawyer, the old firm and, most importantly, the clients - - do not fit neatly within the framework and text of the existing Rules of Professional Conduct. Resolution of a number of thorny issues that arise in this context is not easily achieved.

Moreover, there is an overlap, and sometimes a tension, between the Rules of Professional Conduct and applicable substantive law. Generally, when providing opinions on matters of ethics, this Committee has avoided the difficulties presented by the interface of law

[1] The Pennsylvania Superior Court indicated that the interests of law firms in the stability of their lawyers and clientele are interests deserving of protection. See, Capozzi v. Latsha & Capozzi, P.C., 797 A.2d 314 (Pa. Super. 2002) (adopting the reasoning and rationale of the California Supreme Court in Howard v. Babcock, 6 Cal. 4th 409, 863 P.2d 150 (Cal. 1993)). Thus, the interests of individual lawyers in mobility and of law firms in stability are values to be balanced in providing ethical guidance in this area.

and ethics by simply noting that it is not our province to render advice on substantive law. The temptation here to take that same course is great, for harmonizing ethical principles with legal requirements in the context of the issues that arise when lawyers change law firms is not an easy task. We have concluded, however, that a blanket failure at least to acknowledge and discuss the impact of substantive law in this opinion would not well serve members of this Bar. Although it is not the province of this Committee to provide legal advice unrelated to the Rules of Professional Conduct, ethical advice given in this context should not be dispensed in a vacuum without regard to the legal obligations that departing lawyers and old firms owe separate and apart from the Rules of Professional Conduct.

In ABA Formal Opinion No. 99-414 ("Ethical Obligations When a Lawyer Changes Law Firms"), the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Committee") recognized the need to consider substantive law, as well as rules of ethics, in addressing questions in this setting:

> 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 in determining an appropriate course of action.

ABA Formal Opinion No. 99-414 at 2. We agree.

IV. The Paramount Concern: The Client's Freedom of Choice in the Selection of Counsel

We begin our analysis of the issues by restating that which we said in our prior opinion--the fundamental and paramount rule that must be honored in the difficult circumstances that

sometimes accompany a lawyer's change of law firms is the client's right to choose its counsel. Joint Opinion No. 99-100 at 1. The client's freedom of choice in the selection of counsel is a principle firmly embedded in our Rules of Professional Conduct. Rule 1.16 ("Declining or Terminating Representation") ethically requires a lawyer to withdraw from the representation of a client, if "the lawyer is discharged." Comment [4] to Rule 1.16 emphasizes the point: "[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment of the lawyer's services." ABA Formal Opinion No. 99-414 recognizes the principle as well. There, the ABA Committee stated, "a client has the ultimate right to select counsel of his choice. . . ."

This principle of client freedom of choice has also been recognized by the courts. E.g., Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979); see also, Attorney Grievance Commission of Maryland v. Potter, 380 Md. 128, 158, 844 A.2d 367, 384 (2004) (commenting on client's freedom of choice).[2]

[2] In Potter, Maryland's highest court stated:

> The client has the right to choose the attorney or attorneys who will represent it. . . . Clients are not the "possession" of anyone, but to the contrary, control who represent them. . . . Clients are not merchandise. They cannot be bought, sold or traded. The attorney-client relationship is personal and confidential, and the client's choice of attorneys in civil cases is near absolute.

380 Md. at 158, 844 A.2d at 384.

V. Both the Departing Lawyer and the Old Firm have an Attorney-Client Relationship with Clients Affected by the Departure; Both Bear Ethical Obligations to such Clients in Connection with the Departure

It is axiomatic that a departing lawyer who personally represents a client in a current active matter has an attorney-client relationship with that client. The departing lawyer's firm also has such a relationship with that client. Many engagement letters make this relationship explicit.

This conclusion is entirely consistent with our prior opinion on this subject. There we said that, "generally . . . a client served by one lawyer in a law firm is also a client of the firm," and that, "clients serviced by one lawyer in a firm are clients of the firm." Joint Opinion No. 99-100 at 1, 6 (citing Philadelphia Bar Ass'n Prof. Guid. Comm. Op. No. 94-30 (1994)) (emphasis added)).

It is also consistent with Comment h to § 14 of the Restatement (Third) of the Law Governing Lawyers ("Restatement"). That Comment states:

> Client-lawyer relationship with law firms.
>
> Many lawyers practice as partners, members, or associates of law firms. . . . When a client retains a lawyer with such an affiliation, the lawyer's firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise. For example, the lawyer ordinarily may share the client's work and confidences with other lawyers in the firm. . . and the firm is liable for the lawyer's negligence. . . . Should the lawyer leave the firm, the client may chose to be represented by the departing lawyer, the lawyer's former firm, neither or both. . . .

Restatement § 14, Comment h (citations omitted; emphasis added). See also, Rule 1.10, Comment [2] ("a firm of lawyers is essentially one lawyer for the purposes of the rules governing loyalty to the client. . . .").

ABA Formal Opinion No. 99-414 recognizes the obligations imposed on the remaining managing lawyers of the old firm in the context of a lawyer's departure as well as on the departing lawyer:

> 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.

ABA Formal Opinion No. 99-414 at 1 (emphasis added). In short, both the departing lawyer and the old law firm have an attorney-client relationship with, and owe ethical obligations to, clients in connection with a lawyer's departure.

