Moving On

Professional Responsibility, Risk Management, and Lawyer Mobility

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We believed that we would keep our first spouses and our first jobs. The summer clerkship would lead to the offer of the permanent position; once the offer was accepted we would work hard, make partner, and prosper. We would, with our spouses, live in lovely homes, travel to foreign countries, entertain frequently and graciously, and raise perfect children. The future lay before us: exciting, to be sure; golden, most certainly; and uninterrupted by turmoil, without doubt.

Reality turned out to be a little different.... [1]

It is noble and daring to embark on a career of law by cutting the umbilical cord that ties one to an employment contract. But taking the heart and soul of the benefactor is immoral, illegal and repulsive. If they want their own firm, let them get their own clients.[2]

Lawyer mobility is the benign sounding term use to describe the volatility that now marks the typical law career. If there ever was a day when a new lawyer could expect to get situated early and stay put, it is long gone. Today lawyers at all stages of their careers move laterally to other firms, dissolve firms, form new firms, or just go out on their own. Moving on often results in bitter disputes between those leaving and those left behind. The frequent comparison of a law firm breakup to an acrimonious divorce is an apt one. Aggravating an already difficult situation is the fact that few lawyers when moving on seem to have much idea of what their professional responsibility is or their exposure to malpractice claims.

What obligations do you have to the firm where you practice? Does it make a difference if you are a partner or an associate? Must you give notice if you are planning to leave (and maybe get fired instantly)? Is it OK to solicit firm clients to follow you to your new practice before you leave? After you leave? Whose clients are they anyway - yours or the firm's? What remedies, if any, does the firm have if you take clients with you? What non-compete restrictions may a firm put on you? What is your malpractice risk for work done by you and the lawyers in the left firm? How do you protect yourself from post-departure claims?

If you know clear answers to all these questions, read no further and rush to print. If not, read on for basic information and references for analyzing what many consider the most misunderstood aspect of a lawyer's professional responsibility. It is important to note up front that there is little Kentucky authority on lawyer mobility issues.

Your Other Fiduciary Obligation

One reason lawyers have so much trouble with the ethics of moving on is because the circumstances are usually quite emotional for both the leaving lawyer and the firm. With the excitement and fear attendant to starting over the leaving lawyer often seems to have no time for niceties. The firm, concerned with economic survival, is taking no prisoners. In this posture they both approach the ethical aspects of the departure with invincible ignorance. They don't know and they don't want to know what their professional responsibility is. The problem is exacerbated by the fact that there is no integrated body of rules to guide the way. One has to look to the law of partnerships, agency, corporations, torts, and professional responsibility to assess all the legal and professional implications of lawyer mobility.

A good start in integrating these rules is to stress that in addition to the fiduciary obligation lawyers owe clients, they also have a fiduciary obligation to their firm. The law of partnerships imposes a duty of loyalty and fair dealing among partners. The law of agency applies to associates and imposes the obligation of loyalty to their principals. This loyalty obligation precludes the agent competing with the principal and taking advantage of the principal's trust. These partnership and agency lawyer fiduciary principles figure to carry over into the newer corporate and limited liability forms of practice. In terms of professional responsibility the reasonable conclusion is that all lawyers practicing in a firm together are in a position of trust. When they depart they must do so on a basis that does not violate their fiduciary obligation to those left behind.[3] This fiduciary obligation leads to the mind set that the departing lawyer taking clients is the bad guy and the firm has been wronged. This is often referred to as "grabbing and leaving." The better perspective when evaluating lawyer mobility is one of neutrality. For every example of a lawyer violating firm fiduciary obligations there are examples of unfair compensation and work conditions by firms. Changed circumstances and new opportunities are legitimate reasons for lawyers to move on or to be asked to leave. It may be in a client's best interest to go with the leaving lawyer and only fair if the lawyer brought the client to the firm. The point is that lawyer mobility is now the nature of the practice of law. Let's look at it dispassionately and get it right.

