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November 2020 WSBA *Bar News Ethics & the Law* Column

Parting Ways: Duties Beyond the RPCs When Changing Law Firms

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Two years ago, the Committee on Professional Ethics issued a comprehensive advisory opinion—WSBA Advisory Opinion 201801—on the ethical responsibilities arising when lawyers change firms. I followed with a column discussing the opinion.[1] Both are available on the WSBA web site. In addition to the professional rules involved when lawyers change firms, however, other areas of the broader "law of lawyering" can also come into play. In this column, we'll look at three. First, lawyers owe fiduciary duties to their old firms even while they are planning and making their exit. Second, contractual duties frequently define the advance notice a departing lawyer must provide to the old firm and often govern the division of assets and liabilities resulting from a lawyer departure or a firm dissolution. Third, statutory duties may also apply to the division of assets and liabilities in the event of dissolution and address an old firm's lien rights over matters that follow a departing lawyer to a new firm.

Two qualifiers are in order before proceeding. First, although the accent here will be on duties beyond the RPCs, these other duties often remain tethered in varying degrees to the professional rules and we'll incorporate that interplay. Second, the focus here will be on surveying the other duties involved rather than

attempting to provide "one size fits all" solutions to situations that are inherently fact specific.

Fiduciary Duties

As long as a lawyer remains at an "old" firm, the lawyer continues to have fiduciary duties to that firm.[2] When transitioning from one firm to another, fiduciary duties typically arise in three principal contexts.

First, when planning a departure, lawyers are not generally required to disclose their intentions—such as speaking with another firm or looking for office space—until they are ready to move.[3] To state the obvious, however, lawyers cannot lie to conceal their plans or "preemptively" solicit their clients before telling their own firm. In an Oregon case cited by WSBA Advisory Opinion 201801, for example, a law firm associate was disciplined for secretly diverting clients to his new firm before he told his old firm that he was leaving.[4] Although disciplined under the then-current version of Oregon's "dishonesty rule," the Oregon Supreme Court noted that honesty is "implicit" in a lawyer's fiduciary duty of loyalty to a current firm.[5]

Second, even lawyers who have announced their departure still owe fiduciary duties to their old firm while they remain on the payroll. As the leading ABA ethics opinion on the subject put it: "[T]he departing lawyer must not

disparage the lawyer's former firm."[6] The same ABA opinion permits a departing lawyer to supply detailed competitive information about a new firm—such as rates and resources—if a client asks.[7] WSBA Advisory Opinion 201801 echoes both points.[8] This awkward period of having "one foot in and one foot out" supports the wisdom of making the transition from announcement to exit as short as reasonably possible. WSBA Advisory Opinion 201801 notes that once a lawyer has left an old firm and is no longer bound by fiduciary duties in this regard, the lawyer is generally free to provide more detailed competitive information to clients—as long as it is truthful.[9]

Third, if a firm is dissolving, partners and shareholders generally owe fiduciary duties of candor and good faith in winding-up a firm.[10] *Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 564 P.2d 1175 (1977), for example, involved the dissolution of a law firm. The Court of Appeals found that a partner who withheld material information about the number and value of his cases from his fellow partners during the firm's dissolution had breached these fiduciary duties.

Contractual Duties

Contractual duties typically apply in two key areas during law firm departures: advance notice provisions for departing partners and shareholders;

and partner or shareholder agreements that address the division of firm assets and liabilities upon departure or dissolution.[11]

Many firms have provisions in their partner or shareholder agreements that require a fixed period of advance notice before a partner or shareholder leaves a firm. The often-stated reason is to foster an orderly transition of client work if a principal handling attorney leaves the firm. Some, however, are either inordinately long or include financial penalties if not followed. RPC 5.6(a) prohibits partnership, shareholder or other agreements that restrict "the rights of a lawyer or an LLLT to practice after termination of the relationship[.]" WSBA Advisory Opinion 201801 describes this tension: "[A]ny contractual notice requirement cannot be so lengthy as to amount to a prohibited restriction on the Lawyer's right to practice under RPC 5.6(a)."[12] The ABA made a similar observation in an opinion last year: "'Although "reasonable" notice provisions may be justified to ensure clients are protected when firm lawyers depart, what is "reasonable" in any given circumstances can turn on whether it is truly the client's interest that is being protected or simply a thinly disguised restriction on the right to practice in violation of RPC 5.6(a).'"[13] The practical import of a notice provision or an associated financial penalty that crosses the line into a violation of RPC 5.6(a) is that a court may decline to enforce them on public policy

grounds.[14] The Washington Supreme Court spoke to enforceability generally in *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014): "We have previously and repeatedly held that violations of the RPCs or the former Code of Professional Responsibility in the formation of a contract may render that contract unenforceable as violative of public policy."