VI. The Duty to Communicate the Fact of Departure to Clients

Aptly titled "Communication," Rule 1.4 imposes a duty of communication upon an attorney. The Rule states:

> (a) A lawyer shall:
>
> > (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; . . .
> >
> > (2) keep the client reasonably informed about the status of the matter . . . .
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In our prior opinion on this subject, in reliance upon Guidance Inquiry 92-8 of the Philadelphia Bar Association Professional Guidance Committee, we concluded that this rule imposes an obligation upon both the departing lawyer and the old firm to advise current clients serviced by the departing lawyer of the fact of the departure. Joint Opinion No. 99-100 at 3.

Such notification is necessary in order to allow the clients to make an intelligent decision regarding their future representation. ABA Formal Opinion No. 99-414 concurs in this view:

> Because the client has the ultimate right to select counsel of his choice, information that the lawyer is leaving and where she will be practicing will assist the client in determining whether the legal work should remain with the firm, be transferred with the lawyer to her new firm, or be transferred elsewhere. Accordingly, informing a client in a timely manner is critical to allowing the client to decide who will represent him.

ABA Formal Opinion No. 99-414 at 3. We reaffirm our conclusion that the departing lawyer and the old firm each owe a duty of communication to clients regarding an attorney's impending departure.

The departure of a lawyer from one firm to another is the type of development as to which Rule 1.4 requires a client to be advised. The decision as to who shall continue to represent the client in light of the departure is a decision as to which the client's informed consent must be obtained. Thus, the departing lawyer and the law firm each bear an obligation under Rule 1.4 to notify the client and obtain the client's informed consent with respect to the client's continued representation. This is not to say that each must notify the client of an impending departure, although both are permitted to if they so choose. However, if one fails or refuses to do so, the other one must.

A. <u>The Clients to Whom the Duty to Communicate Runs</u>

In Formal Opinion No. 99-414, the ABA Committee found the duty of disclosure to run only to "current clients." ABA Formal Opinion No. 99-414 at 1-3. The ABA Formal Opinion defined the term "current clients" to mean "clients for whose active matters [the departing lawyer] currently is responsible or plays a principal role in the current delivery of legal services."

Id. at 1. We adopt the ABA Formal Opinion 99-414's concept of "current clients" for purpose of identifying those clients to whom the duty to communicate runs.

Our Committee views the duty of communication of the departing lawyer and the old firm as running, not to all firm clients, but only to current clients of the departing lawyer, i.e., those clients for whom the lawyer either (1) is currently responsible for handling active matters or (2) plays a principal role in the current delivery of legal services. In short, current clients are the clients affected by the departure, and, hence, the ones to whom the duty to communicate is owed. We note that the duty to communicate does not include clients of the old firm on whose matters the departing lawyer did not work or worked only in a subordinate role in a way that afforded the lawyer little or no direct client contact.

B. The Timing of Communication with Clients

Having recognized the duty of communication and identified the clients to whom it does and does not run, we turn to another important aspect of notifying such clients of a lawyer's departure -- the timing of the notification. In our prior opinion, we pointed out that, although "[t]he timing of any notice is important," the subject "does not appear to be specifically covered by the Rules of Professional Conduct." Joint Opinion No. 99-100 at 2. In fact, it is not.

Nonetheless, in our prior opinion, we said that "absent circumstances that would compromise the interests of the client, the prudent approach is that the departing lawyer should not notify clients of an impending departure until the firm has been informed of the lawyer's intention to leave the firm." Id. (See Part VIII.B., infra, discussing the timing of the departing attorney's notice to the old firm).

Our prior opinion did not describe the circumstances that might allow notification of clients prior to notification of the old firm. One such circumstance that might be imagined, however, would involve a departing lawyer's reasonable fear that the old firm, upon receiving

notice of the lawyer's intended departure, would take preemptive action, such as locking the lawyer out of the firm's offices and depriving the lawyer of access to documents and the firm computer systems, which would disable the lawyer from serving clients desiring and in need of her services during the transition phase. Circumstances of this nature should be rare, since such preemptive conduct on the part of the old firm could well violate ethical obligations to clients.

To restate, both the departing lawyer and the old firm owe ethical duties to clients, including the duty to assure that their representation is not adversely affected and that their active matters continue to be handled diligently and with competence, in accordance with Rules 1.3 and 1.1. These duties apply during the period from the lawyer's negotiations looking toward a new association, through the lawyer's announcement of an intention to depart, and the clients' decisions as to whom shall continue the representations, and, if the clients determine to use the departing lawyer at the new firm, on through the transfer of the representation to that firm.

Preemptive conduct on the part of either the old firm or the departing lawyer could violate their mutual obligations along these lines. In short, during the period of transition in a lawyer's change from one firm to another, both the departing lawyer and the old firm owe a duty of cooperation to one another in the protection of the clients' interests. See Part VII, infra.

Our prior opinion, as a general matter, associated the timing of notification of the clients with the timing of notification to the old firm. We affirm that approach today. After notification to the old firm, the risk of claims of breach of fiduciary duty is considerably lessened. Moreover, recognizing that in most cases client notice should not precede notice to the old firm still permits the departing lawyer to comply with the lawyer's duty of communication to the client under Rule 1.4(a).

The timing of notice should be fair and reasonable under all of the circumstances. From the perspective of notice to the old firm, the notice should be timed to enable the old firm to discharge its ethical obligations in a responsible and orderly way while facilitating client freedom of choice in the selection of counsel. From the perspective of the clients, the notice should be timed so as to enable them to make a reasonable, informed, unpressured judgment regarding who should carry on their representation.

Any suggestion that the departing lawyer should not be permitted to communicate the fact of departure until after that the departing lawyer has left the old firm must be rejected. Affording the client notice of a departure after the departure has already occurred is ill-suited to allowing the client to make an informed, unpressured choice of legal counsel. Hillman, § 4.8.3.2 at p. 4:104. ABA Formal Opinion No. 99-414 concurs in this view. Id. at 5 n.11 ("Today, we reject any implication of Informal Opinions 1457 or 1466 that notices to current clients as a matter of ethics must await departure from the firm.").

