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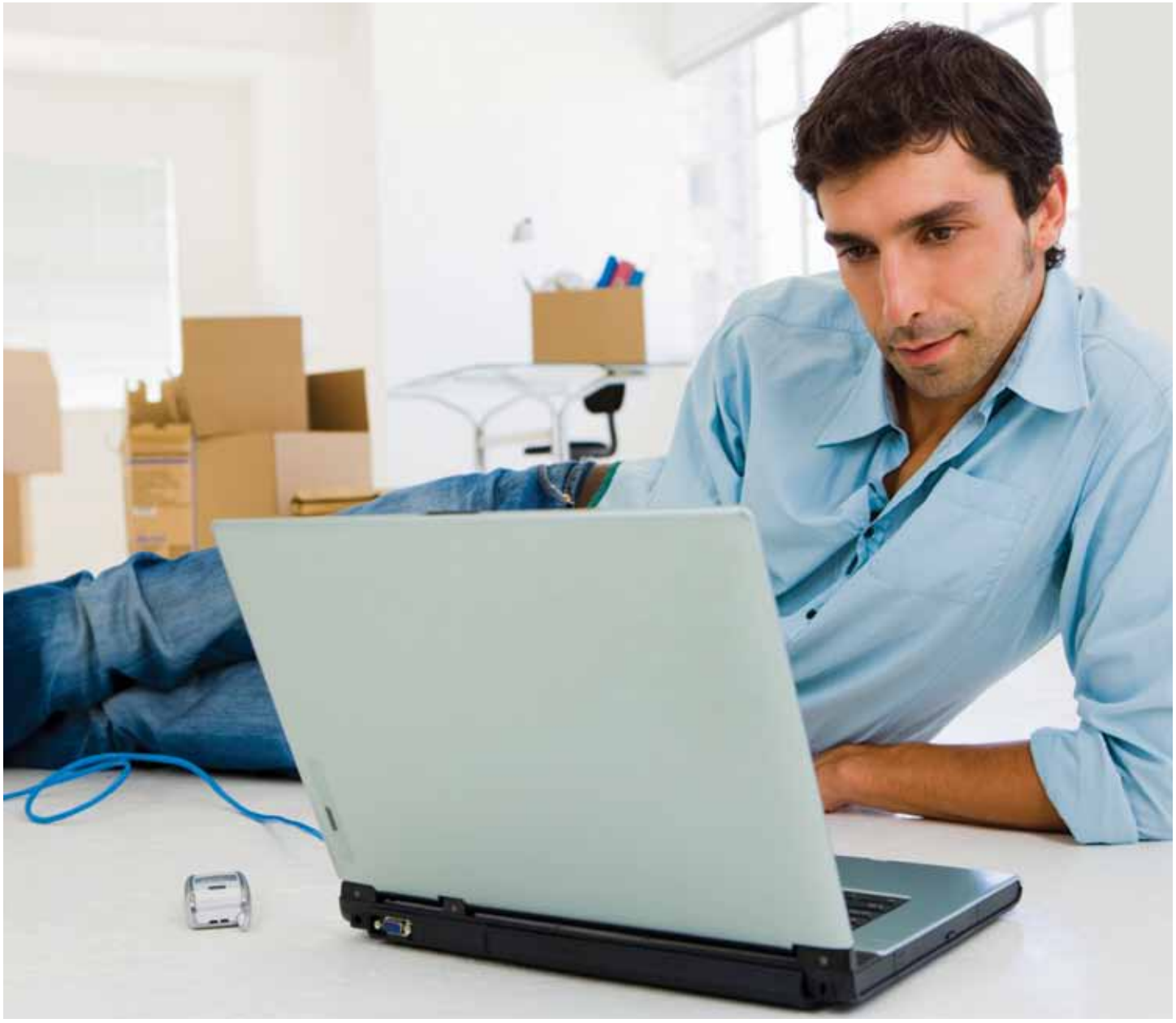
Partnership Law & the Rules of Professional Conduct

Moving Smarter: Avoiding Common Ethical Concerns in Lateral Attorney Transitions



One sign of a healthy economy is an increase in lateral movement in the legal market. With an increase in lateral movement, however, can come a Pandora's Box of troublesome issues that are often completely overlooked until they can no longer be ignored. Smart lawyers and law firms are wise to consider some of these issues early and often because when they occur, they are often time consuming and expensive to fix. What lawyers think they know about partnership law may be at odds with the Illinois Rules of Professional Conduct, and what lawyers think they know about the rules may be at odds with partnership law. For those reasons, lawyers and law firms should pay close attention to these issues.

ANY LAWYER CONSIDERING A DEPARTURE SHOULD begin by reading the applicable firm documents – partnership agreement, employment contracts, or policies. Many, if not most of these documents, include some notice period. Some firms may want a lawyer to leave immediately following the notice of intent to do so. Other firms may have notice periods that may be impermissibly long in light of the ethics rules of the jurisdiction or jurisdictions in question. *See, e.g., Dowd & Dowd, Ltd. v. Gleason,* 181 Ill.2d 460 (1998).

