

## **Movin' On Redux**

### **Lawyer Mobility Professional Responsibility and Risk Management Developments**

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The article "Movin' On" appeared in this space in the Winter 1998 *Bench & Bar*. It provided an overview of the professional responsibility and risk management issues facing lawyers and firms when lawyers move to new firms. Key points covered were the lawyer's fiduciary obligation to the former firm, the issues when a lawyer leaves taking clients, the firm's defensive options when a lawyer leaves taking clients, and the vicarious liability of leaving partners for firm malpractice occurring before and after the partner departed. The article remains current and is available on Lawyers Mutual's web site at [www.lmick.com](http://www.lmick.com) in the loss prevention section.

One of the difficulties in writing "Movin'On" was that lawyer mobility was a hot issue, but there was not a lot of guidance for the well intended departing lawyer. It remains a hot issue as lawyer mobility, if anything, continues to accelerate. In the recent past the ABA issued its first formal ethics opinion on lawyers changing firms and the Kentucky Supreme Court authorized limited liability forms of practice for Kentucky lawyers. These developments, along with several court decisions and state bar ethics opinions, add significantly to the ability of lawyers to guide departures with some confidence that their actions are ethical and liability exposure to clients and the former firm minimal. This article builds on the original by analyzing these developments in terms of the ABA ethics opinion and the due diligence considerations for the departing lawyer and the hiring firm.

An important source for this article is the program "On The Road Again: Ethics Issues Regarding Arriving and Departing Lawyers" presented at the ABA 26th National Conference on Professional Responsibility. The program panelists were Professor of Law Susan Saab Fortney, Texas Tech University; Professor of Law Robert W. Hillman, University of California - Davis; and Mr. Anthony E. Davis a lawyer risk management expert. Materials supporting the program included a paper by Professor Fortney titled "Insurance Issues Related To Lateral Hire Musical Chairs," and the Alexander & Alexander article "Evaluating and Managing the Risks of Mergers, Acquisitions and Lateral Hires," edited by Mr. Davis. Frequent reference is made to the panelists and program materials in this article.

### **Ethical Obligations When a Lawyer Changes Firms -- ABA Formal Opinion 99-414<sup>1</sup>**

Professor Hillman offered an interesting recapitulation of the phases of developing departing lawyer ethics. The first three phases were victories for departing lawyers. Ten years ago it was resolved that lawyers could leave a firm and ethically take clients with them. In the last five to ten years it was decided that for the most part law firms could not ethically protect themselves by contractual restrictions on a departing lawyer's right to

practice. In the past five years it was recognized that partners while with a firm may secretly plan for withdrawal by arranging for office space and other logistical requirements to open a new firm. We are now at the beginning of what Professor Hillman calls the information phase of departing lawyer ethics. It concerns client lists, files, documents, individual lawyer diaries and records, firm practice guides, and computer data. ABA Formal Opinion 99-414 offers in one place a synthesis of most of these departing lawyer ethics issues. What follows is a review of the opinion's key guidance.

### ***Clients Come First!***

The overarching principle of ABA Formal Opinion 99-414 is that clients' interests come first. Both the departing lawyer and the firm have an ethical obligation to act in a manner that assures there is no material adverse effect on a client's representation because of the lawyer's departure. This principle includes the notion that the client is entitled to timely notice so that an informed decision to elect to go with the departing lawyer or stay with the firm can be made.<sup>2</sup> The opinion stresses the need for the departing lawyer taking clients to avoid conflicts of interest in the new firm, to make sure the new firm has the resources to adequately represent transferring clients, and to protect client confidentiality, files, and property.

### ***May the Departing Lawyer Tell the Client Before the Firm?***

One of the biggest shortcomings of prior ABA informal opinions was lack of detailed guidance on what is permissible by a departing lawyer in an initial in-person client contact or letter of notification to a client before leaving the firm. ABA Formal Opinion 99-414 provides these guidelines:

- "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 is currently 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."

The key ethics issues covered by this conservative approach are:

- The departing lawyer and the firm have a professional responsibility to notify affected clients of the impending departure.
- Notification by the departing lawyer is not impermissible solicitation because the departing lawyer has an on-going professional relationship with notified clients.<sup>3</sup>
- The departing lawyer should not make in-person contact with firm clients with whom there is no on-going professional relationship.<sup>4</sup>
- After departure the lawyer may contact firm clients via written or oral recorded communications that the professional responsibility rules allow for any lawyer to contact potential clients.

