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**Changing Teams:
New WSBA Advisory Opinion on Moving
From Firm-to-Firm in Private Practice**

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One of the most significant changes in the legal profession over the past 25 years has been the increasing frequency with which lawyers move from firm-to-firm in private practice over a career. This increased movement, in turn, has generated recurring issues for the lawyers moving to or starting a new firm, their “old” firms and their “new” firms. At the same time, neither the Washington RPCs nor the ABA Model Rules of Professional Conduct include a specific provision addressing this three-cornered scenario. Earlier this year, however, the WSBA Committee on Professional Ethics issued an advisory opinion providing practical guidance for lawyers and their firms from all three perspectives. The new opinion, No. 201801, is available on the WSBA web site.

In this column, we’ll survey the three central questions the new advisory opinion discusses: (1) what notice must the departing lawyer and the Old Firm provide clients and when must that notice be provided? (2) how are file transitions handled in this context? and (3) after a lawyer has left the Old Firm, may the lawyer discuss the possibility of handling work with clients of the Old Firm?

Notice

One of the most basic duties that both a departing lawyer and the Old Firm have is to let the clients affected know that the lawyer who has been handling their work is leaving the Old Firm. This duty, which arises out of the “communication rule”—RPC 1.4, is more nuanced in this setting than the text of the rule might otherwise suggest. The new advisory opinion divides these nuances into three primary categories: (1) the responsibility for notice; (2) the form and content of notice; and (3) the timing of notice.

Before discussing these points, however, Advisory Opinion 201801 includes an important qualifier: it defines the lawyer departures that trigger the duty of notice as those involving a “principal handling attorney.” The opinion defines this term as “a lawyer who is primarily responsible for a particular matter or who is the firm’s primary contact with the client for the client’s work at the firm.” The opinion notes that while the definition would apply to “a partner who has primary contact with a client on a matter,” “it would not apply to a junior associate who worked on occasional legal research projects under the partner’s supervision in the matter involved.” The opinion counsels that this distinction is inherently fact-specific and is ultimately measured against RPC 1.4’s requirement that a client be kept apprised of material developments in the client’s

representation. In crafting this predicate definition, the Washington opinion follows a similar approach in the leading national authority in this area—ABA Formal Opinion 99-414.

Responsibility for Notice. The new Washington opinion puts the duty to inform the client on both the departing lawyer and the Old Firm. Tracking RPC 1.4(a)(3) and its accompanying Comment 3, the opinion reasons that the imminent departure of a principal handling lawyer is a material event in the client’s representation that the client understandably needs to know.

Form and Content of Notice. RPC 1.4 does not suggest a particular form for the notice. The new Washington opinion notes that ABA Formal Opinion 99-414 provides “useful guidance” on the form:

“[Notice] 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, 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.”

Similarly, the new Washington opinion finds that ABA Formal Opinion 99-414 offers “equally useful guidance” on the content of the notice sent while the departing lawyer is still at the Old Firm and, consequently, still has fiduciary duties to the Old Firm:

“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.”

...

“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.” (footnotes omitted; emphasis in original).

The new opinion finds that if the Lawyer has already left the Old Firm and no longer owes fiduciary duties to the Old Firm, then the competitive information provided can be broader as long as it is truthful.

The new Washington opinion notes that ABA Formal Opinion 99-414 suggests that a joint notice from the departing lawyer and the Old Firm is

“preferred,” but recognizes that the personal dynamics of the situation may not make that feasible. Therefore, ABA Formal Opinion 99-414 concludes that joint notice is not required. The Washington opinion takes the same approach.

Timing of Notice. Comment 5 to RPC 1.4 counsels that the timing of communications about material events should generally be reasonable under the circumstances. The Washington opinion agrees with its ABA counterpart that promptly informing the clients affected is “critical” to giving the clients sufficient time to decide on representation moving forward. The new Washington opinion observes that although notice ordinarily will occur before the lawyer departs, it could occur afterward if the lawyer’s departure was immediate through resignation or termination.

The Washington opinion focuses on notice to clients required by the RPCs. Therefore, it does not address the substantive legal question under fiduciary and contract law of whether a departing lawyer must inform the Old Firm before notifying clients. The new opinion, however, suggests that “[a]s a matter of prudent practice . . . a lawyer contemplating leaving a firm should carefully examine any applicable fiduciary and contract considerations as well as the RPCs[.]”

File Transitions

The new Washington opinion makes three principal points on file transitions in this context. First, the opinion emphasizes that the decision to keep a matter with the Old Firm, move it with the departing Lawyer to the New Firm or move it to an entirely different firm in light of the departure is the client's alone. Second, it also emphasizes that under RPC 1.16(d) and WSBA Advisory Opinion 181 (which addresses file transition in detail) the firms involved should work cooperatively to avoid harming the client. Third, the opinion notes that RPC 1.6(b)(7) now provides specific authorization to share client names and limited matter information with a New Firm to facilitate conflict checks unless the identity of a particular client or the nature of a particular matter is itself confidential.

Contact with Old Firm Clients

After a lawyer has left an Old Firm, RPC 7.3(a)(2) generally permits the lawyer to solicit business in-person or through real-time electronic equivalents from clients of the Old Firm with whom the Lawyer had a "prior professional relationship[.]" Even absent a prior professional relationship, RPC 7.3 generally permits a lawyer to solicit business from Old Firm clients in writing or using other non-real-time electronic equivalents. Moreover, amendments to RPC 7.3 that are currently pending before the Washington Supreme Court would broaden a

lawyer's ability to solicit business from Old Firm clients by permitting personal solicitation generally as long as it does not amount to harassment. The new opinion, therefore, notes the current state of the law and advises lawyers to monitor potential future developments on this point.

Summing Up

Although many lawyer departures are handled amicably, others are not.

The new Washington opinion concludes with some wise counsel:

“The personal dynamics of a lawyer departing a firm have the potential to outrun the important professional obligations all concerned have toward the clients involved. Lawyers and their respective Old and New Firms must ensure that client considerations remain paramount despite the often-difficult personal dynamics involved.”

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