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*Roche
Bomse
Fields
Lee
[Dilworth]

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
DRAFT FORMAL OPINION INTERIM NO. 13-0003
ETHICAL OBLIGATIONS WHEN DEPARTING FIRM**

ISSUE: What ethical obligations arise when a lawyer plans to depart from her law firm?

DIGEST: When a lawyer wants to leave her law firm, the guiding ethical principles that govern her departure are the protection of the client's best interests and the client's right to choice of counsel. The departing lawyer and the law firm each have ethical obligations in connection with the departure and must prioritize their ethical obligations to clients above their own competing interests. Specifically, if the departure of the lawyer is a significant development to a particular client, each lawyer has a duty to communicate the fact of the departure to the client and to explain the significance of the change in representation so that the client can make an informed choice in counsel going forward. During all phases of the departure, each lawyer must also be mindful of his or her continuing obligations to protect client confidences and to avoid conflicts of interests with clients. If the lawyer or law firm is unable to competently handle the client's representation as a result of the departure (and cannot remedy that situation), or if the client chooses to make a change in its representation, the lawyer or law firm must comply with Rule 1.16, including taking "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." Finally, both the departing lawyer and the law firm have a duty to cooperate in the transition of any client matter in order to protect the client's interests.

AUTHORITIES

INTERPRETED: California Rules of Professional Conduct, Rule 1.1, 1.4, 1.7, 1.10, 1.16, 1.18, 7.1, 7.2, 2.3, California Business & Professions Code Section 6068(e).

STATEMENT OF FACTS

A lawyer wants to leave her law firm (“Law Firm”) and transition her practice to a new firm (“New Firm.”) Prior to making this transition, the lawyer (“Lawyer” or “Departing Lawyer”) wants to know what ethical obligations arise for her and the Law Firm as a result of her departure.

DISCUSSION

In today’s legal marketplace, most lawyers and law firms are familiar with the reality of attorney mobility. Legal headlines are filled with news of lawyers moving from one firm to another, sometimes alone, sometimes with groups, and often accompanied by tales of acrimony, bad behavior and unresolved disputes. Lawyer mobility occurs with increasing frequency within small to mid-size firms too, perhaps without the flashy legal headlines, but in an environment that can be just as contentious and challenging to navigate. Based on current trends, it appears that lawyer mobility is here to stay.

Almost all attorney departures involve the balancing of competing interests between the departing lawyer and the departed law firm. In analyzing the rights and obligations of the lawyer and the law firm to one another, there is frequently a tension between compliance with the California Rules of Professional Conduct and other ethical guidelines, the fiduciary duties among and between attorneys at the law firm, and any contractual obligations that the attorneys and law firms may have to one another that govern the departure. However, what often gets overlooked or subverted, as lawyers work to navigate the departure of any lawyer, is the primary directive that the client’s interests must come first. Specifically, lawyers and law firms must prioritize their ethical obligations to clients above their own competing interests. Those ethical obligations center around the fundamental concepts that the client has the right to the counsel of its choice and lawyers must protect their clients’ interests during all phases of any transition.

This opinion will discuss the ethical obligations lawyer and law firms have to a client when a lawyer decides to leave her current law firm to move to another law firm. Much of the discussion is also applicable to lawyers who are moving to an in-house position or leaving the practice of law altogether. While the opinion will not seek to resolve issues of substantive law, it may identify some legal issues that are often implicated in attorney transitions since many of these ethical issues cannot be analyzed in isolation.

I. The Client’s Freedom of Choice in Selection of Counsel and Protection of The Client’s Best Interests as Guiding Principles

The guiding ethical principles governing any attorney departure are the protection of the client’s best interests and the client’s right to the counsel of its choice. (See Cal. Formal Ethics Opinion 1985-86, “... the interests of the clients must prevail over all competing considerations ... if the practitioner’s withdrawal from the firm is to be accomplished in a manner consistent with

professional responsibility”; ABA Formal Opinion 99-414, noting, “A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients’ interests must be protected and that each client has the right to choose the Departing Lawyer or the firm, or another lawyer to represent him.”) Thus, the ethical obligations triggered when a lawyer leaves her law firm should be viewed through the lens of these client-centered directives.