- Joint notification by the departing lawyer and the firm is preferred, but the departing lawyer may notify the clients before informing the firm of the intent to leave the firm.

The controversial aspect of the client notification guidance of the opinion is that it allows the departing lawyer to contact clients before telling the firm. Both Professor Hillman and Mr. Davis consider this a dangerous approach that carries a high risk of the departing lawyer being accused of breaching fiduciary obligations owed the firm. Ethics authorities are split on this point. A Pennsylvania bar ethics opinion provides that as a general principle departing lawyers should advise the firm of the impending departure before clients.<sup>5</sup> Kentucky Bar Ethics Opinion KBA E-317 allows Kentucky lawyers to inform "clients of the firm whom she or he personally represented prior to his or her separation from a firm." It does not address the issue of whether the firm should be notified before clients. The just published *Restatement of the Law Governing Lawyers (Third)* takes the position that the firm must be notified first.<sup>6</sup>

This is a good place to stress that ethics opinions do not govern issues of law.<sup>7</sup> In taking an aggressive approach by first notifying clients a lawyer may be fine from a professional responsibility standpoint, but subject to a suit by the firm for breach of fiduciary obligations or other duties. The only sure way to avoid this is to tell the firm first and jointly notify affected clients of the departure. Mr. Davis suggests that unless the lawyer is representing a client that will be harmed by lack of first notification, do not notify clients before the firm is notified.

### ***Departing Lawyer Information Issues***

Professor Hillman identifies use of client and firm information as the current phase of developing departing lawyer ethics. What right to client lists, files, practice forms, CLE materials, business procedures, financial information, and employee lists does a departing lawyer have? Is this the property of the firm or subject to trade secret laws? ABA Formal Opinion 99-414 ambitiously takes on these questions by offering this guidance:

- A lawyer may take copies of files, research memoranda, pleadings, and forms to the extent these documents were prepared by the lawyer and are considered the lawyer's property or are in the public domain. Otherwise get firm consent.
- A departing lawyer not continuing representation of a client may retain copies of documents relating to the representation of the former client, but must be diligent in protecting client confidential information.
- Charges of engaging in unfair competition and wrongful use of trade secrets may be avoided by not using firm client lists or other proprietary information and only using public information and what the departing lawyer personally knows.

This is sensible guidance, but note - information use is a developing issue. Recent instructive cases worth reading are *Fred Seigle Co. v. Arter & Hadden*<sup>8</sup> (not OK to use 63 page firm client list if it is a protected trade secret, but OK to take personal rolodex); and *Gibbs v. Breed, Abbot & Morgan*<sup>9</sup> (OK to talk to another partner about leaving and take duplicates of materials in individual lawyer client files, but not OK to use firm business

information or recruit firm employees before giving notice of departure). From an ethics perspective the primary risk in going too far in using or taking firm information is a charge of misconduct for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.<sup>10</sup> The risk of a suit for breach of fiduciary obligations or other duties is even greater. The use-of-information aspect of leaving a firm must be managed with considerable care. The more aggressive, secretive, and dissembling the departing lawyer is the more likelihood of firm retaliation.

### **Risk Managing Departing Lawyer-Lateral Hire Situations. What Due Diligence is Due?**

All panelists at the "On The Road" program agreed that too little attention is given to the serious liability risks that both the leaving lawyer and hiring law firm incur. Insurance issues are virtually ignored. Professor Hillman observed that lawyers are never more "chatty" than when talking to a prospective firm. Enormous disclosure is made including the lawyer's income, clients, revenue generated, nature of work, likely work to be done in the future, and the to-be former firm's lawyers and staff who might be willing to move. From the hiring firm's perspective this is essential information for a sound employment evaluation. To the former firm most, if not all, of such information is considered confidential or proprietary. An informed client might encourage the lawyer to depart or feel that his information is nobody's business unless he consents to disclosure. From these observations it is clear that disclosure is a delicate issue which if mismanaged can lead to suits against the departing lawyer and the hiring firm.