Moving On With Clients

The overarching professional responsibility principles for taking clients with you are the client's freedom of choice of lawyer, the professional autonomy of lawyers, and limitations on client solicitation. Since a lawyer's employment status with a firm is at will and clients have virtually complete choice of lawyer, a highly fluid situation exists. What follows is an outline of the key ethical considerations for a departing lawyer hoping clients will follow:

Planning to Leave: A Massachusetts case, *Meehan v. Shaughnessy*, provides some insight as to what may be done to get ready to go. The leaving lawyers prior to notice and departure made a number of arrangements for their new firm. These included leasing an office, preparing lists of clients expected to go with them, and using the list to obtain

financing. The court opined that prior to departure logistical arrangements such as these were permissible based on the duty to provide adequate representation for clients who went with the new firm. [4]From this decision and a few others a general proposition is emerging that lawyers may within limits while still practicing with a firm secretly make plans for leaving without breaching fiduciary duties. [5]

Prior To Departure Contact With Clients Served by the Firm: Key to knowing what is permissible in contacting clients is to be sure to understand whose clients they are. The individual lawyer in a firm serving a client sees that person as his client. The firm sees all clients served by the firm as firm clients. The fact of the matter is that neither has a possessory interest in a client. The client has the right to choose, terminate, or replace a lawyer at will 6and neither the departing lawyer nor the firm can permanently seal off the client from the other. This may seem crass, but it essentially boils down to a matter of timing and technique.

Prior to departure contacts with clients raise the issue of a fiduciary breach by the leaving lawyers. In Meehan prior to telling the partnership they were going the leaving lawyers contacted one client to see if the client would retain them. After notice, but while still with the firm, they delayed giving the partnership requested client information until they had obtained substitution agreements from the majority of clients they wanted. These preemptive tactics resulted in the leaving lawyers taking with them 142 of the firm's 350 contingency fee cases. It also resulted in the court finding that the leaving lawyers breached their fiduciary duty to the firm by failing to give it a fair opportunity to compete for clients. This result makes sense and is good guidance.

A recent District of Columbia Bar Legal Ethics Committee opinion helpfully embellishes the lessons of Meehan. The Committee held that Rule 1.4 Client Communication requires lawyers to inform clients they serve of a planned departure because a change of affiliation is material to the client in terms of billing and adequacy of the lawyer's resources. The notification should be enough in advance of the change to allow clients to make an informed decision on how they want to be represented. The opinion emphasizes that any communication must comply with ethics rules. It cautions against a solicitation of the client to leave with the departing lawyer and stresses partnership law, corporate law, and employment law considerations. The Committee observed that the lawyer planning to leave may be required to inform the firm at or close to the time the client is told.7

Contact With Clients After Notice To The Firm And After Departure: Everyone agrees that a letter sent jointly by the firm and leaving lawyer explaining the change and seeking guidance on continued representation is the best way to manage the situation. Once the firm is put on notice or after the leaving lawyer is gone, however, the race is on and a joint letter is often unacceptable to either the firm or the leaving lawyer.

In lieu of a joint letter the best guidance available for contacting clients by a departing lawyer is based on ABA Ethics Committee Informal Opinion 1457 (1980). The Committee approved the following letter to be sent to clients by a departing lawyer with the understanding that the notice would be mailed, sent only to clients for whom the

lawyer was directly responsible immediately before the move, and did not urge clients to sever their relationship with the left firm:

Effective (date), I became the resident partner in this city of the XYZ law firm, having withdrawn from the ABC law firm. My decision should not be construed as adversely reflecting in any way on my former firm. It is simply one of those things that sometimes happens in business and professional life.

I want to be sure that there is no disadvantage to you, as the client, from my move. The decision as to how the matters I have worked on for you are handled and who handles them in the future will be completely yours, and whatever you decide will be determinative.