The client’s right to the counsel of its choice, or the freedom to choose its attorney, has a long history in American jurisprudence¹. (*Echlin v. Superior Court of San Mateo County* (1939) 13 Cal.2nd 368.) It derives from the concept that a client has the right to discharge its lawyer at will, with or without cause, a right that has been recognized in both California statute and case law. (See *Heller Ehrman v. Davis Wright*, Cal. Supreme Court Case No. S236208, March 5, 2018, citing to *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790, citing Code Civ. Proc., § 284; *General Dynamics v. Superior Court (Rose)* (1994) 7 Cal.4th 1164, 1174–1175.) Thus, a lawyer must withdraw from the representation when discharged by a client. (See CRPC, Rule 1.16(a)(4).)

Because clients have the freedom to discharge their lawyer, at will, and hire another one, they do not “belong” either to the law firm or the lawyers that are providing legal services for the client. This may seem like an obvious concept to some, but many lawyers and law firms still subscribe to the dated concept that because clients may be referred to as “the firm’s clients” in some contexts, they are property of the law firm or of an individual attorney. This misguided notion is further reinforced by the fact that because many law firms use partner compensation structures that are tied, in part, to rewarding partners for bringing in clients and generating matters for a particular client (often known as client origination credits), when those law firms allocate compensation among partners, clients are often seen by lawyers at the firm as belonging to a particular partner.² This property notion also arises in the context of law firm valuations. In turn, some law firms and lawyers begin to view their clients as possessions and become very protective of the need to keep them at the firm. Given that clients are the sole source, or at least the primary source, of revenue for a law firm, and integral to its stability, this is understandable. Yet, as the California Supreme Court has made clear, clients are not the property of any law firm

¹ A client’s right to the counsel of its choice is not absolute. (See *Howard v. Babcock* (1993) 6 Cal.4th 409, 422-423.) There are numerous impediments that may affect that choice, especially in the civil context. For example, the lawyer may be unable or unwilling to take on a certain matter, may have conflicts that preclude representation, or the parties may disagree on an acceptable price for legal services. However, in the context of an attorney departure, assuming that both the Departing Lawyer and the Law Firm are willing and able to perform the required legal services for the client, the client has the freedom and right to choose between the two or to hire new counsel.

² To be clear, this opinion is not criticizing law firm compensation structures, or the need and desire to compensate attorneys for bringing in valuable new business to law firms, instead noting that this sometimes contributes to a belief that a client belongs to a particular partner at the law firm or the law firm itself. This also can create conflicts during an attorney departure where origination credit is given to one partner, but another attorney is actually handling the day-to-day aspects of the client relationship and managing most of the client’s matters. The originating partner who is staying with the firm sometimes objects to the Departing Lawyer, who is handling the day-to-day with the client, communicating with the client about her departure. Under those circumstances, to prohibit the Departing Lawyer from communicating with the client about the departure, or demanding that such communications be unreasonably delayed, would be improper.

or lawyer³. In a competitive legal marketplace, it is often the case that law firms and lawyers must earn each client's continued loyalty through outstanding service, quality of representation and an agreement regarding the value and cost of legal services.

II. The Departing Lawyer and the Law Firm Each Have Ethical Obligations to Clients in Connection with a Potential Departure

At the time of the contemplated departure, the Departing Lawyer and the Law Firm each have ethical obligations to all clients who will be materially affected by the departure and/or whose active matters on which the Departing Lawyer is currently working. The ethical obligations of the lawyers involved are the same whether the Departing Lawyer is a partner or shareholder, a non-equity partner, an associate, or some other category of lawyer such as one designated as "Of Counsel." "All attorneys in a law firm owe duties – including ethical duties – to each of the firm's clients." (See Cal. State Bar Formal Opn. No. 2014-190, ("When a client retains a law firm, the client's relationship generally extends to all attorneys in the firm"; see also Cal. State Bar Formal Opn. No. 1981-64 [opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program].) This point also is made in numerous cases in the professional malpractice context. See, e.g., *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 392, ("Unless there is an agreement to the contrary, the retention of an attorney in a law firm constitutes the retention of the entire firm.")