C. Form and Substance of Communication

1. The Initial Communication

The question of the form and substance of communication with clients affected by the departure must be viewed both from the perspective of the departing lawyer and of the old firm. We address the issue first from the departing lawyer's perspective.

As we noted in our prior opinion, there is no ethical prohibition against the departing lawyer's giving notice to current clients (i.e., clients for whose active matters the departing lawyer currently is responsible or for whom the lawyer plays a principal role in the current delivery of legal services) in person or by telephone. Joint Opinion No. 99-100 at 2. Nonetheless, because of the importance of the obligation to communicate with clients affected regarding the lawyer's departure and the fiduciary obligations associated with the departing

lawyer's providing such notice while still associated with the old firm, as a best practice we urge that at least the initial notice be given in writing. A writing will provide a record of the communication. Id.

Additionally, because of the potential for breach of fiduciary or other duties to the old firm in any communication with clients about an intention to depart while still associated with the old firm, communications on this subject should be carefully worded and narrowly circumscribed. See Joint Opinion No. 99-100 at 4 ("the scope of the notice should be carefully limited"). Such communications by a departing lawyer, while still associated with the old firm, should go no further than necessary to protect the important value of client freedom of choice in legal representation, and should not go so far as to undermine the important value of loyalty owed by partners and associates to existing law firms. See, Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 86 N.Y. 2d 121, 119-20, 629 N.Y.S. 2d 1009, 1013, 653 N.E. 2d 1175, 1179 (1995).

Balancing these competing values, we believe that the initial notice by a departing lawyer informing clients of the departing lawyer's new affiliation sent before the lawyer's departure from the firm generally should conform to the following:

1. The client should be advised of the departing lawyer's intended departure and the timing of that intended departure, together with the departing lawyer's new association and the willingness and ability of the departing lawyer at the new firm to continue with current representations of the client;
2. The client should not be urged to sever or continue its relationship with the old firm or to establish a relationship with the new firm;

3. The client should be advised that it has the sole right to decide who will complete or continue the matters, the departing lawyer, the old firm or a new lawyer altogether; and

4. Neither the departing lawyer nor the old firm should be disparaged.

These standards are consistent with ABA Formal Opinion No. 99-414 and also consistent with our prior opinion. See Formal Opinion No. 99-414 at 5; Joint Opinion No. 99-100 at 2-4.[3]

To avoid any risk of exposure to claims of breach of duty arising from unilateral communications with clients, while at the same time seeking to assure that the clients receive appropriate information to facilitate an informed choice in selection of counsel, we urge both the departing lawyer and the old firm to cooperate and provide a written joint notice to the clients affected by the lawyer's departure. As ABA Formal Opinion No. 99-414 notes, "[t]he far better course to protect client's interests is for the departing lawyer and her law firm to give joint notice of the lawyers' impending departure. . . ." See also, Hillman § 4.8.3 at 4:105 ("Ideally, a law firm and withdrawing partner will advance this objective [of assisting clients in making informed choices regarding representations] by cooperating to the end of providing joint notice to clients of the partner's withdrawal." (emphasis in original)); see also, Florida Rule of Professional

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[3] In Joint Opinion No. 99-100, we said:

> In addition, the scope of the notice should be carefully limited. Clients should be told that they have the right to remain with the firm, as well as the right to switch lawyers and be represented by the departing lawyer or by a new lawyer. They should not be urged either to remain with the firm or to go with the departing lawyer. Rather, the letter should simply state the willingness of the departing lawyer or the firm to handle the client's matters. No disparaging remarks should be made about the firm or the departing lawyer, and the notice should not contain comparisons between the firm and the departing lawyer. Finally, the notice should be brief and dignified. Ohio Board of Commissioners on Grievances and Discipline Op. 98-5 (1998).

Id. at 4-5.

Conduct 4-5.8 (prohibiting lawyer unilateral contact with clients of a law firm for purposes of notifying them of intended departure or to solicit their representation, absent bona fide negotiations with an authorized representative of the law firm regarding the sending of a joint communication). Where, however, as a consequence of the circumstances of the departure such joint notice is not possible, both the departing lawyer and the old firm still bear a duty of notification to affected clients, i.e., to "current clients" of the departing lawyer as we have defined it above.

2. Subsequent Communication

Following the initial communication the question arises, what additional information may the departing lawyer and the old firm provide current clients in connection with the departure and the clients' decisions as to who will continue the representations? From the departing lawyer's perspective, during the period after notice of departure to the old firm and while still associated with the old firm, care must be taken in what is said, for any communication might be construed as a duty-breaching solicitation for the benefit of the departing lawyer and the new firm. Nonetheless, ABA Formal Opinion No. 99-414 concluded, "[i]f 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." ABA Formal Opinion No. 99-414 at 6 (relying upon D.C. Bar Legal Ethics Opinion 273 (1997) ("Ethical Considerations of Lawyers Moving from One Private Firm to Another")). The ABA Committee added, however, that "[t]he 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."

The old firm, like the departing lawyer, ethically may, after the initial communication, provide additional information reasonably necessary to assist clients affected by the departure in making an informed choice in the selection of counsel. Thus, the old firm is permitted to discuss such matters as billing arrangements, staffing and the competence of the old firm to continue to handle the matter going forward notwithstanding the departing lawyer's departure. However, to ensure clients' freedom of choice, constraints should apply to the old firm's communication with clients of a nature similar to those which apply to such communications on the part of the departing lawyer. The old firm should reiterate the clients' freedom of choice in the course of these communications.

