LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, FEBRUARY 19, 2013
PERSPECTIVE

More than just goodbye: the ethics of associate departures

By Diana DiGennaro

Offer from new job? Check. Conflicts cleared? Check. Formal notice given? Check. All that's left to do is craft a gracious goodbye email, right? Not so fast. When leaving a law firm, associates must navigate a minefield of legal and ethical obligations to avoid breaching the duties they owe to clients and their firms. Even inadvertently ignoring these obligations can put associates at risk of disciplinary proceedings and civil liability for breach of contract, breach of fiduciary duty and misappropriation of trade secrets. It is in the interest of both the associate and the firm to protect clients' interests and ensure that no client matters are adversely affected by the associate's departure.

Clients come first. In departures from a law firm, as in practice more generally, protecting client confidences is paramount. Under Rule 3-100 of the California Rules of Professional Conduct and Section 6068(e)(1) of the Business and Professional Code, attorneys owe both current and former clients a continuing duty of confidentiality. The duty of confidentiality applies to all information related to the representation, whatever its source. In the context of departures, this duty governs everything from communications with the associate's new employer to client files and materials.

Attorneys also owe clients other duties that are specific to the situation of withdrawal from the client representation. Rule 3-700 provides that an attorney may not withdraw from employment until she "has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." This rule applies when attorneys - including associates - leave their firm. What is "reasonable" will vary according to the circumstances, but such steps generally include giving due notice to the client, allowing time for employment of other counsel if necessary, and, if appropriate, returning the client's property and files. If the matter involves representation before a court or other tribunal, the associate may need to seek permission from the tribunal before withdrawing and properly substitute new counsel. Absent special circumstances, however, "reasonable steps" do not include providing additional services to the client once the client has employed successor counsel.

Associates should be particularly careful when there are imminent deadlines or

CALIFORNIA PRACTICE:

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the associate had primary responsibility for the client matter, as may be the case, for example, with pro bono matters.

The unfortunate circumstances giving rise to the Supreme Court's recent decision in *Maples v. Thomas*, 132 S. Ct. 912 (2012), illustrate the importance of - and practical purposes served by - Rule 3-700's requirements. In *Maples*, two law firm associates represented a death row inmate, but then left their firm to pursue other employment without notifying the client, withdrawing as counsel of record, arranging for new counsel, or ensuring that other attorneys at their firm would handle the matter going forward. The result was a missed deadline for an appeal, which very literally could have been fatal. Lesson learned: associates cannot simply assume that their firm will take responsibility for continuing the client representation or complying with Rule 3-700.

> When leaving a law firm, associates must navigate a minefield of legal and ethical obligations to avoid breaching the duties they owe to clients and their firms.

Associates also have a parallel duty under Rule 3-500 to keep clients reasonably informed about significant developments relating to the representation, including a change in employment. In this area, associates must strike a balance between the requirement that they provide adequate and timely notice to clients, the rules prohibiting client solicitation, and their duties to their old firm.

Duties to the firm. As employees, associates may owe fiduciary responsibilities to their firms, including the duty of loyalty and the duty to refrain from competing with the firm while employed there. This means an associate must be cautious about soliciting her firm's clients or employees before her departure.

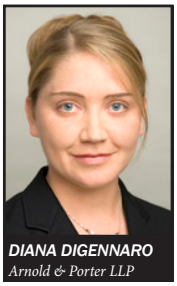
How can an associate inform clients of changes in her employment - for example, a move to a new firm - without competing with her current firm or improperly soliciting clients? The best practice is a joint notice from both the firm and the associate to clients with whom the associate has a current professional relationship. The communication should comply with the guidelines provided by the State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), which include advising the client as to who will handle ongoing work during the transition period and explaining the client's right to decide who will represent it going forward. COPRAC Formal Opinion No. 1985-86; see also American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 99-414. The goal and purpose of the joint notice is to allow the client to make an informed choice without undue influence or pressure from either side. While there may be tension between an associate's duties to the firm and her duties to clients, it likely is in the interest of both the associate and the firm to handle the associate's departure as cooperatively and professionally as possible.

Removal of work product and other materials. In addition to the applicable rules of professional conduct and ethics opinions, departing associates must also consider other legal and contractual obligations, including any obligations or protocols set forth in employment agreements, confidentiality agreements, engagements agreements or other agreements with the firm or the client. One area that warrants attention is intellectual property and trade secrets. In most cases, an associate is free to compete with her former firm after the termination of her employment, but even after termination, unfair competition, trade secret, property, contracts and agency laws - along with confidentiality rules - will determine whether and to what extent the associate may use information acquired during her employment at the old firm.

It might be tempting to keep a copy of those helpful CLE materials a colleague prepared or a list of client matters, but associates should be cautious about what they take with them when they leave. Some authorities recognize the right of an attorney to take copies of documents she personally prepared for clients or for general use in her practice, as well as material in the public domain, such as publicly filed pleadings. An associate might *not* be permitted to remove material that constitutes proprietary information or trade secrets without the firm's consent. This type of material could include client lists and contact information, CLE materials generated by the firm, practice forms or computer files. The propriety of removal will depend on who prepared the materials and the measures employed by the firm to retain title or otherwise protect the material from external use or removal. Firms undeniably have intellectual property, but the nature of a firm's rights is less clear, and such rights may conflict with rules prohibiting unreasonable restrictions on an attorney's right to practice law. See, e.g., Rule 1-500. Where the relevant agreements are silent, the associate should consider having an open discussion with the firm about the materials she is planning to take with her.

If an associate retains copies of materials prepared for clients, then she must take appropriate steps to maintain the confidentiality of those copies in accordance with applicable ethics rules. Original client files and property should not be removed unless the client directs the transfer.

As the legal market recovers from the Great Recession, lateral opportunities for associates continue to increase. But a new job does not erase the professional responsibilities an associate owes to clients and to her former firm. "[T]he interests of the clients must prevail over all competing considerations if the practitioner's withdrawal from the firm or the firm's dissolution is to be accomplished in a manner consistent with professional responsibility." COPRAC Formal Opinion No. 1985-86. So, before drafting that goodbye email, associates should make sure that they have complied with - and continue to comply with - all of their legal and ethical obligations.



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