Because an attorney's change of employment does not by itself terminate an attorney-client relationship (See COPRAC 2014-190; See also CRPC, Rule 1.16) and because the attorneys need to ascertain what the client intends to do as a result of the attorney's departure, both the Departing Lawyer and the Law Firm must be cognizant of the ethical obligations they may have throughout the entire course of the transition period, irrespective of whether the client decides to leave with the Departing Lawyer or to stay at the Law Firm. These ethical obligations sometimes can be at odds with the business interests of the Law Firm or the Departing Lawyer. In such circumstances, all the attorneys involved must hold their obligations to the client as paramount.

During the transition process, the Departing Lawyer and the Law Firm also may have substantive legal obligations to one another, which likely include fiduciary duties and/or contractual obligations. To the extent possible, when there is a conflict between the Departing Lawyer's and the Law Firm's ethical obligations to clients and the Lawyer's and Firm's obligations to each other, the latter obligations should be read to the fullest extent possible in a manner consistent with what is in the best interests of the clients and in upholding their ethical obligations to clients. For example, the Law Firm should not attempt to enforce contractual obligations on the Departing Lawyers that directly would prevent the Departing Lawyer from complying with ethical obligations to her clients or interfere with the client's right to choice of counsel.

III. The Duty to Communicate to Clients Regarding the Lawyer's Departure

³ See *Heller Ehrman v. Davis Wright*, supra, "we affirm that client matters belong to the clients, not the law firms, and the latter may not assert an ongoing interest in the matters once they have been paid and discharged."

California Rule of Professional Conduct, Rule 1.4(a)(3), Communication with Clients, states:

A lawyer shall ...keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed...

The departure of a lawyer is a “significant development” with respect to current clients of the Law Firm for whom the Departing Lawyer is providing legal services. Thus, Rule 1.14(a)(3) imposes an ethical obligation on attorneys to inform clients about the departure of an attorney from a law firm as soon as reasonably practical to allow clients to make an informed choice in counsel and to provide for a smooth transition to avoid prejudice to clients. The 1985 COPRAC opinion states, in part, that: “whenever there is a material change in the representation of the client caused by a change in an attorney's employment status, all members of the Bar involved directly in this change have a responsibility to see that the client receives the protections required by this rule, including timely and accurate notice of the change. The policy behind the notice requirement is to allow the client an opportunity to be advised of the changed status of the attorneys, so the client can make an informed choice of counsel.” (citing to *Jewel v. Boxer, supra*, 156 Cal.App.3d 171 and *Little v. Caldwell, supra*, 101 Cal. 553, and referring to former Rule 2-111(A) related to an attorney’s duties when withdrawing from employment.)

In addition, the Departing Lawyer does not violate Rule 7.3 by notifying her current clients of her departure from the Law Firm. Such notification does not constitute an impermissible solicitation and, as discussed above, the Departing Lawyer is ethically obligated to communicate this information to current clients.

A. Which Clients Should Be Notified of the Lawyer’s Departure?

Notice is only required as to clients whose matter(s) the Departing Lawyer is responsible for or for whom she plays a principal role in the Law Firm's delivery of legal services⁴. (ABA Formal Opn. 99-414, the impending departure of a lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter (i.e., the lawyer's current clients), is information that may affect the status of a client's matter ...) This likely would include notification to any dormant clients of the Departing Lawyer whose matters are currently inactive, but may wish to transfer their client files to the Departing Lawyer at her New Firm.

The general test of whether a client should be informed that the Departing Lawyer is changing firms or leaving the Law Firm is to consider it from the client’s point of view, since

⁴ The notice obligation in the event of an attorney departure is more limited than the obligation of a lawyer in a law firm dissolution context which, pursuant to COPRAC 2014-190, requires all attorneys employed by the firm to comply with CRPC Rule 1.16(d) as to all clients of the firm, regardless of their connection to any specific client or the specific nature of their affiliation with the firm.

communications should always be “governed by the overall principle of what is in the best interest of the client.” (See *Jewel* and COPRAC Opn. 1985-86.) If the client were asked who its attorney is, or attorneys are, the Departing Lawyer would be one of the principal attorneys identified by the client. This does not mean that the Departing Lawyer is necessarily the only attorney providing legal services to that client, as many clients consider a group of attorneys to be its primary attorneys at the firm, depending on the complexity of a client matter, how a particular client matter is staffed and how client communications are handled within the firm.