Washington has long held that when a law firm dissolves or members otherwise go their separate ways, compensation for work-in-progress is determined primarily by looking to the partnership or shareholder agreement involved or any separate dissolution or withdrawal agreement.[15] The *Bovy* decision discussed in the preceding section, for example, focused on a written agreement concerning the division of cases and associated revenues at dissolution. WSBA Advisory Opinion 201801 summarized on this point: "Issues regarding accrued compensation, return of capital and entitlement to accounts receivable or other anticipated future fee income are matters of substantive contract and statutory law beyond the scope of the RPCs."[16]

Statutory Duties

In the absence of controlling agreements, courts also look to relevant statutory law in valuing a departing partner's or shareholder's interest in a former firm[17] and accounting for work-in-progress. In *Dixon v. Crawford, McGilliard,*

Peterson & Yelish, 163 Wn. App. 912, 918, 262 P.3d 108 (2011), for example, the Court of Appeals looked to statutory law in calculating the "buyout price" of a departing partner's interest in a law firm created by an oral partnership agreement.[18] Statutory attorney liens under RCW Chapter 60.40 may also create rights over unpaid hourly or contingent fees when a departing lawyer leaves and a client maintains a client-lawyer relationship with the departing lawyer.[19] Depending on the circumstances, other areas of statutory law—such as bankruptcy[20] and trade secrets[21]—can also be involved.

Summing Up

The RPCs appropriately focus on the ethical duties to clients when lawyers are in transition. At the same time, fiduciary, contractual and statutory duties can come into equally sharp focus when lawyers and their firms are parting ways.

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[1] Mark J. Fucile, *Changing Teams: New WSBA Advisory Opinion on Moving from Firm to Firm in Private Practice*, 72, No. 5 NWLawyer 13 (Aug. 2018).

[2] *See* WSBA Advisory Op. 201801 at 2 n.6 (noting Washington law in this regard); *Holman v. Coie*, 11 Wn. App. 195, 522 P.2d 515 (1974) (discussing intra-firm fiduciary duties); *see generally* Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 N. Ill. U. L. Rev. 1, 17-18 (2009) (discussing fiduciary duties owed to their firms by partners, shareholders and associates); Susan Saab Fortney, *Leaks, Lies, and the Moonlight: Fiduciary Duties of Associates to Their Law Firms*, 41 St. Mary's L.J. 595, 601-15 (2010) (focusing on the fiduciary duties of law firm associates).

[3] *See* ABA Formal Op. 99-414 at 7 n. 17 (1999). *But see* ABA Formal Op. 96-400 (1996) (addressing potential conflicts when negotiating with a law firm on the other side of a matter).

[4] *In re Smith*, 843 P.2d 449 (Or. 1992) (cited by WSBA Advisory Op. 201801, *supra*, at 2 n.6).

[5] *Id*. at 452.

[6] ABA Formal Op. 99-414, *supra*, at 5.

[7] *Id*. at 6.

[8] WSBA Advisory Op. 201801, *supra*, at 2-3.

[9] *Id*. at 2 n.6.

[10] *See* RCW 25.05.305 (winding-up partnership); RCW 25.15.297 (same for PLLC); *see generally Northgate Ventures LLC v. Geoffrey H. Garrett PLLC*, 10 Wn. App.2d 850, 450 P.3d 1210 (2019) (discussing law firm dissolution and successor liability).

[11] In theory, these same issues can arise with non-partner/shareholder lawyers. In practice, however, they are more common with partners and shareholders because they are typically governed by written agreements.

[12] WSBA Advisory Op. 201801, *supra*, at 3 n.9. *See also* WSBA Advisory Op. 2118 (2006) (discussing RPC 5.6(a) as applied to contractual non-compete provisions).

[13] ABA Formal Op. 489 at 6 (2019) (citation omitted).

[14] *See* ABA Formal Op. 94-381 (1994) (collecting cases nationally).

[15] *See, e.g., Gray v. Stern*, 85 Wn. 645, 646-52, 149 P. 26 (1915) (examining dissolution agreement); *Williams v. Danson*, 146 Wn. 358, 360, 262 P. 980 (1928) (looking to partnership and dissolution agreements); *Levinson v. Vanderveer*, 169 Wn. 254, 256-57, 13 P.2d 448 (1932) (citing the parties' agreed division at dissolution).

[16] RPC 5.6(a) would, nonetheless, apply if such agreements included an impermissible restriction on a lawyer's future right to practice. *See* ABA Formal Op. 94-381, *supra*, at 2-3.

[17] *See generally* RCW 25.05.500, *et seq*. (LLP); RCW Ch. 18.100 (PC and PSC); RCW 25.15.046, *et seq*. (PLLC).

[18] *See also McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 890-92, 167 P.3d 610 (2007) (noting that Washington statutory law did not require a professional services corporation to redeem the shares of a departing shareholder in the absence of a controlling agreement).

[19] *See In re Williams, Love, O'Leary & Powers, P.C.*, 2012 WL 5900762 (D. Or. Nov. 21, 2012) (unpublished), *aff'd*, 588 Fed. Appx. 559 (9th Cir. 2014) (attorney lien for work-in-progress at the time of lawyer's departure held by firm because firm provided legal services under fee agreement involved); *see also* RCW 60.40.010(1)(d)-(e) (addressing "charging liens" over, respectively, actions and judgments that create funds to which a lawyer's service contributed).

[20] *See generally* Douglas R. Richmond, *Migratory Law Partners and the Glue of Unfinished Business*, 39 N. Ky. L. Rev. 1 (2012) (discussing the "unfinished business" doctrine); *In re Heller Ehrman LLP*, 830 F.3d 964 (9th Cir. 2016) (certifying question), 716 Fed. Appx. 693 (9th Cir. 2018) (following answer of certified question) (addressing "unfinished business" in bankruptcy context).

[21] *See generally* Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners*, 30 Fla. St. U. L. Rev. 767 (2003); RCW Ch. 19.108 (Uniform Trade Secrets Act).