NAPABA Virtual Experience

Thursday, November 5, 2020
2:00 PM – 3:00 PM

Session CLE 303 |
Primer on the Lateral Market in Private Practice - Weighing Opportunities and Pit Falls

The landscape for law firms is evolving at a rapid pace. With corporate clients' demand for legal services remaining flat, law firms are looking to increase revenue by hiring partners and their teams with portable book of business from other law firm competitors. This competition for talent has resulted in more and more lateral movements for partners and associates in law firms. This panel will focus on: (i) what is the current law firm practice landscape and what is the future – particularly in response to COVID-19 pandemic; (ii) what law firms look for in lateral partners (anything beyond expertise and book of business); (iii) what partners who have made the lateral move wish they had known before the move and what advice they would share with people thinking about moving; (iv) how much weigh should get placed on compensation, brand, geographic footprint and depth of practices; (v) what factors partners should weigh with respect to their current firm and position within the firm before making a move or making a decision to stay at their current firms; (vi) what factors and questions partners need to ask and weigh in connection with the prospective law firms before making a decision to move; (vii) partnership agreement considerations in order to avoid any breaches and legal ethics violations when information and asking clients to move their files to new firm; and (viii) what associates should consider in determining whether to move with their partners to other firms, stay at their current firms or look for other alternative opportunities.

Moderator:
Albert Tan, *Partner, Haynes and Boone, LLP*

Speakers:
Wilson Chu, *Partner, McDermott Will & Emery*
David Lat, *Managing Director, Lateral Link*
Susan Shin, *Partner, Weil, Gotshal & Manges LLP*
Darryl M. Woo, *Partner, Goodwin Procter LLP*

SAMPLE CHECKLIST OF CONSIDERATIONS FOR NEW FIRM AND EXISTING FIRM

	New Firm	Existing Firm
Financial Matters		
Compensation (guaranty period, considerations for compensation – lockstep, points, modified lockstep, or eat-what-you-kill, etc.)		
Clawbacks		
Financial health – Debt?		
Capital Contribution / Return of Capital		
Billing Rates – flexibility or stringent – origination credit, billing credit and service credit, rates and alternative fee arrangements		
Ability to do write-offs		
Requirements for annual billables, administrative, and other requirements		
Benefits and insurance considerations		
Tax Burden Impacts of Office Locations – impact on compensation package		
Is Compensation only measured in $ - intangibles value?		
Quality of Firms		
Name, Brand, Platform		
Practice Specialties		
Lawyer Quality		

Geographical Footprint		
My Practice		
Ability to Shape and Grow Practice		
Move as a Team or Solo		
Resources – BD budget, sponsorship budget and travel budget		
Related and Complementary Practice Areas, Scope and Depth of Experience in Places Needed for My Practice		
Importance of My Practice in the Firm Landscape		
Support Work – Requirement to Provide Support Help for Other Departments		
Conflicts – Ability to Clear Matters		
Ability to Write off and Invest in Client Development		
Management		
Role in Firm		
How Firm and practice group is Managed		
Importance of [office location] office in the Firm's strategy		
Other Considerations		
Ability to Sustain Practice In a Downturn		
Firm, Leadership and Management Culture		
Firm Politics		
Review Partnership Agreement		
Cost Drag of Underperforming Office		
Impact Move will Have on Others in the Existing Practice		
Control over Life / Stress of Starting Over		

Unknowns		

Ethical Obligations When Attorney Changes Law Firms

I. Ethical Obligations to Your Clients

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

- Attorney has a duty and ethical obligation upon withdrawal to disclose "pending departure in a timely fashion to clients for whose active matters (s)he currently is responsible or plays a principal role in the current delivery of legal services."
- The disclosure communication "can be accomplished the lawyer herself or himself, the responsible members of the firm, or the lawyer and those members jointly." Joint notification by both the firm and the departing attorney is preferred – it is viewed as being most fair to the client. If not possible, the departing attorney must notify the client.
- An attorney does not violate the ABA Model Rules by informing clients before giving notice to the current firm, as long as (s)he "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…"

B. ABA Model Rule 1.16(d)

- "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest…" A client's files belong to the client and not to a firm or attorney. Care must be taken to ensure the files follow the client.

C. ABA Model Rule 5.6(a)

- Prohibits an agreement that "restricts the right of a lawyer to practice after termination of the relationship."

II. Confidentiality of Information

A. ABA Model Rule 1.6(a)

- "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent"

B. ABA Model Rule 1.7 Conflict of Interest: Current Clients
C. ABA Model Rule 1.9 Duties to Former Clients
D. ABA Model Rule 1.10 Imputation of Conflicts of Interest: General Rule
E. ABA Formal Opinion 09-455 (October 8, 2009)

- "In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflict analysis." Basic information should only include "persons and issues involved in a matter."

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]

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]

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]

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]

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.

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]

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.

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]

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]

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]

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.

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.

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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.

[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.

[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."

[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.

[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).

[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.

[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."

[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.

[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.

[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.").

[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.

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ABA MODEL RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

Client-Lawyer Relationship

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA MODEL RULE 5.6: RESTRICTIONS ON RIGHTS TO PRACTICE

Law Firms And Associations

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; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(6) to comply with other law or a court order; or
(7) 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.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA MODEL RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

Client-Lawyer Relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

ABA MODEL RULE 1.9: DUTIES TO FORMER CLIENTS

Client-Lawyer Relationship

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ABA MODEL RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

Client-Lawyer Relationship

(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.