On the other hand, if the Departing Lawyer had limited involvement in the client’s matter, or the client is unaware of the Departing Lawyer’s role at the firm, or the client has had little to no communication with the Departing Lawyer, it is unlikely the client would expect to be told of the Lawyer’s departure. In those circumstances, notice to the client is not required. However, whether the Departing Lawyer played a significant or primary role in the client’s matter should be weighed from the client’s perspective with any doubts being resolved in favor of informing the client.

Furthermore, assuming the Departing Lawyer played a primary role in the delivery of legal services to a client, the duty to communicate the fact of the departure applies regardless of whether the Departing Lawyer is a partner, associate or some other category of lawyer at the firm. Rule 1.4(a)(3) applies to all lawyers regardless of their employment status at the law firm. (COPRAC 2014-190).

B. When Should Clients Be Told of the Lawyer’s Departure?

Determining exactly when it is appropriate to notify clients that the Departing Lawyer is leaving the Law Firm, and how much notice should be given to clients in advance of the transition, depends on a variety of factors. Generally, notice to clients should be timely, fair and reasonable under the circumstances. It should enable the Departing Lawyer and the Law Firm to discharge their ethical obligations in a responsible and orderly way while facilitating client freedom of choice in the selection of its counsel. Most importantly, it should be provided in a manner that enables the client to make a reasonable, informed decision about who should carry on with the representation. (See ABA Formal Opn. 99-414; PA Joint Formal Opn. 2007-300.) However, what is reasonable notice to clients of any transition is often fact-specific and may depend on the clients and their needs.

With respect to the Law Firm, any directive to the Departing Lawyer not to contact clients, whether from management, other partners or the Law Firm’s executive committee, should be viewed with extreme skepticism and as potentially violating Rule 1.4(a)(3). As a preliminary matter, any suggestion that the Departing Lawyer should not be permitted to communicate the fact of departure until after that the Departing Lawyer has left the Law Firm has been widely rejected. (ABA Formal Opn. 99-414 at 5 n.11 (“...We reject any implication of Informal Opinions 1457 or 1466 that notices to current clients as a matter of ethics must await departure from the firm.”) Such a demand is directly at odds with the notion that the client must be allowed to make an informed choice with respect to its future representation upon news of the Lawyer’s departure and does not lend itself to facilitating a smooth transition of the client’s matters to avoid prejudice.

Law firms also should be cautious in attempting to enforce firm policies or contractual provisions that expressly limit the Departing Lawyer's contact with clients after the Law Firm has been given notice of the Lawyer's departure. For example, if the policy or provision called for a short delay in contacting clients so that the Law Firm and Departing Lawyer could agree on an approach and joint message to send to clients about the Lawyer's departure, that would likely be acceptable because it has a client-centered objective. However, if the Law Firm's policy or provision were used to prevent or to delay the Departing Lawyer from contacting her clients, all the while the Law Firm was using this delay to talk to the clients first and make their own case for keeping the clients at the firm, such actions are in conflict with the Law Firm's ethical obligations to prioritize its clients' interest in making an informed choice of counsel above their own competing interests during this time of transition. (See again Cal. Formal Ethics Opinion 1985-86, "... the interests of the clients must prevail over all competing considerations ... if the practitioner's withdrawal from the firm is to be accomplished in a manner consistent with professional responsibility.")

With respect to the Departing Lawyer, absent circumstances where a delay in doing so would prejudice the clients' interests or interfere with its right to choice of counsel, the Departing Lawyer should not communicate the fact of the departure to her clients until the Law Firm has been informed of the Departing Lawyer's intent to leave the firm. This allows both the Departing Lawyer and Law Firm the opportunity to communicate with clients about the departure so that each can present options to the client about future representation and allow the client to make an informed choice regarding counsel.