3. Solicitation After Departure[4]

After departure from the old firm, both the departing lawyer and the old firm are free as an ethical matter to solicit clients of the old firm in accordance with the Rules 7.1 through 7.3. In these solicitation efforts, pursuant to Rule 7.1 a lawyer, and a law firm, are prohibited from making "a false or misleading communication about the lawyer or the lawyer's services."[5]

Rule 7.2 "[s]ubject to the requirements of Rule 7.1," permits "a lawyer [to] advertise services through written recorded or electronic communications, including public media, not

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[4] We limit our discussion in this section to the applicable Rules of Professional Conduct in order to avoid a broad ranging discussion of other law that could conceivably be applicable to the subject, such as the law of tortious interference with contractual relationships, use of trade secrets of the former firm, defamation, trade disparagement, breach of fiduciary duty, etc. Suffice it to say, that the substantive law that governs competition in business would operate to constrain the conduct of lawyers in competition for clients post-departure. Both the departing lawyer and the old firm obviously must comply with other law in the post-departure competition for clients.

[5] The obligation of truthfulness applies not only to post-departure communications with clients, but to predeparture communications, as well. See, Rule 8.4(d) (making it professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

within the purview of Rule 7.3." Rule 7.3(a) prohibits "in-person" solicitation of a prospective client, directly by a lawyer, or through an intermediary, unless the lawyer has a family, close personal or prior professional relationship with the person contacted or that person is a lawyer. Under Rule 7.3(a), such prohibited in-person solicitation includes contact "by telephone or by real-time electronic communication, but subject to Rule 7.3(b), does not include written communications."

Reading these Rules together, the departing lawyer may solicit in-person, or by intermediary, including through telephonic or real-time electronic communication, any current or former client of the old firm with whom the lawyer has either a prior professional, close personal or family relationship, or the person contacted is a lawyer, provided once again, however, that such solicitation does not entail a false or misleading communication or fall within the prohibited categories of Rule 7.3(b). Additionally, the departing lawyer is free as an ethical matter to solicit in writing all current and former clients of the old firm, provided the solicitation does not entail a false or misleading communication in violation of Rule 7.1 and provided further that none of the three exceptions to otherwise permissible solicitation set forth in Rule 7.3(b) applies.[6]

With respect to a departing lawyer's in-person solicitation of those clients of the old firm on whose matters the departing lawyer previously worked, we adopt the ABA Committee's discussion in ABA Formal Opinion No. 99-414 of what constitutes a "prior professional relationship" sufficient to permit such in-person solicitation. The ABA Formal Opinion

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[6] The three exceptions to permissible solicitation under Rule 7.3(d) are where: (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; (2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or (3) the communication involves coercion, duress or harassment.

emphasized that the exception under Rule 7.3(a) permitted "in-person solicitation only of those current clients of the firm with whom the lawyer personally has had sufficient professional conduct [sic] [contact] to afford the client an opportunity to judge the professional qualifications of the lawyer. . ." ABA Formal Opinion No. 99-414. Unless the departed lawyer had a prior professional relationship of this nature with a client of the old firm, he would not be permitted to solicit such client by in-person contact, but only through a writing that is not a real-time electronic communication. The ABA Formal Opinion observed that "[a] lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation 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." Id. at 3.

VII. Duty to Cooperate in Handling and Transitioning of Active Client Matters

While this Opinion thus far has focused on duties relating to notification of the old firm and communications with clients, other duties arise under these circumstances. Principal among them is the duty to protect the interests of clients in their legal matters during the period of transition. See, RPC 1.16(d). Both the departing lawyer and the old firm owe an obligation to ensure that the interests of the clients in active matters are competently, diligently and loyally represented in accordance with Rules 1.1, 1.3 and 1.7 during that period. See e.g., ABA Formal Opinion 99-414 at 7, n.1.

For example, with respect to an active matter that the departing lawyer anticipates will follow him to the new firm, the lawyer may not defer work on the matter that can and should be done currently in order to further his own personal interest in generating fees for the new firm. Along similar lines, an old firm which has been notified that a client intends to follow the departing lawyer to the new firm, may not render that lawyer's continued representation of the client difficult or impossible by depriving access to documents and information needed to carry

on the representation in the absence of a valid right to assert a retaining lien.[7] In other words, both the departing lawyer and the old firm owe a duty of cooperation during the transition to avoid prejudice to the clients' interests in connection with current and future legal representation.

In our prior opinion, we discussed one particular aspect of this duty relating to the protection of the interests of the difficult client. Joint Opinion No. 99-100 at 5. We noted there that although the departing lawyer may have an interest in taking as many clients as possible, the lawyer may also want to leave difficult clients behind. Id. We cautioned that in this situation, "the departing lawyer must take care not to violate the duties imposed by Rule 1.3 (diligent representation) and Rule 1.4 (communication with client)." Id. We reaffirmed the duties of both the departing lawyer and the old firm to notify the difficult client of the intended departure and that client's freedom of choice as to who will continue the representation. Id.

We also noted, however, the rights of the departing lawyer and the old firm to withdraw from the representation of the difficult client in accordance with the provisions of Rule 1.16. In our prior opinion, we said:

> If the departing lawyer or former firm does not wish to continue representing such a client, the lawyer or firm is permitted generally to withdraw from the representation "if withdrawal can be accomplished without material adverse effect on the client." Rule 1.16(b). The lawyer or firm is also permitted to withdraw from the representation when the representation "has been rendered unreasonably difficult" by the client even if withdrawal will have an adverse effect on the client. Rule 1.16(b)(5); Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Op. 94-125 (1994). Although withdrawal

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[7] While our prior opinion dealt with some, but not all, aspects of the question of entitlement to client documents in the departing lawyer setting, including the right of a lawyer or law firm to assert a retaining lien, these issues are addressed elsewhere. See, this Committee's Formal Opinion Nos. 2006-300 ("Ethical Considerations in Attorneys' Liens"), and 2007-100 ("Client Files - Right of Access, Possession and Copying, Along With Retention").