In 1987 the KBA Ethics Committee went further than the ABA. The Committee cautiously approved direct contact by withdrawing lawyers to inform clients whom they had personally represented of the change. This exception to the direct contact solicitation rule was based on the lawyer's prior professional relationship with the client. Contact could be by telephone or in person. The Committee was careful to point out the risk of a suit for tortious interference with former firm contracts.8

Some states have permitted contact with clients of the firm by departing lawyers even though there was no prior professional relationship with the client. In effect a solicitation of prospective clients. With the advent of targeted mail solicitation a case can be made that it is permissible to do just that as long as the contact is by mail and the advertising requirements of Kentucky RPC 7.30 are observed. The risk of a suit for tortious interference with former firm contracts is certainly a consideration in making any such contacts. 9

No doubt this is a dicey issue and the law is too unsettled to suggest there is a failsafe formula for contacting clients of a former firm. The ABA/BNA Lawyers' Manual on Professional Conduct suggests this conservative approach:

1. Use a joint announcement of the separation of practices if that is possible.

2. Otherwise, whether you are a partner or associate, wait until after you leave the firm before contacting prospective clients.

3. Then use the mail, not the telephone or personal visits, to announce your new practice. ABA Informal Opinion 1457 gives you an idea of what you can say.

4. When soliciting clients of your former firm, limit your mailings to those clients on whose matters you personally worked and whose names you know from memory.

5. Be sure to inform the recipients of their right to remain with the firm as well as their right to switch lawyers.

6. Don't make any disparaging comments about the firm.

7. Don't make comparisons between the firm and yourself unless you have the objective facts to back them up.10

The Firm Strikes Back

Law firms defend themselves by suing departed lawyers for tortious interference of contractual relations and fiduciary breach, seeking injunctive protection, and filing lawyer misconduct bar complaints. These efforts are often stymied because of the fluid nature of the relationship between lawyer and firm and lawyer and client. The principles of client choice of lawyer and lawyer autonomy limit their effectiveness except in egregious cases of grabbing and leaving. Chapter 3, Tort and Agency Law Perspectives, *Hillman on Lawyer Mobility*, is recommended for further study of these considerations.

Law firms frequently attempt to head off leaving lawyer competition by restrictive covenants in partnership and employment agreements. Restrictions include barring leaving lawyers from practicing in a certain geographical area or during a period of time after leaving the firm and a variety of financial disincentives. These efforts are almost always unsuccessful because of Kentucky RPC 5.6 Restrictions On Right To Practice. This rule provides: "A lawyer shall not participate in offering or making... a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement..." A comment to the rule explains that "An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."11

There is a trend to permit firms to enforce some restrictive agreements if they do not directly restrict the right to practice. For example in Virginia a departing lawyer was held to an agreement to pay his share of a long term lease after he left because it did not directly effect his right to practice.12 Some courts are now taking the position that important business interests of law firms cannot be ignored. *Hillman on Lawyer Mobility* (Section 2.3 at 2:40-85) is an excellent consideration of restrictive lawyer employment agreements and shifting attitudes on what a departing lawyer may be required to do.13

Risk Management and Moving On

Lawyers are responsible for their own malpractice wherever they go. Partners who leave a firm have an additional risk to consider. The rule is that partners have vicarious liability for the malpractice of other lawyers in the firm. Departing partners remain vicariously liable for malpractice committed by firm lawyers while they were with the firm. They also have vicarious liability for malpractice committed during the winding-up period for clients of the firm when they left.14

The classic example of this risk is *Redman v. Walters*.15 A year before the partner withdrew the firm agreed to represent a client in a litigation case. The partner never met

the client and had no knowledge of the matter. Four years after the partner withdrew the client's case was dismissed for failure to bring the case to trial in five years. The client then sued the firm and the departed partner. The court found that the client had neither expressly nor impliedly consented to release the departed partner from his obligations and he was properly a party to the malpractice suit.