This is an area where there is a potential for overlap with substantive law issues. Any notification by the Departing Lawyer to the client that she is leaving the Law Firm prior to the time that she provides notice to the Law Firm may be construed as a breach of the Departing Lawyer's fiduciary duties or contractual obligations to the Law Firm and its partners. However, such analysis would be fact-specific and goes beyond the scope of this opinion.

Advance notice to the client is also very important when the Departing Lawyer does not intend to continue her representation of the client in her post-departure affiliation and/or the Law Firm is unable or unwilling to continue on with the representation⁵. In such circumstances, if the Law Firm and Departing Lawyer were seeking to terminate their attorney-client relationship with the client, they would need to comply with CRPC, Rule 1.16(d) before withdrawing as the lawyer(s) for the client, including taking "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client" and "giving the client sufficient notice to permit the client to retain other counsel." This will be discussed in more detail later in the opinion.

C. What Form and Substance Should These Client Communications Take?

⁵ If the attorney's departure will cause a law firm dissolution, (i.e. in a two-person law firm that is structured as a limited liability partnership), the Departing Lawyer must give sufficient notice to their partner and clients of their intent to depart. There are many important ethical considerations implicated in these circumstances, and sufficient notice may include allowing the other partner reasonable time to find employment and/or another law firm in which to serve existing firm clients to avoid prejudice to those clients.

To the extent practical, the Law Firm and the Departing Lawyer should attempt to agree upon and provide joint notice to all clients on whose matter(s) the Departing Lawyer is responsible or for whom she plays a principle role in the Law Firm's delivery of legal services. (Cal. Formal Ethics Opinion 1985-86.) Joint notice often is considered preferable to unilateral notice and if it is truly the result of a cooperative endeavor between the parties is usually a far better way in which to protect clients' interests. (ABA Formal Opinion 99-414.) However, since not all departures are amicable, if the parties cannot agree on joint notice, or putting together the joint notice is being used by a party to delay formal client notification while informal notice talks have already begun, unilateral notice is ethically permissible and may be required in some circumstances. "When the Departing Lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services..." (See ABA Formal Opinion 99-414, Pg. 5)) It is not imperative that both the Departing Lawyer and the Law Firm notify the client of an impending departure, although both are permitted to if they so choose, with joint notice being recommended. However, if one lawyer fails to notify a client, or refuses to do so, the other one must. (PA Joint Formal Opn. 2007-300.)

The notice, whether joint or unilateral, should inform the client:

- The Departing Lawyer is leaving;
- The timing of the departure;
- Where the Departing Lawyer is going and related contact information both currently and after the Lawyer's actual departure;
- What areas of law the Departing Lawyer will practice at new firm;
- The Departing Lawyer's and the Law Firm's ability and willingness or inability and unwillingness to continue to represent the client⁶;
- The client's option to stay with the Law Firm, go with Departing Lawyer to her New Firm or choose another lawyer or law firm entirely;
- Where the client's file will be and who will be handling the client's matter until the client expresses a choice;
- Make clear that the client has the ultimate right to decide who will complete or continue the representation; and
- That the parties are all obligated to cooperate during the Departing Lawyer's transition to avoid any potential prejudice to the client regardless of what choice the client makes with respect to its future representation.

D. Communications Following Notice of Departure

⁶ Rule 1.4(a)(4) requires lawyers to "advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." If this is unilateral notice, however, one lawyer should not opine on the willingness, ability or competence of the other lawyer or law firm to handle the client's matters. Making such statements poses a high a risk that the information could be false, misleading or disparaging.

Both the Departing Lawyer or any lawyer from the Law Firm may communicate with the client about the Lawyer's departure after notice has been given but before any formal decision has been made by the client. In fact, Rule 1.4 (b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," while Rule 1.4 (a)(3) requires prompt compliance with reasonable client requests for information related to the future representation. For example, the Departing Lawyer should provide the client with additional information that is reasonably necessary to the client in order for the client to make an informed decision about future representation (e.g., billing rates, resources of the New Firm, who would be working on its matters, etc.) Similarly, the Law Firm should also provide the client with relevant information related to the future representation (e.g., billing arrangements, staffing, competence of the Law Firm to handle the matter going forward notwithstanding the departure of Lawyer, etc.). However, all lawyers should continue to make clear the client has the right to choose whether the Law Firm, the Departing Lawyer and the New Firm, or some other firm will continue the representation. (ABA Formal Opinion 99-414.)