Generally, departing lawyers should give notice in person. It is wise for departing lawyers to go into their resignation meetings fully prepared to leave immediately or to prepare for a reasonable transition period. It is ideal if the lawyer can enter the departure meeting with draft documents in hand, such as a draft withdrawal notice, a proposed joint notification letter, and client election documents. Lawyers should have a list of clients that he or she believes should remain with the firm, and a list of clients that the lawyer is interested in pursuing and should therefore receive joint notification. Finally, the lawyer should have a list of any critical upcoming dates on client matters and a plan for how all such dates can be met.

Notifying Clients

A departing partner will typically want to reach out to their clients as soon as possible to discuss the move. However, the firm about to be left behind has an interest in delaying that discussion so that it can move to keep those clients. Each lawyer's situation will be different and will turn on the specific facts of that situation. In general, most questions in this area involve balancing the duties that lawyers owe to their clients with the duties that lawyers owe to their present firm. Ethics rules tell us that clients have a right to know important information about their matters and to choose their lawyer. This is an admittedly gray area of law where traditional partnership norms are shaded, if not trumped, by client rights. *See, Burke v. Lakin Law Firm, PC,* 2008 WL 64521, *4 (S.D. Ill. 2008) This gray area is where most emotionally charged disputes play out.

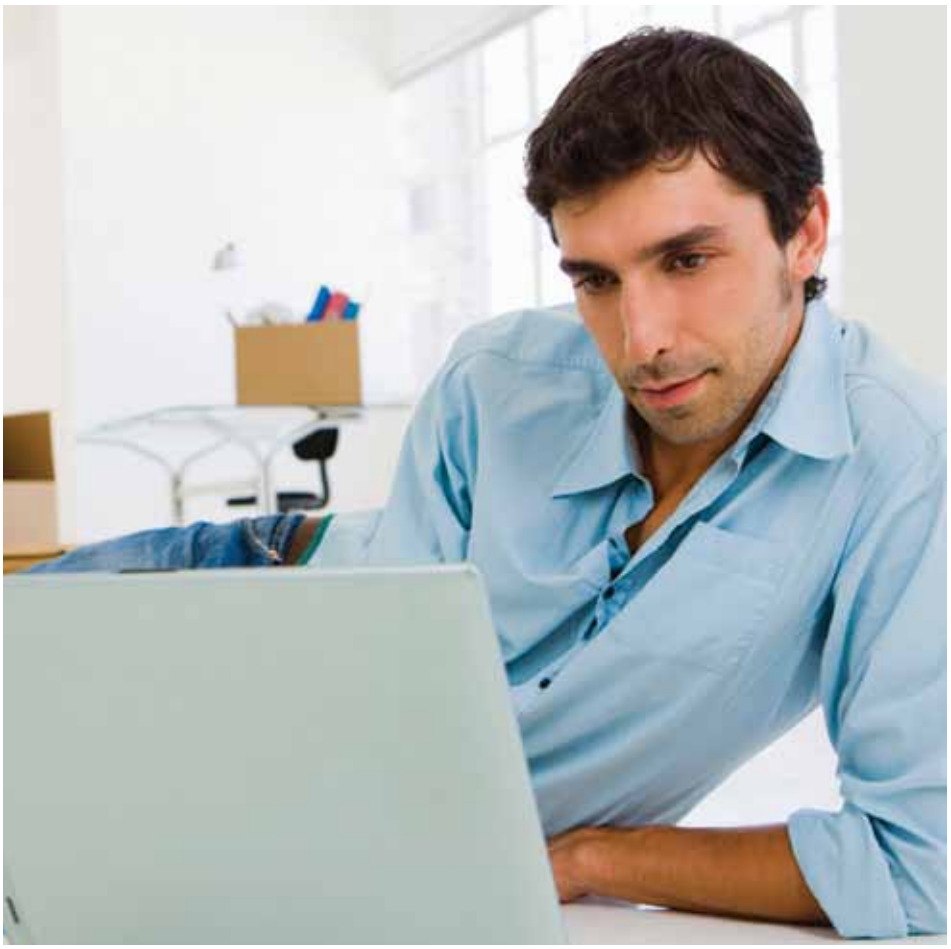
This tension has produced a body of case law, ethics opinions, and writings in search of a best practice. Departing lawyers will likely want to notify their clients as soon as possible about impending departures and may be tempted to seek client assurances, directly or indirectly, that the clients will transfer matters to the new firm. In light of the fiduciary obligations that the lawyer owes to the firm, however, the general practice is not to confer with any firm clients until—at the very least—the lawyer has notified the firm of his or her intent to depart. This is true even though the lawyer may have been the one who brought the client into the firm and may in fact be the only one at the firm working for the client.

