

WHEN FIRMS BREAK UP

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Society has become increasingly more mobile. Lawyers and law firms are no exception. While in the past lawyer mobility was primarily limited to associates, it is not uncommon today for partners, shareholders or entire law firm departments to change their affiliations overnight.

With the occurrence of law firm breakups or lateral departures comes myriad potential problems, many of which may have ethical implications. However, the types of problems to which lawyers pay the most attention tend to be those which directly affect the lawyer's interests and only indirectly affect the interests of clients (i.e., disputes over fees^{Ftn 1}, restrictive covenants in partnership agreements^{Ftn 2} and civil tort actions based upon breach of fiduciary duty^{Ftn 3}). For example, fee disputes between firms and departing lawyers usually do not have an economic impact upon the client's share of a recovery or the total fees paid. Similarly, clients rarely stand to suffer any economic prejudice if a partnership agreement improperly restricts the departing lawyer's right to practice in violation of the professional standards. Moreover, clients have little, if any, economic interest in disputes alleging breach of fiduciary duty by the departing lawyer who tortiously recruits clients prior to his or her departure from the firm. All of these problems involve the interests of lawyers in the first instance and those of clients only secondarily.

Other problems associated with firm breakups more directly involve the clients' interests and unfortunately do not always receive the attention they deserve. These problems can be generally categorized into three areas: (1) client file and property transfer; (2) statements to clients about the lawyers' services; and (3) neglect or abandonment of client files, which is also known as "reverse grabbing."

FILE AND PROPERTY TRANSFER

All firm breakups or departures require file transfer. Where the files are numerous, file transfer can be a monumental task giving rise to professional discipline concerns if the files are not promptly transferred. Rules 1.16(d) and 1.15(b)(4), Minnesota Rules of Professional Conduct (MRPC), require that client files and property be returned upon the client's request. These rules provide only general guidance for file transfer. Further clarification about exactly what must be returned to the client and whether the client can be billed for the file copying expenses is provided by Opinion No. 13 of the Lawyers Professional Responsibility Board.^{Ftn 4} Generally, Opinion No. 13 requires the majority of the contents of most client files to be returned upon request and prohibits lawyers from charging clients for copying expenses unless the client has agreed to such a charge. An aspect of the opinion sometimes overlooked by lawyers is that return of the client file cannot be conditioned upon payment of the copying expense, even where the client has already agreed to pay this expense.

Despite the attempt to eliminate file transfer problems through Opinion No. 13, disputes still occur. With increasing frequency the timeliness of file transfer has been the subject of ethics complaints. Client files should be transferred promptly upon the client's request. In reviewing complaints alleging dilatory file transfer, the Director's Office considers the circumstances surrounding the request for the file(s), including the number of file(s), the size of the file(s) and the client's need for the file(s). Obviously if there is an urgent need for a particular file because of statute of limitations concerns or litigation-imposed deadlines, it is incumbent upon the departing lawyer to point this out to the former firm. At the same time, law firms receiving a blanket request for numerous files may wish to inquire of the departing lawyer whether there are particular files needing more urgent transfer. By assigning priority to those files needing more immediate transfer, both sides can reduce their malpractice exposure.

COMMUNICATIONS TO CLIENTS

Nearly every firm breakup is likely to involve a certain amount of self-promotion to entice the client to remain with the firm or hire the departing lawyer. Several lawyers have been surprised to learn that these promotional types of communications can come under scrutiny in light of the professional rules governing lawyer advertising. Rule 7.1, MRPC, prohibits communications about lawyer services that include material misrepresentations of fact or law, and communications that omit facts necessary to make the communications considered as a whole not materially misleading. Other statements which can result in professional review include those creating an unjustified expectation about the results the lawyer can achieve and those which compare the lawyer's services with another lawyer's services, unless the comparison can be factually substantiated.^{Ftn 5} Some of the statements which have created problems in law firm breakups include:

Statement Made . . .

When in Fact . . .

"I'm the only attorney who knows anything about your case."

Billing statements to the client reflect services performed by other lawyers in the firm.

"I'm the only lawyer from [the former firm] who practices in this area of law."

The lawyer had represented to other clients that an associate with the firm was very capable and competent to handle a particular matter in the same area of law.

"Your fees will now be twice as much because you have discharged our firm and hired another attorney."

This statement generally is not true and in any event the lawyer was not in a position when he made the statement to make such an assessment.

"Discharging our firm will delay settlement of your case."

The lawyer could provide no factual substantiation for his unequivocal statement that the settlement would be delayed.

"We have no idea where [the departing lawyer] is now practicing."

The departing lawyer had sent several letters to the firm noting his new address. More importantly, however, the departing lawyer's new office was located just across the street from his former firm.

