Ethics Watch

So You Are Thinking About Moving—A Primer on Ethical Obligations of Departing Lawyers and Their Firms (Part I)

By Nathan M. Crystal

It used to be the case that when a lawyer started work for a firm, it was practically a lifetime commitment. No more. The profession has changed dramatically. Now it is common for lawyers, particularly those who have a large number of clients, to move to another firm or start their own. These departures raise a number of legal and ethical questions. An understanding of the basic principles applicable to such departures is essential for both departing lawyers and their old and new firms.

1. *When should departing lawyers inform their firms of their plans to leave?*

Lawyers have fiduciary obligations to their firms. A fiduciary has a duty to disclose material information to the principal. However, lawyers may engage in preliminary negotiations with prospective new firms and may make plans to open their own practice without disclosing such activities to their current firm. In the leading case of *Meehan v. Shaughness*, 535 N.E.2d 1255 (Mass. 1989), the Supreme Judicial Court of Massachusetts held that departing partners owed fiduciary obligations to their remaining partners and that they could be held civilly liable for breach of those obligations. However, the court decided that the withdrawing partners did not breach their fiduciary obligations by making "logistical arrangements" for their new firm (executing a lease, preparing a list of clients they expected to retain after their departure, and arranging for financing based on their expected clientele) because fiduciaries may "plan to compete with the entity to which they owe allegiance," provided that they do not otherwise breach their fiduciary obligations. *Id.* at 1264.

As a general matter, in my opinion lawyers need not disclose their intention to move until arrangements with the new firm are final. After all, the deal may fall through for many reasons. For example, suppose a lawyer signs an employment agreement with a new firm. Is disclosure to the old firm required at this point? If the employment agreement is subject to any significant condition, such as the satisfactory completion of a conflicts check, which may often be the case, in my opinion disclosure to the old firm would not be required until such conditions are removed and the employment agreement is essentially final. However, if the lawyer is in a management position in the old firm, the lawyer should not be participating in decisions by the firm that are based on the assumption that the lawyer will remain with the firm. If the lawyer is not ready to disclose his intentions at that point, at the very least, he should absent himself from participation in these decisions.

2. *If a lawyer is joining a new firm, may the lawyer reveal information to the new firm to do a conflicts check without violating the lawyer's duty of confidentiality?*

ABA Model Rule 1.6(b)(7), adopted in 2012, provides that a lawyer may reveal confidential information:

> 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.

South Carolina has not yet adopted this amendment, but in my opinion the authority to reveal confidential information to a limited extent to determine if conflicts exist is permissible under South Carolina rules because disclosure of this information is necessary to comply with the conflict rules. In fact, the ABA Ethics Committee so advised in Formal Opinion #09-455.

What information may be disclosed? The comment to Rule 1.6(b)(7) states that disclosure should ordinarily be limited to "the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated." Comment 13. Disclosure is not permissible when it would be prejudicial to the client. The comment gives the following examples: "(e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge)."

Suppose a prospective new firm wants to know the amount of revenue generated for the old firm by clients represented by the departing lawyer. May the lawyer reveal this information? I don't think so. This information is not necessary for conflicts purposes, goes beyond what is permitted by either the ABA Model Rules or Opinion #09-455, and reveals proprietary information of the old firm in violation of fiduciary duties. Perhaps a lawyer could give general information about the amount of total revenue that the lawyer personally generated without reference to specific clients.

To protect confidential information, the ABA committee approved retention of an independent lawyer to determine if conflicts exist; the "conflicts lawyer" would then share the results with the departing lawyer and the new firm without disclosing confidential information. The Committee found that this procedure was justified under Rule 1.6(b)(4), which allows disclosure of confidential information to obtain ethics advice.

When confidential information necessary to complete a conflicts check cannot be disclosed because it would be prejudicial to a client, the new firm and the moving lawyer have three options: abandon the move, defer the move until the conflicts check can be completed without prejudice to a client, or complete the move even with an incomplete conflicts check in the hope that a conflict does not exist, or that if it does exist the new firm will deal with the situation as appropriate when the conflict becomes known.

Conflicts checks should be limited to clients the moving lawyer personally represented or with whom the lawyer acquired confidential information, for the reasons set forth in the next paragraph.

3. *When does a conflict exist and what can be done about it?*

When lawyers decide to leave a firm and open their own office, conflict of interest issues should not arise because the new firm will not have existing clients. On the other hand, three types of conflicts can arise when lawyers join an existing firm.