Once the firm has been notified, clients are generally entitled to be informed in a manner and with enough time to make an informed decision about the staffing of their legal matters going forward. ILRPC 1.4. At that point, the client has a right to make a choice, and neither the lawyer nor the firm can unilaterally prohibit the client from doing so. In Illinois, courts have broadly recognized a strong public policy ensuring a client's choice of counsel. *See, e.g., Stevens v. Rooks Pitts and Poust,* 289 Ill.App.3d 991, 999 (1st Dist. 1997); *see also,* ILRPC 1.9 cmt. 4.

Before departing his or her old firm, a lawyer generally may *prepare* to compete, without actually competing. After departure, a lawyer who has left a firm generally has the same rights and faces the same limitations with regard to the solicitation of work from that firm's present or former clients that any other lawyer would have. *See, e.g.,* Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups, Second Edition, Robert W. Hillman, Aspen Publishers, 2014, § 2.3

Disclosing Information to Recruiters and Potential New Firms

One extraordinarily difficult issue concerns the disclosure of information throughout the transition process. A lawyer changing firms should expect that the potential acquiring firms may ask for



things that are sensitive. This information may often be confidential either as a matter of duty to the firm or duty to the clients. One mistake lawyers often make is providing more information than they should.

ILRPC 1.6 broadly prohibits disclosure of information related to the representation of clients. ABA Model Rule 1.6(b)(7) was recently amended to allow for sufficient disclosures to allow the potential new firm to run conflicts checks - but, Illinois has thus far not adopted that language. Yet, even in those states like Illinois, which have not adopted ABA Model Rule 1.6(b)(7), it is generally recognized that conflicts checks must be run at some point. It is also worth bearing in mind that ABA Model Rule 1.6(b)(7) and Official Comment [13] not only limit what information can be shared but also impose duties on the prospective or recipient firm about what can be done with the information. A lawyer can typically share information about the amount of the lawyer's past or present compensation. Illinois law also supports that providing financial projections does not constitute an improper disclosure of confidential information. *Dowd and Dowd, Ltd. v. Gleason,* 352 Ill.App.3d 365, 379 (1st Dist. 2004). Just like the conflicts check, however, the information must be limited to the lawyer at issue, not broad financial or confidential information about the firm.

Clients That Transition to the New Firm

With respect to the clients who follow the departing lawyer, the most important consideration must be preventing prejudice to their interests. This consideration is reflected in part in ILRPC 1.16, which deals with terminating representations. When the client goes with the lawyer, ILRPC 1.16 informs the former firm's handling of the transition in the same manner it would be obligated to transition a client matter when there is an everyday substitution of counsel. This means that the lawyer will have to work with the old and new firms to assure a smooth transition. As a general proposition, the former firm is entitled to written authorization on behalf of the client prior to file transfer. One other issue that may come up is the costs of transferring those files, and which firm should bear those costs. The rules on this issue are not uniform throughout the country and, of course, client files are typically the property of the client and should typically travel with the client.

Clients that move with a lawyer may also have closed or inactive files at the soon-to-be-former firm. That should be a consideration in the transition process as well. Another issue is to make sure that what is transferred includes not only the physical file, but also any electronic files, emails, docket information, and trust account information. *See,* Hillman, Robert W. and Rhodes, Allison, Client Files and

Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility (Sept. 23, 2010). Suffolk University Law Review, Vol. 43, p. 897, 2010.

Clients Who Opt to Stay with the Former Firm

Both the rules regarding termination of an attorney-client relationship and the need for professionalism should inform this process. An attorney is obligated to withdraw in a manner that does not prejudice the client.

For those clients or matters that stay at the former firm, the lawyer will therefore want to make clear that he or she will do what is reasonably necessary to assist in any transition. That assistance could include anything from writing a file transfer memorandum to meeting with the subsequent attorneys handling a file. Changes of address and court filings are required and completing those steps remains the obligation of the attorney of record.

Post-Departure Communications

This is an issue that the lawyer and the firm that the lawyer is leaving must discuss. If nothing else, mismanagement and failures of communication are invitations to see both the lawyer's and the firm's name on the wrong side of the "v" in a legal malpractice or breach of fiduciary duty claim. Ideally, the lawyer and her soon-to-be-former firm will enter into a written agreement regarding how this process will be handled, although an exchange of emails can suffice. It is also wise to test this system to make sure that it works as the parties agreed. Even if a lawyer's actual departure is unpleasant, both the lawyer and the firm have an interest in making sure that nothing subsequently falls through the cracks due to a failure to forwarding mail, email or telephone calls.

Conclusion

While the transition process can sometimes be emotional, both lawyers and law firms have incentives to make the process go as smoothly as possible. Lawyer mobility can be difficult and fraught with issues, but many complications can be avoided with careful planning. Higher risk moves will always benefit from the support of professional recruiters brokering the process and legal advice before and during the transition. Through careful planning and analysis of the applicable issues, both lawyers and law firms can make transitions as cleanly as possible, while meeting obligations to clients. ■

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