ABA FORMAL OPINION 09-455 OCTOBER 8, 2009

Disclosure of Conflicts Information When Lawyers Move Between Law Firms

When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. Although Rule 1.6(a) generally protects conflicts information (typically the "persons and issues involved" in a matter), disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations. Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.[1]

Many lawyers change law firm associations during their careers. New York's highest court noted more than a decade ago that the "revolving door" is a modern-day law firm fixture.[2] Usually these changes are voluntary, but often they are not. The Model Rules of Professional Conduct recognize lawyer mobility. Comment [4] to Rule 1.9, "Lawyers Moving Between Firms," states that the rule on duties to former clients should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel or unreasonably hamper lawyers from forming new associations and accepting new clients. The February 2009 amendment of Rule 1.10(a) to permit screening of lawyers moving between firms to prevent imputed disqualification of the new firm is grounded on that premise. The importance of clients being free to choose counsel after a change of association is also identified in Comment [1] to Rule 5.6.

The Need for Conflicts Analysis

When a lawyer moves between law firms, the moving lawyer and the new firm each have an obligation to protect their respective clients and former clients against harm from conflicts of interest. A moving lawyer whose current clients may wish to become clients of the new firm must determine whether the new firm would have disqualifying conflicts of interest in representing those clients.[3] The prospective new firm has a corresponding duty to determine the conflicts in its current representations that could arise if the moving lawyer actually joins the firm. Comment [3] to Rule 1.7 advises lawyers to adopt reasonable procedures, appropriate for the size and type of firm and practice, "to determine in both litigation and non-litigation matters the persons and issues involved" to ascertain whether proposed new matters are permitted under the conflicts rules. Comment [2] to Rule 5.1(a) includes policies and procedures designed to "detect and resolve" conflicts of interest among those measures that law firm managers must establish to give reasonable assurance that all lawyers in the firm conform to the Rules.

The obligation to detect and resolve conflicts of interest derives from the common law as well as the lawyer ethics rules. [4] When lawyers move between firms, early detection and resolution of conflicts of interest is also prudent risk management. "A common and often serious problem for law firms is the conflict of interest involving a newly hired lawyer … and his or her former clients or adversaries. Accordingly … it is essential to conduct prior conflict screening as thoroughly as possible before making hiring decisions."[5] Other authorities have deemed it essential in order to facilitate the necessary conflicts screening to include client identification and subject matter in the new firm's conflicts database for all former clients of lawyers joining the law firm.[6]

Tension between Confidentiality and Conflicts Analysis

Despite the need for both a lawyer considering a move and the prospective new firm to detect and resolve conflicts of interest, some commentators have expressed concern that the Model Rules do not specifically permit disclosure of the information required for conflicts analysis.[7] This concern arises from the definition of information covered by Rule 1.6(a), which is "all information relating to the representation, whatever its source."[8] Thus, the persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.[9]

Disclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6. The exception in Rule 1.6(a) for disclosures "impliedly authorized in order to carry out the representation" typically is limited to disclosures that serve the interests of the client. Examples cited in Comment [5] to Rule 1.6 include facts that must be admitted in litigation or a disclosure that facilitates a satisfactory conclusion to a matter, disclosures clearly necessary to advance a client's representation. Another example was recognized in ABA Formal Opinion 98-411,[10] which found limited disclosure outside a law firm in a lawyer-to-lawyer consultation impliedly authorized "when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client." This interpretation is consistent with general agency law: an agent's implied authority is limited to acts "necessary or incidental" to achieving the principal's objectives.[11] There may well be instances where client representations are advanced by lawyers moving between firms, but most such moves appear to take place for the sake of the lawyer rather than advancement of the client's representation. Absent a demonstrable benefit to a client's representation from the disclosure of conflicts information, it is unlikely that the disclosure would be "impliedly authorized" within the generally understood and accepted meaning of that exception.

A second stated exception to Rule 1.6(a) that might arguably allow disclosure of conflicts information incident to lawyers moving between firms is Rule 1.6(b)(6), which permits disclosure of information "the lawyer reasonably believes necessary … to comply with other law." However, Comment [12] to Rule 1.6 seems to limit "other law" to law other than the Rules. Compliance with Rule 1.7 would therefore not seem to fall within the exception. Comment [12] also notes that the disclosure must be "required" by the other law. Because the movement of lawyers between firms is not mandated by some external law, it is unlikely that disclosure of conflicts information to comply with Rule 1.7 qualifies as required by other law outside the Rules. Finally, as explained in Comment [12], when disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. Such a discussion at the time conflicts information is provided often would not be practicable.

Obtaining clients' informed consent, as defined in Rule 1.0(e), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely would involve giving notice to the lawyer's current firm,[12] with unpredictable and possibly adverse consequences.[13] Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm. Nevertheless, as noted below, there

may be unusual situations where the persons and issues involved are so sensitive that a moving lawyer may need to seek informed client consent or take alternative protective measures before disclosing that information.

