

Update on Law Firm Departures

One of the unique side effects of the Office of Lawyers Professional Responsibility (OLPR) having such a highly usable website is that it makes writing this column more challenging. All of the articles ever written by directors and other attorneys in our office for *Bench & Bar of Minnesota* over the past 39 years are available online, searchable and indexed. In the “old days,” it was possible to find a topic that hadn’t “been written on” for several years and do a new piece, figuring that people can use a reminder on just about any topic of professional responsibility once in a while. Now, however, any diligent lawyer or member of the public can find every old article and read it, even lawyers admitted to practice long after the particular article was written. Unless there is significant new information about the topic to offer, why write a new article?

One topic that continues to draw inquiry from lawyers seeking advisory opinions and those raising questions for OLPR lawyers at continuing legal education seminars is law firm departures and breakups, and the rights and obligations of departing lawyers and remaining lawyers. Amazingly enough, this topic has not generated an article from our office in 13 years.¹ Even though much remains the same, perhaps it is time for an update. There have been a number of related changes to the Rules of Professional Conduct and Lawyers Board opinions since 1997, numerous ethics opinions and articles have been published, and a large number of layoffs and law firm dissolutions are occurring in these difficult economic times.

Protecting Client Interests is Key

Perhaps the most determinative aspect to any law firm departure or breakup is whether it will be handled amicably ... or not. If an attorney or group of attorneys departs with the “blessing” of the remaining attorneys, then almost all potential problems can and will be resolved without ending in complaints or even litigation. When a significant group of attorneys leave a firm without prior notice, taking a substantial number of clients with them, then almost inevitably our office will hear of it, by complaint or advisory requests.²

From a professional responsibility perspective, protecting the interests of clients is the key element in any lawyer departure or law firm breakup. First, affected clients must be advised that their attorney is changing firms or starting her own firm or leaving practice.³ This can best be done jointly by the lawyer and the firm if the breakup is amicable. Otherwise, either or both may notify the client and request the client to continue representation with that lawyer. Clients often will wish to maintain a relationship with a particular lawyer they have worked

with successfully, but if the client’s loyalty is more to the firm than the lawyer currently servicing their legal needs, or if they prefer to remain with a firm that has greater resources to meet their needs, they may stay with the departed lawyer’s firm. The choice must be the client’s. While either party may reasonably offer information on why they think the client should go/stay, misrepresentations as to the other’s abilities are improper.

While lawyers sometimes come to feel as though they “own” clients and their files, in fact a lawyer never does. Clients are always free to discharge an attorney and replace the attorney with someone else. With few exceptions, the contents of the file belong to the client and must be produced and delivered to the former client or to their successor counsel.⁴ Disputes and complaints about returning client files, what must be included in such files, and whether lawyers can charge for retrieving and copying the file are a steady source of business for lawyer disciplinary agencies, and one of the top areas of inquiry for advisory opinions. These issues become magnified when an attorney departs from a law firm, especially if the attorney has numerous clients whose matters she is principally handling, or has a book of client business that she intends to take with her to her new position.

The smooth transfer of files between lawyers is expected. The clients are not supposed to be the ones to bear the burden of any disputes or animosity that may exist between the departing attorney(s) and the former firm. Clients who desire to have their files transferred to the departing attorney or his new firm should be promptly accommodated. Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC), includes a requirement that “upon termination of representation, a lawyer shall ... surrender papers and property to which the client is entitled” Rules 1.16(e), (f) and (g) were added to the MRPC during the last major revision in 2005, essentially codifying former Lawyers Board Opinions No. 11 and 13 into the rules, establishing requirements as to what must be included as part of the client’s file, and limiting the former lawyer’s (or firm’s) ability to charge any retaining lien for unpaid fees or costs. Another element of Rule 1.16(d) requires the refund of “any advance payment of fees or expenses that has not been earned or incurred.” Client funds, just like client files, cannot be held hostage to any issues between the departing attorney and the firm.

Detailed Opinions

Although the Minnesota Lawyers Professional Responsibility Board has never issued a formal opinion concerning the appropriate steps for departing attorneys, several bar association ethics committees in the past ten years have done so, some in great detail. Many are worth close scrutiny by any lawyer or group of lawyers considering leaving their present firm; most of the information applies equally when a lawyer is laid off or discharged from a position.

ABA Formal Opinion 99-414 (Ethical Obligations When a Lawyer Changes Firms) is a reasonable starting point. It covers essentially all of the critical issues, as some of its topic headlines indicate: notification to current clients is required;



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Professional Responsibility

notification of current clients is not impermissible solicitation; the initial notice must fairly describe the client's alternatives; the departing lawyer should provide additional information; joint notification by the lawyer and the firm is preferred; and entitlement to files, documents and other property depends on the rules and other law.

One of the more recent state opinions is Colorado Ethics Opinion 116 (Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure from a Law Firm).⁵ In addition to covering the topics noted above, the Colorado opinion briefly addresses issues such as conflicts of interest arising out of the departing lawyer's new affiliations and issues relating to restrictions on the right to practice. There are also many extensive articles that have addressed this topic in the past few years,⁶ providing additional guidance to both the departing lawyer, whether voluntary or not, and to the former law firm.

Conclusion

Departures and breakups will continue to occur both in tough economic times and beyond. It's been 13 years since this column has addressed this topic and much has been written and can be accessed as part of a diligent lawyer's research. Beyond the basic points addressed here, an advisory opinion from the OLPR can amplify some of these points if needed. Many such questions contain issues of law as well as ethics, however, and will be better answered by hiring counsel who can advise the individual lawyer personally. ▲

Notes

¹ Kenneth Jorgensen, "When Firms Break Up," *Bench & Bar of Minnesota* (Aug. 1997), p. 26.

² Timing can be critical; although civil claims for breach of fiduciary duty are beyond the scope of this column, contacting clients and making other arrangements in advance of giving notice to the firm can create potential liability.

³ Rule 1.4, MRPC.

⁴ See generally Rules 1.16(a)(3) and (d) – (g), MRPC.

⁵ Ethics Committee of the Colorado State Bar (March 17, 2007). See also, e.g., Kentucky Bar Assn. Ethics Opinion KBA E-424 ("Departure from a Law Firm") (March 2005); Philadelphia Bar Assn. Ethics Opinion 99-100 (April 1999).

⁶ See, e.g., Watson, "Breaking Up is Hard to Do," *Wisconsin Lawyer* (Dec. 2006).

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