An interesting outgrowth of cases like *Redman* is the emphasis from courts and ethics committees that the law firm and departing lawyer have a responsibility to give clients notice of the departure so they can make informed decisions on future representation. There is an obvious tension between this duty and the duty not to improperly contact clients when planning to leave.16

The mutual interest of the leaving partners and the remaining partners in risk managing the vicarious liability risk they all have during the winding-up period is the best reason to work cooperatively in agreeing which clients should stay and which go. The partners should then jointly seek express client consent for future representation. This in effect converts the matter from winding-up business to new business and does away with vicarious liability for future malpractice.17

Of course, the best risk management when moving on, whether a partner or associate, is to have adequate professional liability insurance. Things to consider are:

1. Whether your new firm has prior acts coverage;

2. Whether a new firm of the left partners will become the successor in interest to the old firm and will have adequate insurance; and

3. Whether you should buy "tail coverage" that provides you an extended reporting period for claims for acts that occurred when a member of the left firm.18

The best way to address these considerations is to talk early in your departure planning with a professional liability insurance carrier and get definitive advice.

Some Closing Observations

In an article of this scope it is not possible to cover all the issues of lawyer mobility. Compensation, fee sharing, valuation of firm assets, client files, conflicts of interest, imputed conflicts, expulsion of partners, termination of employment, professional corporations, and limited liability forms of practice are all issues not covered that could be pertinent. *Hillman on Lawyer Mobility - The Law and Ethics of Partner Withdrawals and Law Firm Breakups* covers most of these issues in detail. It is the best reference on point. Keep your eye on the future of limited liability forms of practice in Kentucky. While their status is very much up in the air now, it seems likely the Supreme Court will recognize them in some fashion. This will have a substantial impact on lawyer mobility and may alleviate some of the most awkward liability risks of moving on.

1 Theresa A. Gabaldon, Miles From Home and Not Where We Thought We Would Be: A Map Through the Forest and a Light Through the Trees, 9 Geo. J. Legal Ethics 195,195(1995)(citation omitted).

2 Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 382 A.2d 1266,1233(1977).

3 Robert W. Hillman, Hillman on Lawyer Mobility Section 2.6 at 2:92-96; Section 3.4 at 3:16-19; and Chapter 6 (1997).

4 535 N.E. 2d 1255(1989).

5 Robert W. Hillman, Hillman on Lawyer Mobility Section 3.2.2 at 3:12-14; Section 4.8 at 4:82-93 (1997).

6 Mark W. Bennett, You Can Take It With You: The Ethics Of Lawyer Departure and Solicitation Of Firm Clients, 10 Geo. J. Legal Ethics 395, 397 (1996). Robert W. Hillman, Hillman on Lawyer Mobility Section 2.3.1 at 2:20-22 (1997).

7 Opinion 273, 9/17/97, ABA/BNA Lawyers' Manual On Professional Conduct, Vol. 13, No. 20, at 331(10/29/97).

8 See Opinion KBA E-317 (January 1987). 6

9 Mark W. Bennett, You Can Take It With You: The Ethics Of Lawyer Departure and Solicitation Of Firm Clients, 10 Geo. J. Legal Ethics 395, 402, 408 (1996). Robert W. Hillman, Hillman on Lawyer Mobility Section 2.2.4 at 2:16-20 (1997).

10 Withdrawal and Termination, 91:720 ABA/BNA Lawyers' Manual On Professional Conduct.

11 KBA E-326 (September 1987) found that a no practice for two years after withdrawal agreement improperly restricted the lawyer's right to practice.

12 Shuttleworth, Ruloff and Giordano P.C. v. Nutter , Va SupCt, No. 962538, 10/31/97; ABA/BNA Lawyers' Manual On Professional Conduct, Vol. 13, No. 22, at 358 (11/26/97).

13 See also Mark W. Bennett, You Can Take It With You: The Ethics Of Lawyer Departure and Solicitation Of Firm Clients, 10 Geo. J. Legal Ethics 395, 404 (1996).

14 See generally Mallen & Smith, Legal Malpractice (4 th ed.) Section 5.3 at 348 Vol.1.

15 152 Cal. Reptr. 42 (1979).

16 See generally Robert W. Hillman, Hillman on Lawyer Mobility Section 4.11 at 4:108-116 (1997).

17 Robert W. Hillman, Hillman on Lawyer Mobility Section 4.11.4 at 4:119-122 (1997).

18 Robert W. Hillman, Hillman on Lawyer Mobility Section 4.11.3 at 4:116--119 (1997).