New Rules Make Changing Firms a Little Easier

It's a sign of our times that most of us don't end up retiring from the same firm at which we started. Lawyer mobility has become a fact of professional life and in the process has generated a number of ethical considerations as well as some new ethical rules to go with them.

If you are a lawyer who is planning on leaving a firm, or a lawyer with management responsibilities in a law firm from which a lawyer is leaving or to which a new lawyer is migrating, you need to read Lynda Shely's excellent article on the ethical obligations we need to be concerned with when lawyers switch firms.[1] Originally published in the ABA's Professional Lawyer in 2006,[2] her 2013 update focusing on Arizona's ethics rules is the best guide you are going to find on the subject. As noted, there are ethical issues involving the migrating lawyer's relationship to her client, to her old firm, to her new firm, and issues that deal with the relationships between the two firms involved. This column addresses only the ethical concerns between the lawyer, her clients, and the firm to which she is moving.[3]

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There have been a few changes in Arizona's ethics rules since January 2013 that bear on lawyer mobility, one of which concerns the expansion of the ability to prevent the imputation of conflicts by screening migrating lawyers from litigation matters in which they participated prior to leaving their former firm.[4] Another allows for the exchange of otherwise confidential information between the lawyer and the firm to which he is moving for the purpose of preventing conflicts of interest. It is this last amendment that is the topic of this column.

ER 1.6(d)(7),[5] part of the rule dealing with the confidentiality of information relating to a representation, provides that lawyers may now more comfortably reveal otherwise confidential information to the extent they believe necessary "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."

Until this subsection became effective on January 1, 2015, our ethics rules were silent on the information that could be disclosed in these specific situations. This created occasional stress not only between lawyers in the firms involved in the case of a migrating lawyer, but between firms contemplating a merger or when a lawyer was negotiating the sale of his practice. Lawyers got some guidance from an ABA ethics opinion on the subject of disclosing confidential information when lawyers change firms,[6] but the opinion was based on implications and interpolations from other rules and general observations about the practicalities of the situations presented.

The problem, of course, is that when a lawyer moves between firms, the migrating lawyer and the new firm have separate obligations to protect their respective clients from disqualifying conflicts of interest. The migrating lawyer needs to communicate the situation to his existing clients in order to give them sufficient information on which to decide whether they want to go with him to the new firm. This might include the fact that the new firm represents individuals or entities that the client considers to be competitors. It certainly would include any increased fee schedules required by the new firm. These matters would require disclosing facts that the new firm would normally consider confidential. And the new firm would need to know the names of and the issues concerning the migrating lawyer's current and former clients in order to determine whether any screening procedures would be required once the lawyer joins the firm and, if so, whether there could be problems concerning the screening's effectiveness. This kind of information is normally considered confidential and covered by the proscriptions of ER 1.6 (Confidentiality of Information).

That there was no specific rule covering these matters prompted the ABA House

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of Delegates to approve the amendment quoted above and that essentially codifies the aspirations found in the ABA opinion. It is noteworthy that the new rule is permissive rather than mandatory, meaning that the lawyers involved need to use professional judgment to ensure that the disclosures made are no greater than reasonably necessary to accomplish the purpose of detecting and resolving, if possible, any conflicts.[7]

Finally, it is important to remember that disclosures permitted under the new rule must never prejudice a client and should probably never occur until the parties involved have entered into substantive negotiations about a new association. "Wouldn't it be fun to practice together?" would most likely not be a sufficient basis to justify disclosures under the new rule.

And it should go without saying that the disclosed information may never be used for any purpose other than detecting potential conflicts and resolving them in accordance with the Rules of Professional Conduct.

endnotes

1. *Ethical Obligations When Lawyers Change Firms*, at www.shelylaw.com/ethical-obligations-when-lawyers-change-firms (Jan. 8, 2013).
2. Lynda Shely, *Law Firms Changes: The Ethical Obligations When Lawyers Switch Firms*, Prof. Law. (2006 Symposium Issue) at 69.
3. To see how many moving parts can get involved in law firm changes, *see* Susan J. Michmerhuizen & Peter Geraghty, *Seeking Greener Pastures: Job Negotiations and Disclosure of Conflicts Information With an Adverse Firm*, at www.americanbar.org/publications/youraba/2015/june-2015/seeking-greener-pastures; and ABA Formal Op. 96-400 (Job Negotiations with Adverse Firm or Party) (Jan. 24, 1996).
4. *See On Screening*, Ariz. Att'y (Sept. 2013) at 8.
5. Rule 42, Ariz.R.S.Ct.
6. ABA Formal Ethics Op. 09-455 (Disclosure of Conflicts Information When Lawyers Move Between Firms) (Oct. 8, 2009).
7. Comment [18] to ER 1.6.