Permissive Disclosure of Conflicts Information

In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis. The Model Rules are "rules of reason" to be "interpreted with reference to the purposes of legal representation and of the law itself."[14] Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

The need to disclose conflicts information has been recognized when lawyers change firms as well as in other contexts. As noted above, a moving lawyer with a current client that may wish to become a client of the new firm "must ensure that her new firm would have no disqualifying conflict of interest…. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation."[15] Providing guidelines for employing temporary lawyers in compliance with the Rules, ABA Formal Opinion 88-356 advises: "The second firm should make appropriate inquiry [of the temporary lawyer] and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter."[16] ABA Formal Opinion 99-415 gives guidance regarding representations adverse to an organization by its former in-house lawyer, and advises in-house lawyers to maintain logs describing those matters on which they worked because determination by the new firm of whether there was a conflict of interest with the former employer required "an inquiry into the responsibilities of the lawyer" during the former employment.[17] Further, the February 2009 revision of Rule 1.10(a) that permits screening of lawyers moving between firms to avoid imputing the disqualification of the moving lawyer to the new firm becomes relevant only if a former client conflict of the moving lawyer has been recognized by the new firm, presumably on the basis of information obtained from the moving lawyer. These opinions and amended Rule 1.10(a) clearly acknowledge that disclosure of conflicts information is permitted to facilitate compliance with the obligation to deal with conflicts of interest.

The importance of a lawyer's compliance with the Rules has justified limited disclosure of protected information in other circumstances. Rule 1.6(b) was amended in 2002 to clarify that disclosures reasonably necessary to secure legal advice about the lawyer's compliance with the Rules are proper even when not impliedly authorized under the stated exception to 1.6(a) because of the overriding importance of compliance with the Rules.[18]

As discussed above, before a moving lawyer joins a new firm, the Model Rules and the common law require the lawyer and the firm to detect and resolve conflicts of interest to protect their clients and former clients, even if only one party to the move undertakes the actual conflicts analysis. Conflicts analysis cannot be accomplished without sharing conflicts information generally about the persons and issues involved in a matter. Because conflicts information is needed to detect and resolve conflicts of interest when lawyers move between firms, as a general matter and subject to the limitations stated below, disclosure of conflicts information otherwise protected by Rule 1.6 should be considered permissible as necessary to comply with the Rules.

This conclusion is consistent, although not congruent, with a comment to the current ethics rules of one state and at least four bar association opinions. Comment [5A] to Colorado Rule 1.6 (which defines protected information substantially the same as Model Rule 1.6) states that a lawyer moving or contemplating a move from one firm to another may disclose client identity and the basic nature of the representation to insure compliance with the conflicts rules. Boston Bar Association Opinion 2004-1 concluded that without implicit authorization to share limited conflicts information, the requirement of Rule 1.7 to check for conflicts of interest as well as the protection of lawyer mobility and a client's right to choose a lawyer under Rule 5.6 could not be reconciled.[19] Opinions from jurisdictions that did not adopt the Model Rules definition of protected information, but rather retained the 1969 Model Code of Professional Responsibility formulation of confidences and secrets, reached similar results.[20]

Limitations on Disclosure

Permissive disclosure of conflicts information otherwise protected by Rule 1.6(a) incident to the process of lawyers moving between firms is limited in scope. Consistent with Comment [14] to Rule 1.6, any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest. As noted in Comment [3] to Rule 1.7, conflicts information typically includes the persons and issues involved in the relevant matter, and disclosure of that information would be permitted. In some cases, conflicts of interest that would likely frustrate a contemplated move can be discovered even before disclosure of client-specific information is necessary. For example, if it is recognized that moving lawyer's current firm and the prospective new firm are adverse in numerous existing matters or regularly represent commonly antagonistic groups (e.g., landlords and tenants or management and unions), then discussions regarding a potential move probably would proceed no further. In other cases, simply comparing client lists or the general nature of the practices of the moving lawyer and the prospective new firm will often reveal the absence or presence of potential conflicts without the need for additional disclosure; initial disclosures of conflicts information thus can often be limited to names of clients or areas of practice. In any case, if information beyond the persons and issues involved appears necessary for conflicts analysis, alternative measures such as those discussed below should be considered.

Another important limitation is that disclosing conflicts information must not compromise the attorney-client privilege or otherwise prejudice a client or former client.[21] There are matters, albeit rare, in which the identity of the client or the nature of the representation or both are protected by the attorney-client privilege.[22] There are also situations (e.g., clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury) in which disclosure of non-privileged information to the prospective new firm of the persons and issues involved would likely prejudice the client or former client.

In some situations, resolving whether a lawyer's move to a new firm would result in a conflict of interest requires fact-intensive analysis of information beyond just the persons and issues involved in a representation. Such an analysis will often be required in determining whether there is a “substantial relationship” between two matters for purposes of Rule 1.9. In such cases, the firm may be able to resolve the question based on information available from sources other than the moving lawyer. If not, the moving lawyer must either seek prior client consent, be screened from the current representation pursuant to Rule 1.10(a)(2), forgo the move, or persuade the prospective firm to undertake an alternative method of detecting and resolving the conflicts of interest issue consistent with the stated exceptions to Rule 1.6.

An alternative suggested by some commentators is retention by the moving lawyer, the prospective new firm, or both, of an independent or intermediary lawyer to receive and analyze conflicts information in confidence. This approach should not compromise any privilege nor frustrate the reasonable expectations of a client. It also conforms to Rule 1.6(b)(4), which expressly permits disclosure of protected information to secure legal advice about a lawyer's compliance with the Rules. The intermediary lawyer then may advise one or both, without disclosing any facts to the other, of the intermediary lawyer's conclusion on the resolution of, or the inability to resolve, any conflicts of interest that may have been detected. Procedures involving use of intermediary lawyers when lawyers move between firms have been described by Professors Tremblay,[23] and Wald,[24] as well as by Professors Hazard and Hodes.[25] If a client has instructed the moving lawyer not to reveal particular information to any other person, including other firm lawyers, that information cannot properly be imparted to the intermediary lawyer.[26]

In every case, a lawyer or law firm receiving conflicts information has a duty not to reveal that information. Use of conflicts information by the receiving lawyer or firm should be limited to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.

