

Lawyers in transition

As one year ends and another begins, some lawyers find themselves in transition between firms or employment opportunities. When this happens, it's natural to focus on employment law—and, if one is a partner, fiduciary obligations. But please don't forget there are also ethical obligations when a lawyer leaves a firm. And they're a frequent source of questions on our ethics hotline at this time of year. The American Bar Association issued a formal opinion on this topic that provides a good framework for lawyers and firms.¹ If you are considering leaving your firm, or are in the management ranks of a firm, it is important that you understand your ethical obligations.

Restrictions on right to practice

Noncompetes are prevalent in business but prohibited in the legal profession. It is unethical to offer or make an agreement that restricts the right of a lawyer to practice after termination of the relationship.² An exception exists for benefits upon retirement, but otherwise the rule is straightforward. This is less about lawyer autonomy than about prioritizing the client's

right to a lawyer of their choosing (in keeping with the ethical imperative to place the client's interest first). Even though the point is well-settled, we receive questions every year about terms in employment agreements that clearly aim to restrict practice after termination. Lawyers are naturally competitive and money is money, but keep this clear ethical requirement in mind.



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

✉ SUSAN.HUMISTON@COURTS.STATE.MN.US

Orderly transitions

One of our most important ethical obligations is to keep the client informed of the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.³ These communication obligations require notice to the client of material information—such as a planned law firm move or changed staffing on their case. The ethics rules do not dictate who must make this notice or what it must say.

Opinion 489 takes the position that 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—and we always advise as much on the ethics line. This is the best and most professional approach, since it appropriately puts the emphasis on supplying the client with information they need to make informed decisions about their matter. Alternatively, the opinion provides that separate notices may be provided. But in that case care should be taken to make sure clients know they have the option of remaining with the firm, going with the departing attorney, or choosing another attorney. Again, this approach appropriately places the choice in the hands of the client.

There are nuances here that must be taken into consideration. Notice need not be given to everyone who ever came in contact with the lawyer, no matter how casual the contact—the opinion focuses on significant contact on the matter. If the departing lawyer is very junior or not primary counsel, then notice may not make any sense. Remember, too, that notice and options are separate from the departing lawyer's prerogative to solicit former clients—a right that nothing in the ethics rules prevents, and as noted above, one that should not be restricted through agreement.

The opinion also focuses on making the departing lawyer's notices to the firm and to clients as nearly contemporaneous as they can be, but notes that firms can require advance notice to the firm sufficient to allow for an orderly transition. This includes working together to

provide a joint client notification, making sure files are in order for transfer, and coordinating coverage for key deadlines in a client's matter. The opinion cautions, however, that advance notice requirements should not be so broad as to pose, in effect, a proscription on practice. If the lawyer is terminated and not departing voluntarily, a whole new layer of complexity is added, but the main obligations from the client's perspective remain the same.

Clients are not property

This is my favorite line in the opinion, and the one that so many lawyers and law firms struggle to embrace. Clients should not be divided up by the lawyer and firm; the focus, rather, should be on the client's right to decide. Again, there are nuances. Much will depend on the departing lawyer's role in the client representation. Reason should prevail but it can be difficult, particularly if the departure is sudden or acrimonious, to reach that goal. We hear from both sides of the coin on this point, but whether or not you expressly bring up the client's option to move, it certainly exists, and you just look petty (and may be violating the rules) if you deprive the client of information they need to make informed decisions about the representation. This includes providing relevant contact information for the departing lawyer. It goes without saying that a professional, neutral approach is always best. Few if any clients want to be involved in a law firm's internal battles.

The opinion also cautions against restricting the departing lawyer's pre-departure access to the file and resources to allow the lawyer to continue to competently and diligently represent the client as decisions are being made by the client regarding representation. Again, there are nuances. The guiding principle should be placing the client's interest first, and keeping that in mind tends to help things work out for the best. If a lawyer is terminated unexpectedly and immediately, and there are imminent case deadlines, this can be a challenge. Both the terminated lawyer and the firm must take steps to protect the client's interests.

Other obligations

While Opinion 489 does a good job framing some of the ethics issues implicated when lawyers change firms, the opinion is silent on the often complementary but sometimes conflicting legal obligations that also apply. Most partners and shareholders have fiduciary obligations to their employer or partners that, to the extent they are consistent with the ethics rules, also must be taken into consideration. No one size fits all here, and it is clear that the opinion is focused more on raising the noncompete and related issues than providing detailed guidance on the myriad ways that compliance with ethical obligations can assist in the orderly transition of matters. The opinion correctly notes, however, that firm management has an ethical obligation to have in place measures that offer reasonable assurance of compliance with the ethics rules.⁴ Good checklists, procedures, and training on the variety of potential circumstances surrounding lawyer departures should be part of those measures, and will help guard against errors when the unexpected occurs.

Conclusion

It is hard to mess up transitions if you step back and put the client's interests first. If your guidepost is what is best for the client, as well as how best to work together to serve the client, you will be in a good position to satisfy your ethical obligations. But don't forget there are legal duties, whether contractual or under common law, that should also be given consideration. At this time of year we frequently received calls on this topic and are happy to answer the ethics half of the questions. Best wishes for a significantly better 2021! ▲

Notes

¹ ABA Opinion 489, *Obligations Related to Notice When Lawyers Change Firms* (12/4/2019).

² Rule 5.6(a), Minnesota Rules of Professional Conduct (MRPC). A lawyer may also not make or offer an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. Rule 5.6(b), MRPC.

³ Rule 1.4(a)(3), MRPC; Rule 1.4(b), MRPC.

⁴ Rule 5.1(a), MRPC.