In some circumstances, the Departing Lawyer may move on to her New Firm prior to the time that the client has been given notice of the Lawyer's departure or exercised its right to choice of counsel. These circumstances do not change each lawyers' ethical obligations to provide notice to the client of the departure along with relevant information to allow the client to make an informed choice in counsel. If the Departing Lawyer has already left the Law Firm this includes information related to where the Departing Lawyer is now practicing law. In addition, a Law Firm should never withhold information from any client that asks for the whereabouts of the Departing Lawyer or mislead the client about the Departing Lawyer in any way. Each lawyer should also refrain from making any false, misleading or disparaging comments about the other when communicating to the client.

IV. Client Solicitation is Ethically Permitted in Certain Situations

Beyond notification and providing follow up information that is required to be communicated to the client by Rule 1.4, the question often arises as to whether it is proper for the Departing Lawyer to solicit any client to come with her to her New Firm⁷. For any client with whom the Departing Lawyer has a "prior professional relationship," she is ethically permitted to solicit those clients in accordance with California's rules of professional conduct and related statutes governing solicitation.⁸ (See CRPC, Rules 7.1-7.3) Specifically, any lawyer is ethically permitted

⁷ It should be noted that we have limited our discussion in this section to the applicable California Rules of Professional Conduct and specifically do not address California substantive law that governs business competition. It should go without saying, however, that both the Departing Lawyer and the Law Firm must comply with California law in the post-departure competition for clients.

⁸ We do not opine here on whether the clients with whom the Departing Lawyer has a "prior professional relationship" under CRPC, Rule 7.3, are the same set of clients to whom notice would be required of that Lawyer's departure (i.e., to whom the Departing Lawyer plays a principal role in the law firm's delivery of legal services.). We do note, however, that in the executive summary to Rule 7.3 it states, "The two exceptions to such solicitations are included because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer." Thus, the summary supports the idea that the rule intended to limit solicitation to situations in which there is an existing relationship between the soliciting lawyer and the client, and not just that the client is a

to solicit in person, by telephone or by email any client with whom the lawyer has a familial, close personal or prior professional relationship, provided that in the course of said solicitation the lawyer does not make any false or misleading communications to the client. As to any written communications, both the Departing Lawyer and the Law Firm may ethically communicate in writing to former or current clients of the Law Firm subject to the requirements of these same rules.

In addition, neither the Departing Lawyer nor the Law Firm should solicit, or continue to solicit, any client that has made it known that it does not want to be solicited, or in any “manner which involves intrusion, coercion, duress or harassment.” (CRPC, Rule 7.3(b)) No lawyer should attempt to keep a client at the Law Firm by imposing conditions on how or when a client can leave the firm, transfer its matters or receive its file. For example, a lawyer should never (1) condition the release of a client file or willingness to transfer the matter to new counsel on the client’s payment of any outstanding balances or costs to duplicate the files, (2) impose any contractual obligations on the client as a condition of signing a transfer authorization letter⁹ or (3) improperly suggest that it would cost the client additional fees or costs to leave the firm. Such actions likely would violate CRPC, Rule 7.3(b).

Furthermore, once a client has exercised its right to choice of counsel and expressed its desire with respect to who will represent it going forward, neither the Law Firm nor the Departing Lawyer should engage in further conduct which could be viewed as violating CRPC, Rule 7.3(b) in an effort to get the client to change its mind about its stated choice for representation.

Finally, questions often arise about whether solicitation is permissible after the Departing Lawyer provides notice to the Law Firm of her departure, but before she actually leaves the firm. The same rules that permit a lawyer in certain circumstances to solicit clients (Rules 7.1-7.3) would apply here. Although this situation involves a decided intersection between the ethical rules requiring notice and permitting solicitation, the scope of the fiduciary duties among partners and in some circumstances contractual obligations between the parties. The question whether such conduct would violate fiduciary duties between partners or amount to unfair competition is an open question that is likely to be a fact-specific inquiry. However, it has been suggested that prohibiting lawyers who have already given notice to the law firm of their departure from properly soliciting clients and competing for clients on equal footing as the law firm undermines client choice. (See Hillman on Lawyer Mobility, Appendix C, II, B.)