> may be permissible, steps still must be taken to protect the client's interests. Rule 1.16(d). Thus, the client must be notified of the lawyer's and/or firm's decision to terminate the representation. In addition, the client must also be provided with sufficient time to retain a new lawyer following notification of the lawyer's and/or firm's decision to terminate the representation. Rule 1.16(d).

Id. Our statements in our prior opinion regarding the protection of the interests of problem clients continue to apply.

In our prior opinion we also concluded, relying upon Opinion 94-30 of the Philadelphia Professional Guidance Committee, that where, following a partner's departure a client for whom the partner had worked, telephoned the law firm asking for the former partner, the firm was obligated to provide the contact information for that former partner prior to engaging in any other discussion with the client. Joint Opinion No. 99-100 at 6. That advice was based on the need to allow the client to make prompt contact with the former attorney in order to facilitate the client's freedom of choice in the selection of counsel. Id. We also concluded that after providing the contact information, the firm's representative was permitted to inquire whether the call was related to a legal matter, and if so, the firm's representative could properly propose the firm's assistance in the matter. Id. This conclusion was based upon the analysis that a client represented by one lawyer in a firm is a client of the firm. Id. Under Rule 7.3(a), we acknowledged the firm's right to communicate with a prospective client with whom the firm had a prior professional relationship. Id. We noted, however, that if the caller resisted the invitation or indicated a desire to talk only to the former partner, continued persistence or heavy-handedness by the firm would run the risk of violating Rule 7.3(b) which prohibits direct solicitation of persons who display a disinclination to deal with the firm. Id. We believe this guidance remains appropriate today.

VIII. Duty of Departing Lawyer to Notify Firm of Possible or Intended Departure

A. Existence of the Duty

We believe that a lawyer may owe an obligation to provide notice to the old firm of the lawyer's possible departure. Moreover, when the possibility of departure ripens into an affirmative intention to leave, an affirmative obligation to notify the old firm arises. Although no Rule of Professional Conduct expressly imposes such a duty to notify the old firm, the obligation flows from a number of sources.

First, in recognizing that an attorney-client relationship exists between the client and the old firm, we have acknowledged that certain ethical obligations are imposed upon the old firm flowing from that relationship and the fact of the departure. ABA Formal Opinion No. 99-414 supports this view. That opinion concludes that the members of the old firm with managerial authority (and hence, in our view, the old firm itself) are obligated, for example, "(1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure of a lawyer who is currently responsible for or plays a principal role in the current delivery of legal services for the client's active matters; (2) to make clear to those clients and others for whom departing lawyer has worked and who inquire that the client may choose to be represented by the departing lawyer [by the old firm or by another lawyer]. . .; (3) to assure that active matters on which the departing lawyer has been working continue to be managed by the remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that upon firm's withdrawal from the representation of any client, the firm takes reasonable steps to protect the client's interest pursuant to Rule 1.16(d)." ABA Formal Opinion No. 99-414 at 2 n 1. We agree that the old firm bears these obligations to clients.

Moreover, as ABA Formal Opinion No. 99-414 further recognizes, "[w]hen 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 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 No. 96-400." ABA Formal Opinion No. 99-414 at 6 n. 12.

ABA Formal Opinion No. 96-400 ("Job Negotiations with Adverse Firm or Party"), cited in the foregoing quotation from ABA Formal Opinion No. 99-414, is instructive in understanding certain interests and obligations of the old firm in the departing lawyer context, and hence the basis for the imposition of a duty upon the departing lawyer to notify the old firm of a possible or intended departure. ABA Formal Opinion No. 96-400 addresses ethical issues which arise when a lawyer pursues an employment opportunity with a firm or party that the lawyer is opposing in a matter, focusing on the conflict that may arise in these circumstances. The opinion concludes that "depending on the stage of the discussions," a lawyer's pursuit of employment with an adversary firm or party may "materially limit the lawyer's representation of a client because the area of the lawyer's interest in the prospective affiliation may affect the discharge of many of his ethical duties to his client." Id. at 3. The opinion notes that for the lawyer to continue the representation under these circumstances (i.e., in the face of a material limitation conflict) requires consultation and the consent of the client. Id.

Addressing the question of when such consultation must occur, ABA Formal Opinion No. 96-400 concludes:

> While recognizing that the exact point at which a lawyer's own interests may materially limit his representation of his client may vary, the Committee believes that clients, lawyers and their firms are all best served by a rule which requires consultation and consent at the earliest point that the client's interests could be prejudiced. We, therefore, conclude that a lawyer who has an

> active and material role in representing a client in litigation must consult with and obtain the consent of that client, ordinarily before he participates in a substantive discussion of his experience, clients or business potential or the terms of an association with an opposing firm.

Id. at 5.