Timing of Disclosure

Timing is also important. Conflicts information should not be disclosed until reasonably necessary, but the process by which firms decide to offer lateral lawyers positions varies widely among firms and usually differs within firms according to the age and experience level of the lawyer under consideration. Many firms might not ask conflicts information of younger lawyers until making an offer of employment, which will be contingent on resolution of conflicts. For partner-level lawyers, the process is more complicated. As a consequence, conflicts issues may need to be detected and resolved at a relatively early stage.[27]

In any event, negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association. In another context, ABA Formal Op. 96-400 [28] explored at length the issue of when a lawyer considering potential employment with an adverse firm or party must consult with and seek consent of the involved client. The analysis there concluded that participation in substantive discussions by the moving lawyer and the prospective employer best identified the point at which such consideration needed to occur. Thus, conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place.

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Graubard Mollen Dannet & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1180 (N.Y. 1995).

[3] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (September 8, 1999) (Ethical Obligations When a Lawyer Changes Firms) n. 12.

[4] See Restatement (Third) Of The Law Governing Lawyers §121, cmt. g (2000); and Richard E. Flamm, Lawyer Disqualification: Conflicts of Interest and Other Bases §3.9 (2003).

[5] Anthony E. Davis and Peter R. Jarvis, Risk Management: Survival Tools for Law Firms 109 (2d ed. 2007).

[6] Lawrence J. Fox and Susan R. Martyn, Red Flags: A Lawyer's Handbook on Legal Ethics §6.07 (ALI-ABA 2005).

[7] See, e.g., Paul R. Tremblay, Migrating Lawyers and the Ethics of Conflict Checking, 19 Geo. J. Legal Ethics 489, 506-08 (2006); and Eli Wald, Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality Requirements and Contemporary Lawyers' Career Paths, 31 J. Legal Prof. 199, 203-07 (2007).

[8] Rule 1.6 cmt. 3.

[9] See, e.g., Comment [4] to Rule 1.6 (use of hypothetical to discuss representation permissible so long as there is no reasonable likelihood that listener could ascertain identity of client or situation involved); ABA Formal Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 384-85 (ABA 2000) (lawyers may be unable to comply with proposed condition of Legal Services Corporation funding to disclose identity of all clients); and ABA Formal Op. 01-421 (February 16, 2001) (Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions) (insurance defense lawyer may not disclose billing records relating to insured's representation to third-party auditor designated by insurer without insured's informed consent).

[10] ABA Formal Op. 98-411 (August 30, 1998) (Ethical Issues in Lawyer-to-Lawyer Consultation).

[11] See Restatement (Third) Of Agency §2.02(1) (2006).

[12] See Robert W. Hillman, Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups §2.2.4 (2d ed. 2009 Supp.).

[13] For a discussion of when a lawyer changing firms must give notice to clients for whom the lawyer has active matters, see ABA Formal Op. 99-414, supra note 3.

[14] Scope, Paragraph [14].

[15] ABA Formal Op. 99-414 n. 12.

[16] ABA Formal Op. 88-356 (Dec. 16, 1988) (Temporary Lawyers), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 41.

[17] ABA Formal Op. 99-415 (Sept. 8, 1999) (Representation Adverse to Organization by Former In-House Lawyer).

[18] A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005 (ABA 2006) at 125. See also Comment [9] to Rule 1.6 (even when not impliedly authorized, paragraph (b)(4) permits disclosure to secure legal advice because of importance of compliance with Rules).

[19] Boston Bar Ass'n Eth. Comm. Op. 2004-1 (May 20, 2005) ("The 'Do's and Don'ts' of Revealing 'Conflict-checking Information'"), available at http://www.bostonbar.org/sc/ethics/op04_1.pdf. Massachusetts Rule 1.6(a) protects only "confidential information relating to representation of a client."

[20] See D.C. Bar Ass'n Eth. Op. 312 (April 2002) (Information That May Be Provided To Check Conflict When a Lawyer Seeks to Join a New Firm), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion312.cfm; New York State Bar Ass'n Eth. Op. 720 (August 27, 1999) (Successive Representation; Moving Lawyer; Conflict Check.), available at http://www.nysba.org/AM/Template.cfm?Section= Ethics_Opinions&CONTENTID=18917&TEMPLATE =/CM/ContentDisplay.cfm; and Association of the Bar of the City of New York Eth. Op. 2003-03 (Oct. 2003) (Checking For Conflicts of Interest), available at http://www.abcny.org/Ethics/eth2003-3.html.

[21] See ABA Formal Op. 98-411, supra footnote 9 and accompanying text (consulting lawyer in lawyer-to-lawyer consultation impliedly authorized to disclose certain information relating to the representation without client consent, but may not waive attorney-client privilege or otherwise prejudice client).

[22] See Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 88-93 (5th ed. 2007).

[23] 19 Geo. J. Legal Ethics at 544.

[24] 31 J. Legal Prof. at 227.

[25] See Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering §14.4, note 2 at 14-40 (3d ed. 2009 Supp.).

[26] See Comment [5] to Rule 1.6.

[27] See, e.g., Roberts & Schaefer Co. v. San-Con, 898 F. Supp. 356, 363 (S.D.W.Va. 1995) ("Lawyers and law firms must consider and address the effects of mergers and new associations on their clients well in advance of when such events occur.").

[28] ABA Formal Op. 96-400 (January 24, 1996) (Job Negotiations with Adverse Firm or Party), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) 391 n. 9.