V. Duty of Competence

Any Departing Lawyer who will be taking a current client with her to her new firm must make sure that she is competent to handle the representation. (CRPC, Rule 1.1.) For example, the

client of the law firm where the departing lawyer works or worked. By way of contrast, the ABA Model Rule 7.3 has broader language that permits solicitation in a wider variety of situations.

⁹ Any contractual obligations that governs that attorney-client relationship should be set forth in the attorney-client fee agreement between the parties and can likely be enforced pursuant to the terms of that agreement. No new or additional terms should be added as part of any client choice of counsel letter, or as a condition of transitioning any client matter.

Departing Lawyer would need to be sure that she had the skill, support and resources necessary to handle the matter at the New Firm if the client matter is transferred to her. Similarly, the Law Firm must ensure that there are other lawyers in the firm with the experience and ability to handle the client's matters once the Departing Lawyer leaves the Law Firm. If the Departing Lawyer or Law Firm does not have the ability to handle any client matter with competence, Rule 1.1(c) describes circumstances in which the representation may continue. These options include consulting with a competent lawyer, acquiring sufficient knowledge before performance is required, or referring the matter to a competent lawyer. (CRPC, Rule 1.1(c).) However, there is an obligation to withdraw if continued representation would result in violation of the rules. (CRPC, Rule 1.16(a)(2).)

VI. Duty of Confidentiality

Pursuant to B&P Code section 6068(e), an attorney has a duty to: "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Also, under CRPC, Rule 1.6(a) "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule."

During all phases of any transition or departure, the Departing Lawyer should be mindful of her obligations to protect client confidences. This duty often is implicated when the Departing Lawyer must check for conflicts with a potential new law firm; however, it can also arise in the context of communicating with the New Firm before, during and after the departure. There is often a tension between the duty of confidentiality and other ethical duties the Departing Lawyer and Law Firm face as part of the departure process, but nevertheless should be managed by every lawyer involved in the transition with the goal of protecting and preserving confidential client information.

VII. Duty of Departing Lawyer and Law Firm to Cooperate in Transitioning Client Matters

Both the Departing Lawyer and Law Firm have an obligation to protect the interests of clients during the period of transition and must take reasonable steps to assure that the withdrawal of the Departing Lawyer, the Law Firm, or both, is accomplished in a way that does not prejudice the rights of clients. (CRPC, Rule 1.16(d).) In addition, both the Departing Lawyer and Law Firm have ethical obligations during the transition period to ensure that active client matters continue to be handled diligently and with competence. (CRPC, Rule 1.1.) Thus, by virtue of the contemporaneous obligations that Departing Lawyer and Law Firm each owe to clients throughout the transition process, the Departing Lawyer and Law Firm have a duty to cooperate with each other during the transition process to protect clients' interests.

The Departing Lawyer, for example, may not delay or postpone work that should be done on a matter she expects to follow her to her New Firm until after her departure in the hopes of generating more fees for New Firm. (PA Joint Formal Opn. 2007-300.) Prior to her departure, the Departing Lawyer also should cooperate with any reasonable Law Firm protocols and requests for information from the Law Firm where the goal is to evaluate the Law Firm's

capacity to continue to service any client, facilitate the transition or comply with the Law Firm's ethical obligations to clients. Of course, the Law Firm should not improperly use such procedures to inundate the Departing Lawyer with busy work so that the Departing Lawyer is unable to service existing clients or meet clients' needs related to the impending departure.

Also, the Law Firm may not, after being notified of the Departing Lawyer's intent to leave, render Departing Lawyer's continued representation of the client unreasonably difficult or impossible by depriving the Departed Lawyer access to documents or information needed to carry out the continued representation, or to assign another lawyer to the client's matters prior to the time that the client has expressed its choice of counsel going forward.