ABA Formal Opinion No. 96-400 goes on to recognize that in certain circumstances it may be "inappropriate or unnecessary for the job-seeking lawyer to raise the potential conflict personally with the client." Id. at 6. "This would be true, for example," the opinion states, "if the job-seeking lawyer does not have the principal relationship with, or any direct contact with the client." Id. In such circumstances, the opinion continues, "the job-seeking lawyer should first make disclosure to his superior in the matter or the lawyer who has the principal relationship with the client. That lawyer may then decide whether to remove the job-seeking lawyer of further responsibility for the matter pending his employment discussions, or to disclose the job-seeking lawyer's interest in the opposing firm to the affected client, and, on behalf of the job-seeking lawyer, seek to obtain the client's consent to the job-seeking lawyer's continuing to work on the matter." Id.

ABA Formal Opinion No. 96-400 concludes that the personal interest conflict that exists where a lawyer representing a client in a matter desires to pursue job negotiations with an adversary in that matter is not imputed to other lawyers in the firm. Id. at 7-8. See, RPC 1.10(a). Thus, if the job-seeking lawyer is relieved of responsibility of a matter, the firm, through other lawyers, may continue the representation of the client in that matter. Id. In this context, it would be prudent for the old firm to screen the job-seeking lawyer from further involvement in or contact with that matter.

The type of conflict addressed in ABA Formal Opinion No. 96-400 may arise anytime a lawyer in a firm negotiates with another firm if the two firms are opposite one another in any

matter. Were a job-seeking lawyer, in the course of the job negotiations, to be exposed even inadvertently to confidential information regarding a matter in which the old firm and new firm are opposite one another, the lawyer would be obligated to disclose that fact to the lawyer's existing firm, i.e., to the lawyers within that firm with managerial authority under Rule 5.1, so that the firm could properly address the situation. Thus, a job-seeking lawyer should be vigilant, while remaining at the old firm, to avoid any involvement in or being exposed to any confidential information relating to any matter where the firm with which the lawyer is negotiating is on the opposite side.[8] Moreover, the negotiating lawyer has a duty of disclosure to the lawyer's current firm if circumstances should arise in the course of the negotiation which raise a realistic possibility of conflict.

In short, the old firm's ability to comply with its own ethical obligations to avoid conflicts, notify clients of departures, ensure client freedom of choice and avoid prejudice to client interests in the course of a departure and any accompanying withdrawal from representation, could be compromised absent the recognition of a duty on the departing lawyer in certain circumstances to notify his current firm of the lawyer's possible or intended departure. Hence, the departing lawyer may owe a duty to the old firm to provide such notice. See, Hillman, § 4.8.2 at p. 4:98 ("Generally, a partner should provide reasonable notice of an intent to withdraw from a firm."). This obligation is a natural outgrowth of the departing lawyer's practicing in the old firm.

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[8] If the departing lawyer were to become involved in such a matter or acquire such information while at the old firm and the client did not follow the lawyer to the new firm, the lawyer would carry to the new firm a former client conflict under RPC 1.9. Imputation of that conflict to others of the new firm could be avoided by following the screening requirements of Rule 1.10(b).

B. Timing of the Duty of the Departing Lawyer to Notify Old Firm

Where a duty of notice to the old firm arises, precisely when the departing lawyer should notify the old firm of a possible or intended departure will vary depending upon the circumstances. The interests of the departing lawyer and the old firm may diverge on this question. The old firm, for example, would have an interest in knowing of a lawyer's possible departure at a relatively early stage of the lawyer's job search -- to use the words of ABA Formal Opinion No. 96-400, at the point at which the lawyer "participates in a substantive discussion of his experience, clients or business potential or the terms of an association with [another] firm." Id. at 5.[9] The lawyer, however, may not want to disclose to the old firm the fact of those types of

[9] This Opinion does not attempt to resolve definitively the difficult question of what information, if any, relating to a client might be disclosed by a lawyer in discussions with another firm regarding a potential new association, prior to the lawyer's joining the new firm, in the absence of client consent. On a practical level, we perceive a need, for conflicts checking purposes, to disclose pre-departure at least some limited information regarding the identity of the lawyer's clients, both those who might, and those might not, join the lawyer at the new firm, as well as the nature of the work done for those clients, and the parties opposite those clients in current matters that may become matters of the new firm. We also recognize that, as a practical matter, this type of exchange of client information and conflicts checking is routinely done in connection with lawyer's changing law firms. In Formal Opinion No. 99-414, the ABA Committee recognized the need for limited disclosure of otherwise confidential client information in this context and seemed to assume that such disclosure is permissible under the Rules. Formal Opinion No. 99-414 at 6 n. 12 ("The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation."). The ABA Committee, however, cited no authority in the Rules or otherwise to support this assumption.

We note the apparent absence of any express authorization in the Rules of Professional Conduct or elsewhere for a lawyer's making these types of pre-departure disclosures to another law firm without client consent. See Tremblay, Migrating Lawyers and the Ethics of Conflicts Checking, 14 Geo. J. Legal Ethics 489 (Spring 2006). Of course, where client consent is obtained, there can be no ethical issue regarding the propriety of disclosures under Rule 1.6. Thus, obtaining client consent would insulate the lawyer from allegations of ethical improprieties in making such disclosures. Moreover, where

discussions at such an early stage out of concern that the lawyer could lose the goodwill of his existing firm and thereby jeopardize his existing association if discussions with the anticipated new firm do not come to fruition. The departing lawyer, acting out of self-interest, may typically desire to defer notice to the old firm until after an offer of association in the new firm has been made and accepted.

In some cases deferring disclosure of the possibility of a lawyer's change of law firm until the arrangement with the new firm has been concluded will be appropriate. For reasons of both ethics and the law of fiduciary duty, however, the Committee must note that late notice will, in certain circumstances, be improper. As mentioned above, if the lawyer were, for example, working on a client matter at the old firm and the new firm were on the other side, any personal interest conflict arising in that circumstance would be one that the old firm would have an interest and an obligation to address.[10] Thus, in that circumstance, the departing lawyer would have a duty of disclosure to the old firm, even before a final arrangement or decision to leave were made. The duty to disclose to the old firm in such a case -- consistent with the timing of disclosure to the client -- could arise at the point at which the lawyer desires to "participate[] in a substantive discussion of his experience, clients or business potential or terms of an association" with the other firm. ABA Formal Opinion No. 96-400.