"REVERSE GRABBING"

Much has been written about firm breakups and the mad dash for clients and client files. This phenomenon has been dubbed by legal scholars as "grabbing."^{Ftn 6} At the other end of the spectrum is a lesser known occurrence referred to as "reverse grabbing." Reverse grabbing occurs when files of a dissolved partnership or departed lawyer are neglected, or in the worst cases abandoned, because there is little economic incentive to complete the unfinished business on the file. Reverse grabbing can expose both sides of a law firm breakup or lateral departure to risk of professional discipline or legal malpractice. For example, a recent ethics complaint alleged abandonment of a client by an associate who had left his law firm. When the associate announced his intention to leave, the partners told the associate not to notify clients, most likely because they feared the associate would leave with economically desirable files. Unfortunately, the associate was also responsible for a number of economically undesirable files that he had no intention of taking to his new firm. After not receiving any information from the firm for a substantial period, the client contacted the firm only to discover: (1) that the associate assigned to the client's case had left the firm two months previously; (2) no new attorney had been assigned to the client's file and nobody had informed the client of the associate's departure; and (3) no activity had occurred on the client's file for over two months. Not surprisingly, this discovery prompted an ethics complaint which caused problems for both the associate and the law firm.

The associate's failure to notify the client of his departure implicated his obligation to adequately communicate and provide the client with notice that he personally was terminating his representation. *See* Rules 1.4 and 1.16(d), MRPC. The client's complaint also raised issues concerning whether the firm's partners had made reasonable efforts to ensure that the firm had in effect measures which would assure compliance by all lawyers in their firm^{Ftn 7} and whether the partners were responsible for the files left by the departed associate because the client had signed a retainer agreement with the firm and not the departed associate.^{Ftn 8} All of these problems could have been avoided if either side or both had timely notified the client. In fact, at least one state ethics opinion holds that both sides "must provide the clients

with fair and adequate notice of the change in order to permit them the opportunity to make an informed choice of counsel."^{Ftn 9}

Malpractice can also be a consequence of reverse grabbing, regardless of who has physical possession of the file after the breakup. Several attorneys have been the subjects of suits for malpractice allegedly committed after they left their firms, some by clients they never met.^{Ftn 10} Another malpractice action was allowed to proceed against a withdrawing partner simply because he had not notified all of the firm's clients of his departure.^{Ftn 11} The potential for malpractice liability only further increases the need for timely communication with clients about firm breakups and departures.

CONCLUSION

Most practitioners invest significant personal and financial resources in building their practices and making them successful. They can hardly be faulted for becoming preoccupied with these interests when firm breakups and departures jeopardize their significant investment. Nevertheless, professional rules and potential malpractice exposure demand that lawyers be constantly cognizant, even during these difficult times, of their clients' interests and the corresponding professional requirements. Most of these requirements can be fulfilled by keeping the following in mind:

1. Transfer client files promptly upon request. When requesting files, assign a priority to the request according to your need for the file, taking into consideration any applicable statute of limitations or court-imposed deadlines.
2. Do not hold client files hostage to the payment of copying expenses even where the client or the departing lawyer has agreed to pay the copying expense.
3. In determining which particular documents in the file must be returned to the client, err on the side of returning documents to the client. Many lawyers would be time and money ahead by simply photocopying the entire file and turning it over. Remember, Opinion No. 13 prohibits lawyers from seeking payment for the services performed in preparing any document which is withheld from the client.
4. Return original client property and unearned client funds promptly. Failure to promptly return unearned client funds may hamper the client's ability to retain new counsel.
5. Be candid in your statements about firm breakups and departures and remember that quantitative representations and comparisons may require factual substantiation.
6. Notify all affected firm clients of lawyer departures and tell the clients who will be handling their file. Departing lawyers should similarly notify all affected clients of their departure. Concerns about tort liability associated with notifying clients can be minimized by either sending the notice after the lawyer has left the firm or agreeing with the firm to send a joint notice concerning the lawyer's departure.

NOTES

¹ See e.g., *In re L-Tryptophan Cases*, 518 N.W.2d 616 (Minn. Ct. App. 1994) and *Stacker & Ravich v. Simon*, 411 N.W.2d 217 (Minn. App. 1987). But c.f. *Trenti, Saxhaug, Berger, Roche, Stephens, Richards & Aluni, Ltd. v. Nartnik*, 439 N.W.2d 418 (Minn. App. 1989) where the amount of fees paid by the client most likely was affected.

² See e.g., *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354 (Minn. App. 1995).

³ See e.g., *Meehan v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1989).

⁴ Wernz, *Opinion 13: Copying Costs . . .*, 46 Bench & Bar 7 (August 1989). The Lawyers Board Formal Opinions are also now published in West's Rules of Court deskbook.

⁵ Rule 7.1(a)(2) and (3), Minnesota Rules of Professional Conduct.

⁶ See e.g., Hillman, *Hillman on Lawyer Mobility, Section 1.3* (1996).

⁷ See Rule 5.1, MRPC.

⁸ See e.g., ABA *Informal Opinion 1428* (1979) which opines that a client employs a Legal Services Office as a firm and not a particular lawyer, and therefore the firm, as well as the departing lawyer, has responsibility for the files left at the firm by the departing lawyer.

⁹ See *Standing Comm. on Prof. Resp. and Conduct of the California State Bar, Formal Opinion 1985-86*.

¹⁰ See e.g., *Redman v. Walters*, 152 Cal. Rptr. 42 (1979); *Palomba v. Barish*, 626 F.Supp. 722 (E.D.Pa. 1985); *Thompson v. Gilmore*, 888 S.W.2d 715 (Mo. Ct. App. 1994); and Hillman, *supra* at n.6, § 4.11.2.

¹¹ *Volgraff v. Block*, 458 N.Y.S.2d 437 (Sup. Ct. 1982).