Mr. Davis gave several examples of hiring firms that failed to perform due diligence only to learn that a lawyer was hired who was not admitted to the bar, had a history of bar discipline, or faced potential large malpractice claims. Imagine the malpractice claims when clients find out the firm put such a lawyer on their case. Davis calls these hires Trojan Horses to be avoided at all costs. The hiring policy he suggests is "trust, but verify."

What follows is a gloss of ideas from the "On The Road" panelists taken from their program comments and materials on how to risk manage the hiring process from the departing lawyer's perspective and the hiring firm's perspective:

#### ***Departing Lawyer's Perspective:***

How Much Disclosure? Professor Hillman in his law review article *Loyalty In The Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms* suggests that a departing partner may make limited disclosure of confidential firm information and client-specific information when meeting with a hiring firm provided that the disclosed information "is the *minimum necessary* to allow the parties to assess, with generality rather than specificity:

- (a) The general nature of the partner's practice;
- (b) The firm's interest is accommodating that practice;
- (c) The financial and personnel resources that would be needed to support the

practice;

(d) Any limitations that may exist (for example, conflict of interest and imputed disqualification rules) that may limit the firm's ability to represent clients of the partner; and

(e) An appropriate range of compensation."<sup>11</sup>

Professor Hillman's article covers the gamut of departing lawyer issues and is recommended reading for any lawyer contemplating a move.

Insurance Considerations. The departing lawyer should:

- Examine the professional liability insurance policy of the former firm for provisions dealing with lawyers leaving the firm.
- If available, consider purchasing an extended reporting period endorsement (tail coverage).
- Consider asking the hiring firm to purchase full prior acts coverage for practice with the former firm.
- Consider purchasing an individual policy covering prior acts.
- Prior to leaving review activities with the to-be former firm for potential malpractice claims. If any, report them to the firm's insurer before moving.
- To the extent feasible monitor for several years the former firm's liability insurance for changes to coverage for departed lawyers.<sup>12</sup>

Most professional liability policies cover departed lawyers for their acts while they were with an insured firm. As long as the former firm remains in existence or any successor firm assumes the dissolved former firm's liabilities and maintains liability insurance, the departing lawyer is probably adequately protected. If the former or successor firm drops liability insurance or dissolves, the lawyer is left without a net and may need to scramble for insurance for acts of malpractice prior to joining the hiring firm.

Partner Vicarious Liability and Limited Liability Forms of Practice. Under partnership law partners are vicariously liable for the malpractice of other lawyers in the firm. This can mean considerable risk for a departing partner for malpractice committed by firm lawyers while the partner was with the firm and after departure on matters that were active when the partner left the firm. This is a major consideration for hiring firms. Fortunately for Kentucky lawyers the Kentucky Supreme Court recently adopted SCR 3.022 Forms of Practice of Law and SCR 3.024 Requirements of Practicing Law in Limited Liability Entities. In essence they provide that Kentucky lawyers are responsible for their own malpractice and that of lawyers supervised by them. They may avoid vicarious liability for other lawyers' malpractice in the firm by practicing in a limited liability form that maintains prescribed amounts of professional liability insurance or other acceptable forms of financial coverage. It is too soon to know how much protection limited liability forms of practice will provide, but it is obviously a positive risk management development for departing lawyers and hiring firms. It is another reason to track as closely as possible former firm professional liability insurance coverage.

### ***Hiring Law Firm Perspective:***

To avoid Mr. Davis' Trojan Horse some authorities recommend that the hiring firm take these actions.

- Before hiring screen candidates thoroughly by checking for:
  - legal qualifications by getting authority to obtain information from law schools and bar admission and disciplinary authorities - trust, but verify;
  - ethics complaints and malpractice claims -- inquire about potential claims;
  - financial status and credit record;
  - membership in organizations; officer, director, or other interests in business; fiduciary services such as trustee, conservator, administrator, or executor; and
  - powers of attorney held involving financial matters.

As a practical matter consider these questions before making a decision: Will this lawyer stay with us or jump to another firm at the first opportunity? Why will this lawyer succeed and be satisfied here if one or the other was not the case in the former firm? Is the investment the firm will make in hiring this lawyer cost effective recognizing that often both the firm and the lawyer are too optimistic about the synergistic results the move will bring.