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NAPABA Virtual Experience

Thursday, November 5, 2020
2:00 PM – 3:00 PM

Session CLE 303 |
Primer on the Lateral Market in Private Practice - Weighing Opportunities and Pit Falls

The landscape for law firms is evolving at a rapid pace. With corporate clients' demand for legal services remaining flat, law firms are looking to increase revenue by hiring partners and their teams with portable book of business from other law firm competitors. This competition for talent has resulted in more and more lateral movements for partners and associates in law firms. This panel will focus on: (i) what is the current law firm practice landscape and what is the future – particularly in response to COVID-19 pandemic; (ii) what law firms look for in lateral partners (anything beyond expertise and book of business); (iii) what partners who have made the lateral move wish they had known before the move and what advice they would share with people thinking about moving; (iv) how much weigh should get placed on compensation, brand, geographic footprint and depth of practices; (v) what factors partners should weigh with respect to their current firm and position within the firm before making a move or making a decision to stay at their current firms; (vi) what factors and questions partners need to ask and weigh in connection with the prospective law firms before making a decision to move; (vii) partnership agreement considerations in order to avoid any breaches and legal ethics violations when information and asking clients to move their files to new firm; and (viii) what associates should consider in determining whether to move with their partners to other firms, stay at their current firms or look for other alternative opportunities.

Moderator:
Albert Tan, *Partner, Haynes and Boone, LLP*

Speakers:
Wilson Chu, *Partner, McDermott Will & Emery*
David Lat, *Managing Director, Lateral Link*
Susan Shin, *Partner, Weil, Gotshal & Manges LLP*
Darryl M. Woo, *Partner, Goodwin Procter LLP*

SAMPLE CHECKLIST OF CONSIDERATIONS FOR NEW FIRM AND EXISTING FIRM

	New Firm	Existing Firm
Financial Matters		
Compensation (guaranty period, considerations for compensation – lockstep, points, modified lockstep, or eat-what-you-kill, etc.)		
Clawbacks		
Financial health – Debt?		
Capital Contribution / Return of Capital		
Billing Rates – flexibility or stringent – origination credit, billing credit and service credit, rates and alternative fee arrangements		
Ability to do write-offs		
Requirements for annual billables, administrative, and other requirements		
Benefits and insurance considerations		
Tax Burden Impacts of Office Locations – impact on compensation package		
Is Compensation only measured in $ - intangibles value?		
Quality of Firms		
Name, Brand, Platform		
Practice Specialties		
Lawyer Quality		

Geographical Footprint		
My Practice		
Ability to Shape and Grow Practice		
Move as a Team or Solo		
Resources – BD budget, sponsorship budget and travel budget		
Related and Complimentary Practice Areas, Scope and Depth of Experience in Places Needed for My Practice		
Importance of My Practice in the Firm Landscape		
Support Work – Requirement to Provide Support Help for Other Departments		
Conflicts – Ability to Clear Matters		
Ability to Write off and Invest in Client Development		
Management		
Role in Firm		
How Firm and practice group is Managed		
Importance of [office location] office in the Firm's strategy		
Other Considerations		
Ability to Sustain Practice In a Downturn		
Firm, Leadership and Management Culture		
Firm Politics		
Review Partnership Agreement		
Cost Drag of Underperforming Office		
Impact Move will Have on Others in the Existing Practice		
Control over Life / Stress of Starting Over		

Unknowns		

Ethical Obligations When Attorney Changes Law Firms

I. Ethical Obligations to Your Clients

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

- Attorney has a duty and ethical obligation upon withdrawal to disclose "pending departure in a timely fashion to clients for whose active matters (s)he currently is responsible or plays a principal role in the current delivery of legal services."
- The disclosure communication "can be accomplished the lawyer herself or himself, the responsible members of the firm, or the lawyer and those members jointly." Joint notification by both the firm and the departing attorney is preferred – it is viewed as being most fair to the client. If not possible, the departing attorney must notify the client.
- An attorney does not violate the ABA Model Rules by informing clients before giving notice to the current firm, as long as (s)he "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…"

B. ABA Model Rule 1.16(d)

- "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest…" A client's files belong to the client and not to a firm or attorney. Care must be taken to ensure the files follow the client.

C. ABA Model Rule 5.6(a)

- Prohibits an agreement that "restricts the right of a lawyer to practice after termination of the relationship."

II. Confidentiality of Information

A. ABA Model Rule 1.6(a)

- "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent"

B. ABA Model Rule 1.7 Conflict of Interest: Current Clients
C. ABA Model Rule 1.9 Duties to Former Clients
D. ABA Model Rule 1.10 Imputation of Conflicts of Interest: General Rule
E. ABA Formal Opinion 09-455 (October 8, 2009)

- "In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflict analysis." Basic information should only include "persons and issues involved in a matter."

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]

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]

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]

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]

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.

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]

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.

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]

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]

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]

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.

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.

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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.

[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.

[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."

[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.

[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).

[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.

[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."

[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.

[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.

[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.").

[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.

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ABA MODEL RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

Client-Lawyer Relationship

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA MODEL RULE 5.6: RESTRICTIONS ON RIGHTS TO PRACTICE

Law Firms And Associations

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; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(6) to comply with other law or a court order; or
(7) 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.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA MODEL RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

Client-Lawyer Relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

ABA MODEL RULE 1.9: DUTIES TO FORMER CLIENTS

Client-Lawyer Relationship

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ABA MODEL RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

Client-Lawyer Relationship

(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.