First, the lawyer's old firm may represent a client that is directly adverse to a client of the new firm, either in a litigation or a transactional matter. If the client of the old firm will remain with that firm, and if the moving lawyer was not involved in the representation of the client of the old firm and did not acquire any confidential information from the client, then no conflict exists. See SCRPC 1.9(b). In this case the rules do not prohibit either the moving lawyer or the new firm from representing a client of the new firm against the client of the old firm. However, it may be prudent, although not ethically required, for the moving lawyer to avoid involvement in the matter after joining the new firm.

Second, a conflict does arise if the moving lawyer was substantially involved in the representation of the client of the old firm or otherwise acquired confidential information about that client. In this case the moving lawyer is personally disqualified from representing the client of the new firm against the client of the old firm under either SCRPC 1.9(a) or 1.9(b) and, perhaps more significantly, the disqualification is imputed to the new firm. See SCRPC 1.10(a). What can be done when this type of conflict arises? There are four possibilities: (i) abandon the move; (ii) defer the move until the conflict-generating matter ends; (iii) seek the informed consent of both affected clients under Rule 1.9(b). These three options may be either undesirable or impractical. (iv) The fourth option is screening of the disqualified lawyer, but the ethical propriety of this option in South Carolina is questionable. The ABA Model Rules now allow screening when a disqualified lawyer moves to a new firm to prevent disqualification of the firm, ABA Model Rule 1.10(a)(2). Unfortunately, South Carolina has not adopted this provision, and the South Carolina Bar Ethics Advisory Committee has also advised against screening, although the facts of the opinion were somewhat unique. See S.C. EOP #04-10. However, in other jurisdictions courts approved screening for policy reasons even before the adoption of the ABA Model Rule revision, so perhaps a court in South Carolina could be persuaded to approve screening when a disqualified lawyer joins a firm.

Third, a conflict may arise when a client that a moving lawyer plans to bring to the new firm has a conflict with an existing client of the new firm. The conflict may be in a single matter or, more commonly, in unrelated matters. For example, if a lawyer plans to bring a transactional client to the new firm, a conflict exists if the new firm is handling a litigation matter against the transactional client on behalf of another client. In this situation, the screening option is not available. The ABA Model Rules and prior case law only allowed screening when the lawyer moved between firms and the conflict was based on the lawyer's former representation of the client. In this third situation, the conflict arises because of current representation of multiple clients by the new firm under Rule 1.7(a)(1); screening is not permitted; only the first three options listed above can be used. See ABA Model Rule 1.10(a)(2) (limiting screening to situations in which the conflict arises under either Rule 1.9(a) or 1.9(b)). Note, however, that the new firm could propose screening to the affected clients as part of the process of seeking their informed consent to this conflict.

4. *How should the lawyer and the old firm handle notification*

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to existing clients of the lawyer's departure?

The issue of notification to clients represented by the departing lawyer arises both when departing lawyers move to new firms or open their own practices. Departing lawyers and their firms must recognize that clients do not "belong" to either of them. Clients have the right to choose who will represent their interests. Thus, both the firm and the departing lawyers have the right and the obligation to notify clients of the departure so that clients can decide whether the old firm, the departing lawyer, or some other attorney will handle the case. In Formal Opinion #99-414, the ABA committee advised that joint notification by the departing lawyer and the firm was the preferred approach. Recognizing that joint notice was infeasible if the departure was not amicable, the committee concluded that departing lawyers could properly provide either in-person or written notice to their current clients—those clients for whom the lawyer was responsible or for whom the lawyer played a principal role in the firm's delivery of legal services—but not clients with whom the lawyer had little or no personal involvement. The committee advised that the initial notice of the lawyer's anticipated departure to clients should conform to the following requirements:

- The notice should be limited to current clients.
- The departing lawyer should not ask the client to end its relationship with the old firm, but the notice could state the departing lawyer's availability to provide services to the client.
- The notice must make clear that the client has the ultimate right to decide who will handle the client's matter.
- The departing lawyer must not disparage the former firm.

The committee stated that the departing lawyer could provide the client with additional information, including a statement of whether the lawyer will be able to continue to represent the client at her new firm. A departing lawyer may also ethically respond to requests for information from clients to assist them in making informed decisions about the handling of their cases. In *Meehan v. Shaughness,* above, the court found that the withdrawing partners breached their fiduciary duties by seeking and obtaining prior to their departure secret consents from clients to retain their services after they left the firm. The court remanded for a determination of whether there was a causal connection between the departing lawyers' breach of fiduciary duty and damage to the partnership. It imposed the burden of proving lack of causation on the departing lawyers because of their breach of duty. See also *In re Smith*, 843 P.2d 449 (Or. 1992) (en banc) (imposing a four-month suspension on an associate who, among other misconduct, secretly met with 31 clients of the firm and had them sign individual retainer agreements during the two and one-half months prior to his departure). ■

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