- After hiring:
  - perform a lawyer review of every file brought by the new lawyer;
  - determine if the new lawyer has client funds and, if so, have them immediately deposited in the firm's client trust account; and
  - inventory client property for which the new lawyer was responsible.<sup>13</sup>

### **Some Closing Ruminations**

It's kind of fun to sit in my cozy home office and research, analyze, and work up what is hoped to be useful information on tough ethical and risk management issues. The nice cautious and conservative guidance that evolves is what you get from an ethicist and insurance risk manager. If you follow it, you should be fine. I leave the risk taking up to you. Unfortunately, the legal profession like nature is "red in tooth and claw" or as the song goes "paranoia runs deep." Nothing in the practice seems to get as nasty as law firm break-ups or lawyers departing taking clients. Taking a fair and balanced approach, which is the point of this article, takes some doing for the best of us - but it can be done.

My observation is too many lawyers and firms go into lawyer mobility situations without knowing their professional responsibility or their risk exposure. One partner made a midnight departure taking clients and was aghast when the partners of the blind-sided firm took the risk management precaution of writing these clients to document that they understood the firm had no further responsibility for their matter. To do otherwise left the firm exposed to post-departure malpractice claims on those matters. I doubt if the departed partner ever understood that he was vicariously liable for firm malpractice that occurred while he was with the firm and after his departure on matters active in the firm

when he left. If you are going to leave, know what you're doing - the clients deserve it and your professional responsibility and financial security requires it. By the way, this approach just might avoid a lot of the nastiness.

### **Endnotes**

<sup>1</sup> ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 99-414 Ethical Obligations When a Lawyer Changes Firms, September 8, 1999. This opinion contains many useful citations in the footnotes.

<sup>2</sup> The anomalous situation when neither the departing lawyer nor the firm wants to continue to represent a client is covered in footnote 9 of FO 99-414. Whoever the client chooses usually must continue the representation unless withdrawal is necessary or permissible under Rule 1.16 (a) or (b). "Other good cause" for withdrawal under Rule 1.16 (b)(6) is an improper basis for withdrawal "solely because the client matter is difficult or time consuming or has little chance of success ...."

<sup>3</sup> Apparently with associates in mind, the opinion limits the concept of a prior professional relationship with this sentence: " 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 a client along with other lawyers in a way that afforded little or no direct contact with the client."

<sup>4</sup> Ky. RPC 7.30 permits in-person or by live telephone contact with prospective clients with whom the lawyer has a prior professional relationship or family relationship. ABA Formal Opinion 99-414 narrows the contact to "current clients" defined as "clients for whose active matters she currently is responsible or plays a principal role in the current delivery of legal service."

<sup>5</sup> Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility and Philadelphia Bar Ass'n Prof. Guidance Comm. Jt., Op. 99-100, 4/99; Current Reports, p.217, Vol. 15, No. 9, 5/26/99, ABA/BNA Lawyers' Manual On Professional Conduct. <sup>6</sup> Section 9(3).

<sup>7</sup> And ABA opinions are not binding on Kentucky lawyers - but they are often all we have.

<sup>8</sup> 707 N.E.2d 853 (Oho Sup. Ct. 1999).

<sup>9</sup> N. Y. Sup. Ct. App. Div. 1st Dept., No. 3040, 7/13/00, Current Reports, p.388, Vol. 16, No. 14, 8/2/00, ABA/BNA Lawyers' Manual On Professional Conduct.

<sup>10</sup> Ky. RPC 8.3(c).

<sup>11</sup> Hillman, *Loyalty In The Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 Wash. & Lee L. Rev. 997, 1022 (1998). Client-specific information in this context is client identification, billing, billing rates, and firm staff working on a client's matter. Disclosing client-specific information without prior client consent is an apparent violation of Ky. RPC 1.6 Confidentiality of Information. Hillman's approach recognizes the practicalities of the situation, but is not clear on how revealing unconsented client-specific information comports with RPC 1.6.

<sup>12</sup> Primary source for this information is Professor Fortney's paper "Insurance Issues Related To Lateral Hire Musical Chairs" and authorities cited therein.

<sup>13</sup> This list is derived from Professor Fortney paper "Insurance Issues Related To Lateral Hire Musical Chairs," and the Alexander & Alexander article "Evaluating and Managing the Risks of Mergers, Acquisitions and Lateral Hires" edited by Mr. Davis; and from their presentation at the "On The Road Again" program.