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Disclosure of Conflicts Information When Lawyers Move Between Law Firms

When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. Although Rule 1.6(a) generally protects conflicts information (typically the "persons and issues involved" in a matter), disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations. Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.[1]

Many lawyers change law firm associations during their careers. New York's highest court noted more than a decade ago that the "revolving door" is a modern-day law firm fixture.[2] Usually these changes are voluntary, but often they are not. The Model Rules of Professional Conduct recognize lawyer mobility. Comment [4] to Rule 1.9, "Lawyers Moving Between Firms," states that the rule on duties to former clients should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel or unreasonably hamper lawyers from forming new associations and accepting new clients. The February 2009 amendment of Rule 1.10(a) to permit screening of lawyers moving between firms to prevent imputed disqualification of the new firm is grounded on that premise. The importance of clients being free to choose counsel after a change of association is also identified in Comment [1] to Rule 5.6.

The Need for Conflicts Analysis

When a lawyer moves between law firms, the moving lawyer and the new firm each have an obligation to protect their respective clients and former clients against harm from conflicts of interest. A moving lawyer whose current clients may wish to become clients of the new firm must determine whether the new firm would have disqualifying conflicts of interest in representing those clients.[3] The prospective new firm has a corresponding duty to determine the conflicts in its current representations that could arise if the moving lawyer actually joins the firm. Comment [3] to Rule 1.7 advises lawyers to adopt reasonable procedures, appropriate for the size and type of firm and practice, "to determine in both litigation and non-litigation matters the persons and issues involved" to ascertain whether proposed new matters are permitted under the conflicts rules. Comment [2] to Rule 5.1(a) includes policies and procedures designed to "detect and resolve" conflicts of interest among those measures that law firm managers must establish to give reasonable assurance that all lawyers in the firm conform to the Rules.

The obligation to detect and resolve conflicts of interest derives from the common law as well as the lawyer ethics rules. [4] When lawyers move between firms, early detection and resolution of conflicts of interest is also prudent risk management. "A common and often serious problem for law firms is the conflict of interest involving a newly hired lawyer … and his or her former clients or adversaries. Accordingly … it is essential to conduct prior conflict screening as thoroughly as possible before making hiring decisions."[5] Other authorities have deemed it essential in order to facilitate the necessary conflicts screening to include client identification and subject matter in the new firm's conflicts database for all former clients of lawyers joining the law firm.[6]

Tension between Confidentiality and Conflicts Analysis

Despite the need for both a lawyer considering a move and the prospective new firm to detect and resolve conflicts of interest, some commentators have expressed concern that the Model Rules do not specifically permit disclosure of the information required for conflicts analysis.[7] This concern arises from the definition of information covered by Rule 1.6(a), which is "all information relating to the representation, whatever its source."[8] Thus, the persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.[9]

Disclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6. The exception in Rule 1.6(a) for disclosures "impliedly authorized in order to carry out the representation" typically is limited to disclosures that serve the interests of the client. Examples cited in Comment [5] to Rule 1.6 include facts that must be admitted in litigation or a disclosure that facilitates a satisfactory conclusion to a matter, disclosures clearly necessary to advance a client's representation. Another example was recognized in ABA Formal Opinion 98-411,[10] which found limited disclosure outside a law firm in a lawyer-to-lawyer consultation impliedly authorized "when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client." This interpretation is consistent with general agency law: an agent's implied authority is limited to acts "necessary or incidental" to achieving the principal's objectives.[11] There may well be instances where client representations are advanced by lawyers moving between firms, but most such moves appear to take place for the sake of the lawyer rather than advancement of the client's representation. Absent a demonstrable benefit to a client's representation from the disclosure of conflicts information, it is unlikely that the disclosure would be "impliedly authorized" within the generally understood and accepted meaning of that exception.

A second stated exception to Rule 1.6(a) that might arguably allow disclosure of conflicts information incident to lawyers moving between firms is Rule 1.6(b)(6), which permits disclosure of information "the lawyer reasonably believes necessary … to comply with other law." However, Comment [12] to Rule 1.6 seems to limit "other law" to law other than the Rules. Compliance with Rule 1.7 would therefore not seem to fall within the exception. Comment [12] also notes that the disclosure must be "required" by the other law. Because the movement of lawyers between firms is not mandated by some external law, it is unlikely that disclosure of conflicts information to comply with Rule 1.7 qualifies as required by other law outside the Rules. Finally, as explained in Comment [12], when disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. Such a discussion at the time conflicts information is provided often would not be practicable.

Obtaining clients' informed consent, as defined in Rule 1.0(e), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely would involve giving notice to the lawyer's current firm,[12] with unpredictable and possibly adverse consequences.[13] Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm. Nevertheless, as noted below, there

may be unusual situations where the persons and issues involved are so sensitive that a moving lawyer may need to seek informed client consent or take alternative protective measures before disclosing that information.

