

When A Law Firm Splits Up

By the NHBA Ethics Committee

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The mobility of attorneys is a fact of life in New Hampshire. The new *Rules of Professional Conduct* should help attorneys, whether moving or staying, with answers to the following ethical issues:

Who Get to (Or Has To) Take/Keep the Work Clients?

Representation of a client continues until the matter is completed, or until the attorney-client relationship is terminated. Rule 1.3; 1.16. When one or more attorneys leave a firm, therefore, both attorneys and support staff must be extremely careful to ensure that no files fall between the cracks, that all deadlines and hearing dates are adhered to, and that service to clients does not suffer during the transition period.

On the other hand, absent a court appointment, a lawyer may not continue to represent a client who does not wish to be so represented. ABA Informal Opinion 1397 (Aug. 31, 1977); *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 521 F. Supp. 365, 78 (D.N.H. 1981, *rev'd in part, other grounds*, 689 F. 2d 281 (1st Cir. 1982). Note that an attorney might not be able to withdraw from a matter until is concluded. Rule 1.16(b). When a firm represents a client, it may be unclear whether the client intended to hire the firm or an individual attorney. If an attorney who was performing work for the client leaves the firm, both the departing attorney and the firm may logically claim the client's loyalty. In this situation, the appropriate course is for the firm -- including the departing attorney -- to notify all such clients of the planned change, and give the clients an opportunity to select their future representation.

If a firm refuses to send out a notice, the departing attorney is in a delicate position. The migrating attorney must decide whether or not to contact the clients he represented in his/her old firm. An attorney may, of course, solicit business from his/her current and former clients. Rule 7.3, Although Rule 4.2 prohibits communication with "a party the lawyer knows to be represented by another lawyer, " which technically could include clients of the old firm, the rule was not directed at this situation and should not apply to it. Surprisingly, two courts have ruled that the migrating lawyer's contact with his or her own client constituted tortious interference with the firm's relationship with the client. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa 416, 393 A.2d 1175 (1978), *cert. denied*, 422 U.S. 907 (1979); *Accord, Rosenfeld, Meyer & Susman v. Cohen* 146 Cal. App.3d 200, 194 Cal. Rptr. 180 (1983). Given the ambiguity as to whether the client's relationship was with the firm or the individual attorney, these decisions seem out of line.

However it is accomplished, the choice of future representation must rest with the client. In consulting with clients about this choice, all attorneys involved should be sensitive to potential conflicts between the attorney's own financial or personal interests and the best interests of the client. Rule 1.7(b).

The duty to preserve client confidences continues even after the client-lawyer relationship has ended. Confidential information may be discussed among members of a law firm. Prudence would indicate that the client be notified and consulted before the migrating attorney shares the client's information with the new law firm. *See* Rule 1.6.

How Do You Notify People, Including the Court?

All members of a firm-in-transition must be careful that letterhead, public announcements, and the like are changed in a timely manner. It is an ethical violation, however inadvertent, to use letterhead containing the name of an attorney who has withdrawn from the firm but continues in active law practice. Rule 7.5.

Appearances and withdrawals should be filed with the court to clarify who will be handling all pending litigation. If the migrating lawyer will continue to handle the case, a change of address should be filed,

(There is no form for a change of address.) Even so, the courts do not always correct their records, and support staff must be alert for hearing notices and other documents that are incorrectly distributed.

The firm's malpractice insurance carrier should also be notified promptly, as care should be taken to ensure that coverage will continue for each attorney.

Who Has A Conflict Of Interest When?

The new Rules clarify the "imputed disqualification" rules when an attorney migrates. The departing attorney is, of course, bound to continued loyalty to clients he or she actually represented in the former firm. Rule 1.9. Actual conflicts of interest created in the *old* firm travel or migrate to the *new* firm, *unless* the migrating attorney did not work on the file and did not acquire confidential information while with the *old* firm. Rule 1.10(b). Similarly, the old firm retains its conflicts of interest if any lawyer remaining in the firm has acquired protected information. Rule 1.10(c).

How Is The Money Divided?

Surprisingly to many, the division of fees earned from the winding up of a firm's existing matters does not necessarily follow the work itself. In a partnership, money earned during the "winding up" should be divided according to the partnership agreement's formula for dividing profits, regardless of who actually does the work. *See*, RSA 304-A:40; *McLean v Michalowsky*, 117 Misc. 2d 649, 458 N.Y.S 2d 1005 (1983) (division based on work); *Berkson v. Berryman*, 62 Md. App. 79, 488 A. 2d. 504 (1985); *Resnick v. Kaplan*, 49 Md. App. 499, 434 A.2d 582 (1981). A firm and a departing attorney may, however, agree to a different division of fees in a given case, based on the services performed, with the client's consent. Rule 1.5(f). Payments made to a former partner or associate pursuant to a separation agreement are an exception to the normal fee-splitting rules. Rule 1.5(g).

An attorney may not sell the goodwill (i.e. clients) of his or her practice. *Geffen v. Moss*, 53 Cal.App.3d 215, 125 Cal.Rpts. 678, 79 A.L.R.3d 1232 (1975); N.H. Ethics Op. 1983-4/12 (1984). The *Geffen* court reasoned that the sale of the expectation of future patronage of former and current clients is contrary to public policy and, therefore, illegal. Conversely, an attorney may not compensate anyone for client referrals. Rule 7.2(c). In other words, in dividing partnership assets, client files and goodwill should not be considered "assets" that can be traded against other financial assets.

What About A Covenant Not To Compete?

The Rules specifically prohibit agreements among lawyers that would restrict any of them from practicing law, "except an agreement concerning benefits upon retirement." Rule 5.6; *See*: DR 2-108(A).

A firm may not restrict a withdrawing partner from hiring associates away from the firm. ABA Informal Opinion 1417 (July 1978). *See Rule 1.6 Confidentiality of Information*.

How Do You Prevent Trouble Before It Starts?

To prevent the nasty or at least ill will that may result in these situations, every partnership or other entity should have a written agreement with clear provisions for how financial and other issues will be handled if the firm dissolves.

CONCLUSION

The central and overriding concern of the migrating attorney and the attorneys in the new and old law firms, must be what is in the best interests of the client. All doubts as to the ethical resolution of a problem should be resolved with the client's best interest in mind, and client's consent should be actively sought.