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such client consent is sought prior to departure, the lawyer may be obligated to disclose the fact of the discussions and the communication with the client regarding the same, to the old firm. See Section VIII.A., supra. Further, when a lawyer involved in discussions with another firm regarding a new association discloses client information without client consent, such disclosures should go no further than necessary to insure the new firm's ability to comply with its own ethical obligations, e.g., to avoid conflicts and ensure the ability to competently and diligently represent a prospective client.

[10] Cf. Rule 1.12(b) which states that a lawyer serving as a law clerk to a judge may not negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially until the lawyer has notified the judge.

Similarly, a duty to disclose a possible departure in advance of any binding commitment or agreement to join a new firm could arise under the law of fiduciary duty. For example, if a partner with a substantial practice were aware that the old firm was making significant investments or undertaking significant commitments in terms of personnel, space, equipment, financing or other resources, to support that partner's practice, a fiduciary duty of disclosure may arise if the partner were to engage in substantive discussion that reasonably could result in that partner and the practice being taken elsewhere after the investments and commitments were entered. Similarly, if a partner or an associate engaged in substantive discussions with another firm about joining that firm, the partner or associate could not ethically deny the existence of such discussions if asked by his current firm. See, RPC 8.4(c).

Where the circumstances are such that disclosure to the old firm is not required before a final commitment to join the new firm arises, then the question of notice to the old firm becomes one of what is either required or reasonable under all the circumstances. If the question is governed by an agreement between the parties (e.g., a partnership or employment agreement), then compliance with the agreement should, absent facts that would otherwise mandate an earlier or later disclosure, suffice to discharge the duty. In the absence of an agreement, the departing lawyer should give such notice as is fair and reasonable under all the circumstances. In determining what is fair and reasonable in this context, the guiding principles should be to ensure that client freedom of choice is maintained and to allow the old firm in a responsible and orderly way to discharge its ethical obligations to clients, although other factors may also be relevant.[11]

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[11] Hillman states:

> Relevant factors in evaluating the reasonableness of notice may include:

IX. Tortious Interference and Fiduciary Duty

In the preceding section, we suggested that the prudent approach is that the departing lawyer should not notify clients of her impending departure until she notified her firm. We offered that advice in light of substantive legal authority to the effect that "a lawyer owes a fiduciary duty to his or her current firm by virtue of the employment or partnership relationship." Id. In support of this proposition of law, we cite, inter alia, our Supreme Court's opinion in Adler, Barish, Daniels, Levin & Creskoff v. Epstein, supra, 482 Pa. 416, 393 A.2d 1175 (1978), and the Superior Court's decision in Joseph D. Shein v. P.L. Myers, 394 Pa. Super. 549, 576 A.2d 985 (1990), alloc. denied, 617 A.2d 1274 (Pa. 1991). We noted previously that "[d]epending upon the circumstances and the context of the communications, communication with the firm's clients about the lawyer's impending departure before the firm is aware of the departure could 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." Joint Opinion No. 99-100 at 2.

In Adler, Barish, the Pennsylvania Supreme Court reversed a Superior Court order dissolving an injunction against former salaried associates of a law firm. In reinstating the injunction prohibiting the former associates from contacting or communicating with clients of their former firm, the Court found that the former associates' actions in seeking to represent their former firm's clients constituted tortious interference with the former firm's contractual

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> (1) past practice concerning withdrawal from the firm; (2) compliance with notice provisions of the partnership agreement; (3) the possibility of retribution from the firm that may serve to harm the interests of clients; (4) the promptness with which the partner informs the partnership of the partner's decisions to withdraw.

Id. § 4.8.2 at p. 4:98.

relationships with those clients. The Court held that the circumstances and manner in which the former associates sought the representation of those clients undermined the clients' freedom of choice in the selection of counsel. The Court explained:

> "[A]ppellees' conduct frustrates rather than advances, [the former firm's] clients' 'informed and reliable decision making.' After making [such] clients expressly aware that appellees' new firm was interested in procuring their active cases, [one of the former associates] provided the clients the forms that would sever one attorney-client relationship and create another. [The former associates'] aim was to encourage speedy simple action by the client. All the client needed to do was 'sign on the dotted line' and mail the forms in the self-addressed stamped envelopes. . . . Thus, appellees were actively attempting to induce the clients to change law firms in the middle of their active cases. Appellees' concern for their line of credit and the success of their new law firm gave them an immediate, personally created financial interest in the clients' decisions. In this atmosphere, appellees' contacts posed too great a risk that clients would not have an opportunity to make a careful, informed decision.