Permissive Disclosure of Conflicts Information

In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis. The Model Rules are "rules of reason" to be "interpreted with reference to the purposes of legal representation and of the law itself."[14] Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

The need to disclose conflicts information has been recognized when lawyers change firms as well as in other contexts. As noted above, a moving lawyer with a current client that may wish to become a client of the new firm "must ensure that her new firm would have no disqualifying conflict of interest…. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation."[15] Providing guidelines for employing temporary lawyers in compliance with the Rules, ABA Formal Opinion 88-356 advises: "The second firm should make appropriate inquiry [of the temporary lawyer] and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter."[16] ABA Formal Opinion 99-415 gives guidance regarding representations adverse to an organization by its former in-house lawyer, and advises in-house lawyers to maintain logs describing those matters on which they worked because determination by the new firm of whether there was a conflict of interest with the former employer required "an inquiry into the responsibilities of the lawyer" during the former employment.[17] Further, the February 2009 revision of Rule 1.10(a) that permits screening of lawyers moving between firms to avoid imputing the disqualification of the moving lawyer to the new firm becomes relevant only if a former client conflict of the moving lawyer has been recognized by the new firm, presumably on the basis of information obtained from the moving lawyer. These opinions and amended Rule 1.10(a) clearly acknowledge that disclosure of conflicts information is permitted to facilitate compliance with the obligation to deal with conflicts of interest.

The importance of a lawyer's compliance with the Rules has justified limited disclosure of protected information in other circumstances. Rule 1.6(b) was amended in 2002 to clarify that disclosures reasonably necessary to secure legal advice about the lawyer's compliance with the Rules are proper even when not impliedly authorized under the stated exception to 1.6(a) because of the overriding importance of compliance with the Rules.[18]

As discussed above, before a moving lawyer joins a new firm, the Model Rules and the common law require the lawyer and the firm to detect and resolve conflicts of interest to protect their clients and former clients, even if only one party to the move undertakes the actual conflicts analysis. Conflicts analysis cannot be accomplished without sharing conflicts information generally about the persons and issues involved in a matter. Because conflicts information is needed to detect and resolve conflicts of interest when lawyers move between firms, as a general matter and subject to the limitations stated below, disclosure of conflicts information otherwise protected by Rule 1.6 should be considered permissible as necessary to comply with the Rules.

This conclusion is consistent, although not congruent, with a comment to the current ethics rules of one state and at least four bar association opinions. Comment [5A] to Colorado Rule 1.6 (which defines protected information substantially the same as Model Rule 1.6) states that a lawyer moving or contemplating a move from one firm to another may disclose client identity and the basic nature of the representation to insure compliance with the conflicts rules. Boston Bar Association Opinion 2004-1 concluded that without implicit authorization to share limited conflicts information, the requirement of Rule 1.7 to check for conflicts of interest as well as the protection of lawyer mobility and a client's right to choose a lawyer under Rule 5.6 could not be reconciled.[19] Opinions from jurisdictions that did not adopt the Model Rules definition of protected information, but rather retained the 1969 Model Code of Professional Responsibility formulation of confidences and secrets, reached similar results.[20]

Limitations on Disclosure

Permissive disclosure of conflicts information otherwise protected by Rule 1.6(a) incident to the process of lawyers moving between firms is limited in scope. Consistent with Comment [14] to Rule 1.6, any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest. As noted in Comment [3] to Rule 1.7, conflicts information typically includes the persons and issues involved in the relevant matter, and disclosure of that information would be permitted. In some cases, conflicts of interest that would likely frustrate a contemplated move can be discovered even before disclosure of client-specific information is necessary. For example, if it is recognized that moving lawyer's current firm and the prospective new firm are adverse in numerous existing matters or regularly represent commonly antagonistic groups (e.g., landlords and tenants or management and unions), then discussions regarding a potential move probably would proceed no further. In other cases, simply comparing client lists or the general nature of the practices of the moving lawyer and the prospective new firm will often reveal the absence or presence of potential conflicts without the need for additional disclosure; initial disclosures of conflicts information thus can often be limited to names of clients or areas of practice. In any case, if information beyond the persons and issues involved appears necessary for conflicts analysis, alternative measures such as those discussed below should be considered.

Another important limitation is that disclosing conflicts information must not compromise the attorney-client privilege or otherwise prejudice a client or former client.[21] There are matters, albeit rare, in which the identity of the client or the nature of the representation or both are protected by the attorney-client privilege.[22] There are also situations (e.g., clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury) in which disclosure of non-privileged information to the prospective new firm of the persons and issues involved would likely prejudice the client or former client.

In some situations, resolving whether a lawyer's move to a new firm would result in a conflict of interest requires fact-intensive analysis of information beyond just the persons and issues involved in a representation. Such an analysis will often be required in determining whether there is a “substantial relationship” between two matters for purposes of Rule 1.9. In such cases, the firm may be able to resolve the question based on information available from sources other than the moving lawyer. If not, the moving lawyer must either seek prior client consent, be screened from the current representation pursuant to Rule 1.10(a)(2), forgo the move, or persuade the prospective firm to undertake an alternative method of detecting and resolving the conflicts of interest issue consistent with the stated exceptions to Rule 1.6.

An alternative suggested by some commentators is retention by the moving lawyer, the prospective new firm, or both, of an independent or intermediary lawyer to receive and analyze conflicts information in confidence. This approach should not compromise any privilege nor frustrate the reasonable expectations of a client. It also conforms to Rule 1.6(b)(4), which expressly permits disclosure of protected information to secure legal advice about a lawyer's compliance with the Rules. The intermediary lawyer then may advise one or both, without disclosing any facts to the other, of the intermediary lawyer's conclusion on the resolution of, or the inability to resolve, any conflicts of interest that may have been detected. Procedures involving use of intermediary lawyers when lawyers move between firms have been described by Professors Tremblay,[23] and Wald,[24] as well as by Professors Hazard and Hodes.[25] If a client has instructed the moving lawyer not to reveal particular information to any other person, including other firm lawyers, that information cannot properly be imparted to the intermediary lawyer.[26]

In every case, a lawyer or law firm receiving conflicts information has a duty not to reveal that information. Use of conflicts information by the receiving lawyer or firm should be limited to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.

Timing of Disclosure

Timing is also important. Conflicts information should not be disclosed until reasonably necessary, but the process by which firms decide to offer lateral lawyers positions varies widely among firms and usually differs within firms according to the age and experience level of the lawyer under consideration. Many firms might not ask conflicts information of younger lawyers until making an offer of employment, which will be contingent on resolution of conflicts. For partner-level lawyers, the process is more complicated. As a consequence, conflicts issues may need to be detected and resolved at a relatively early stage.[27]

In any event, negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association. In another context, ABA Formal Op. 96-400 [28] explored at length the issue of when a lawyer considering potential employment with an adverse firm or party must consult with and seek consent of the involved client. The analysis there concluded that participation in substantive discussions by the moving lawyer and the prospective employer best identified the point at which such consideration needed to occur. Thus, conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place.

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Graubard Mollen Dannet & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1180 (N.Y. 1995).

[3] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (September 8, 1999) (Ethical Obligations When a Lawyer Changes Firms) n. 12.

[4] See Restatement (Third) Of The Law Governing Lawyers §121, cmt. g (2000); and Richard E. Flamm, Lawyer Disqualification: Conflicts of Interest and Other Bases §3.9 (2003).

[5] Anthony E. Davis and Peter R. Jarvis, Risk Management: Survival Tools for Law Firms 109 (2d ed. 2007).

[6] Lawrence J. Fox and Susan R. Martyn, Red Flags: A Lawyer's Handbook on Legal Ethics §6.07 (ALI-ABA 2005).

[7] See, e.g., Paul R. Tremblay, Migrating Lawyers and the Ethics of Conflict Checking, 19 Geo. J. Legal Ethics 489, 506-08 (2006); and Eli Wald, Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality Requirements and Contemporary Lawyers' Career Paths, 31 J. Legal Prof. 199, 203-07 (2007).

[8] Rule 1.6 cmt. 3.

[9] See, e.g., Comment [4] to Rule 1.6 (use of hypothetical to discuss representation permissible so long as there is no reasonable likelihood that listener could ascertain identity of client or situation involved); ABA Formal Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 384-85 (ABA 2000) (lawyers may be unable to comply with proposed condition of Legal Services Corporation funding to disclose identity of all clients); and ABA Formal Op. 01-421 (February 16, 2001) (Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions) (insurance defense lawyer may not disclose billing records relating to insured's representation to third-party auditor designated by insurer without insured's informed consent).

[10] ABA Formal Op. 98-411 (August 30, 1998) (Ethical Issues in Lawyer-to-Lawyer Consultation).

[11] See Restatement (Third) Of Agency §2.02(1) (2006).

[12] See Robert W. Hillman, Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups §2.2.4 (2d ed. 2009 Supp.).

[13] For a discussion of when a lawyer changing firms must give notice to clients for whom the lawyer has active matters, see ABA Formal Op. 99-414, supra note 3.

[14] Scope, Paragraph [14].

[15] ABA Formal Op. 99-414 n. 12.

[16] ABA Formal Op. 88-356 (Dec. 16, 1988) (Temporary Lawyers), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 41.

[17] ABA Formal Op. 99-415 (Sept. 8, 1999) (Representation Adverse to Organization by Former In-House Lawyer).

[18] A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005 (ABA 2006) at 125. See also Comment [9] to Rule 1.6 (even when not impliedly authorized, paragraph (b)(4) permits disclosure to secure legal advice because of importance of compliance with Rules).

[19] Boston Bar Ass'n Eth. Comm. Op. 2004-1 (May 20, 2005) ("The 'Do's and Don'ts' of Revealing 'Conflict-checking Information'"), available at http://www.bostonbar.org/sc/ethics/op04_1.pdf. Massachusetts Rule 1.6(a) protects only "confidential information relating to representation of a client."

[20] See D.C. Bar Ass'n Eth. Op. 312 (April 2002) (Information That May Be Provided To Check Conflict When a Lawyer Seeks to Join a New Firm), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion312.cfm; New York State Bar Ass'n Eth. Op. 720 (August 27, 1999) (Successive Representation; Moving Lawyer; Conflict Check.), available at http://www.nysba.org/AM/Template.cfm?Section= Ethics_Opinions&CONTENTID=18917&TEMPLATE =/CM/ContentDisplay.cfm; and Association of the Bar of the City of New York Eth. Op. 2003-03 (Oct. 2003) (Checking For Conflicts of Interest), available at http://www.abcny.org/Ethics/eth2003-3.html.

[21] See ABA Formal Op. 98-411, supra footnote 9 and accompanying text (consulting lawyer in lawyer-to-lawyer consultation impliedly authorized to disclose certain information relating to the representation without client consent, but may not waive attorney-client privilege or otherwise prejudice client).

[22] See Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 88-93 (5th ed. 2007).

[23] 19 Geo. J. Legal Ethics at 544.

[24] 31 J. Legal Prof. at 227.

[25] See Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering §14.4, note 2 at 14-40 (3d ed. 2009 Supp.).

[26] See Comment [5] to Rule 1.6.

[27] See, e.g., Roberts & Schaefer Co. v. San-Con, 898 F. Supp. 356, 363 (S.D.W.Va. 1995) ("Lawyers and law firms must consider and address the effects of mergers and new associations on their clients well in advance of when such events occur.").

[28] ABA Formal Op. 96-400 (January 24, 1996) (Job Negotiations with Adverse Firm or Party), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) 391 n. 9.

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