Id. at 427-28, 393 A.2d at 1181.[12]

However, communication that goes beyond notification of the fact of the departure and begins to take on the appearance of an active effort to take the client from the old firm and acquire it for the new firm may constitute solicitation. When such communication (i.e., one tantamount to solicitation) occurs while the departing lawyer is still a partner in or employed by the old firm, the communication may, as a matter of the substantive law of partnership, agency or

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[12] One commentator has said that Adler, Barish is the "first case of consequence" to apply the law of tortious interference with contractual relationships in the context of lawyers departing from a law firm and competing for clients they serviced at the old firm. Hillman, § 3.1.2 at p. 3:4. Although aspects of the case have been criticized by commentators (see Hillman, § 3.1.2 at p. 3:8 n. 26; Johnson, Solicitation of Law Firm Clients by Departing Lawyers and Associates: Tort, Fiduciary and Disciplinary Liability, 50 U. Pitt. L. Rev. 1, 10. n.23), the case has never been directly overruled. Its broad fundamental holding still appears to be good law; if a departing lawyer's conduct in competing for clients is "improper," it may constitute tortious interference with the contractual relationships of the old firm with those clients and may be enjoined. 482 Pa. at 429-436, 343 A.2d at 1181-1185.

tortious interference, expose the lawyer to liability for breach of fiduciary or other duty to the old firm. E.g., Adler, Barish, supra, 482 Pa. at 435, 393 A.2d at 1185 (recognizing agency duties owed by associates to their existing firm); Meehan v. Shaughnessy, 535 N.E. 2d 1255 (Mass. 1989) (partner's efforts, while still at the firm, to lure away clients to new firm constituted breach of fiduciary duty); Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 86 N.Y. 2d 112, 624 N.Y.S. 2d 1009, 653 N.E. 2d 1175 (1995) (predeparture secret solicitation of firm client to commit to representation by departing lawyer at new firm constitutes breach of fiduciary duty to firm); Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A., 679 So.2d 637, 637 (Ala. 1996) (attorney "breached his fiduciary obligations owed to the . . . firm, by contacting clients of that firm and obtaining employment as an attorney for those clients while he was still an officer, director and shareholder of the firm.").[13]

[13] Certain authorities suggest that the critical event with respect to determining when a departing lawyer's "solicitation" of clients of the old firm is permissible is the lawyer's giving of notice to the old firm of an intention to leave or to solicit clients, not the lawyer's actual departure. Section 9 of the Restatement, for example, states that "prior to leaving the firm" a departing lawyer "may solicit firm clients," "after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose. . . ." See, also, Hillman § 4.8.3.2 at p. 4:104 ("The act that enables the solicitation is the notification of withdrawal rather than the withdrawal itself."). In providing our ethical guidance, we stop short of advising lawyers that solicitation of firm clients is permissible while remaining associated with the firm. Neither the Restatement nor Hillman cites any judicial authority that squarely supports that proposition, and we have uncovered no Pennsylvania decision that so holds. We perceive a risk that such direct competition with the lawyer's current firm would constitute a breach of fiduciary or other duty even if the lawyer gave notice to the old firm of an intent to commit such a breach. In providing our guidance we opt instead for a more conservative approach based on the distinction articulated in the text between communication and solicitation. We believe that during the period post-notification and pre-departure, a departing lawyer's duty to communicate with clients regarding an intended departure (see, Part VI.B., supra) can be satisfied by providing factual information relevant to the client's options in the selection of counsel (see, Part VI.C., supra), without actively soliciting the client to terminate an existing relationship and establish a new one.

In a leading case, the New York Court of Appeals, in Graubard, Mollen, supra, 86 N.Y. 2d 112, 624 N.Y.S. 2d 1009, 653 N.E. 2d 1175, recognized the somewhat amorphous line in this context between permissible communication and impermissible solicitation under the law of fiduciary duty.[14] In Graubard, Mollen the court, after concluding that "preresignation surreptitious 'solicitation' of firm clients for a partner's personal gain . . . is actionable" (86 N.Y.2d at 1190-20, 624 N.Y.S. 2d at 1013, 653 N.E. 2d at 1183), went on to explain that precisely what constitutes prohibited solicitation is unclear:

> What, then, is the prohibited "solicitation"? As the trial court recognized, in classic understatement, the answer to that question is not self-evident. (149 Misc.2d, at 486).
>
> Given the procedural posture of the case before us [on summary judgment] plainly this is not an occasion for drawing the hard lines. Factual variations can be crucial in determining whether an attorney's duties have been breached, and we cannot speculate as to what conclusions will follow from the facts yet to be found in the case before us.

86 N.Y.2d 102, 629, N.Y.S.2d 1015, 653 N.E.2d 1184.

The New York high court went on to set out certain broad parameters of permissible and impermissible conduct. At one end of the spectrum, the court noted, attorneys dissatisfied with an existing arrangement would not violate fiduciary duties by taking "steps to locate alternative space and affiliations." Id. Likewise, the court noted that as a matter of ethics "departing

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[14] In Graubard, an "of counsel" attorney of one law firm began discussions with another firm about joining the latter firm. Two other partners of the old firm were contemplating the move also. The new firm would not finalize any arrangement with the lawyer, or the other partners, unless a large client of the old firm approved transfer of its business to the new firm. The lawyer likewise wanted to ensure that he would continue to represent that client if he moved to the new firm. A series of meetings were held between the client, the lawyer and the representatives of the new law firm. Eventually, before the lawyer changed firms, the client gave the requested assurances. The trial court denied the defendant lawyer's motion for summary judgment and, first, the Appellate Division, and then, the New York Court of Appeals affirmed.

lawyers have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of their choice . . . ." Id. At the other end of the spectrum, the court said, "secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and jobs) would not be consistent with a partner's fiduciary duties." Id., 629 N.Y.S.2d at 1014-15, 653 N.E.2d at 1183-84 (citing Matter of Silverberg, 81 A.D.2d 640 641); see also, Meehan v. Shaughnessy, 404 Mass. 419, 535 N.W.2d 1255; Adler, Barish, supra, 482 Pa. at 428, 393 A.2d at 1181.

In the middle ground between these two ends of the spectrum lies the challenge for the departing lawyer in staying within the proper scope of predeparture communications with clients.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.

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