VI. Conflicts of Interest

There are a variety of potential conflict issues that are implicated during any attorney transition. Significantly, it is imperative that a detailed conflicts check is conducted with respect to the Departing Lawyer's client relationships and those of the New Firm that she will be joining. Such a comprehensive inquiry should not only bring to light whether any of the Departing Lawyer's clients will have a conflict or potential conflict with the New Firm, but also whether the Departing Lawyer (by virtue of its current, and sometime former, client relationships) may have a conflict with any clients of the New Firm. (See CRPC, Rule 1.7 for discussion on what constitutes a conflict with a client.) The Departing Lawyer and the New Firm also should consider whether any screening protocols should be implemented once the Departing Lawyer joins their firm (CRPC, Rule 1.10) and whether there are potential conflicts with respect to prospective clients. (CRPC, Rule 1.18)

As discussed above, this is an area where there is an obvious tension between the duty to maintain client confidences and the duty to avoid conflicts of interests with clients. In such cases where the Departing Lawyer must provide information to the New Firm related to her present and former client relationships in order for the New Firm to run a conflicts check; the Departing Lawyer should be mindful of her duties under Rule 1.6. The issue of whether and under what circumstances information protected by Rule 1.6 can be provided in order to permit a conflict check is beyond the scope of this opinion.

VIII. Withdrawal by the Law Firm or Departing Lawyer

Most attorney transitions involve the termination of the attorney-client relationship by either the Departing Lawyer, the Law Firm, or both, which requires that all lawyers involved in the transition comply with Rule 1.16. Specifically, CRPC, Rule 1.16(d) states: "A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e)."

As such, the key aspects of this rule are:

- Providing reasonable notice to clients;
- Avoiding reasonably foreseeable prejudice to clients;

- Giving clients a reasonable opportunity to employ new counsel;
- Court approval may be required if there is litigation;
- Surrendering the client file as soon as possible if requested;
- Refunding any unearned fee;

In situations where neither the Departing Lawyer nor the Law Firm wants to continue the representation, the ethical obligations are the same as in other situations in which a lawyer wants to withdraw from representation: the Departing Lawyer and Law Firm must bear in mind the ethical obligations regarding competent and diligent representation, communication, and termination of representation.

IX. Client File

Rule 1.16(e) also addresses the client's right to the return of its file when the attorney-client relationship is terminated. Specifically, "subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. 'Client materials and property' includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not..."

Thus, in the context of an attorney departure, if the client elects to follow the Departing Lawyer or retains another firm, the Law Firm must promptly forward any requested part of the client's file to the client or its new attorney. Pending the client's instruction, however, the Law Firm and Departing Lawyer should have reasonable access to the file in order to protect the client's interests. The Departing Lawyer should never remove the client's files without the client's consent. Even where the client has requested that file be transferred to Departing Lawyer, the Law Firm should be given reasonable notice and an opportunity to copy the file. However, the Law Firm should do so as quickly as possible to avoid any potential prejudice to the client, prioritizing getting files to clients where there are time-sensitive and pressing client matters that are in active litigation or with pending deadlines. While the paper file, if demanded, may take time to copy, the Law Firm should be able to transfer an electronic copy of the client's file to its new counsel in an expedited manner.

In addition, if the client is leaving the Law Firm, any original client property and unearned client funds should be returned promptly to the client so as not to prejudice the client's ability to retain new counsel. While an attorney-client fee agreement can hold a client responsible for costs of copying client files, a firm can never condition the return of client files or property on receipt of those costs or the payment of any outstanding legal fees. The client's papers and property belong to the client, not to the attorney. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 655.) The client's ownership is not altered by the circumstances or the timing of the termination of the attorney-client relationship, or by whether the attorney has been paid for his or her services. (*Academy of*

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541 *California Optometrists, Inc. v. Superior Court* (Damir) (1975) 51 Cal.App.3d 999, 1005-06; See
542 also Cal. State Bar Formal Opn. No. 1994-134, Cal. State Bar Formal Opn. 2001-157.)
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Conclusion

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547 The clients' right to the counsel of its choice and the protection of the clients' best interests are
548 the guiding ethical principles that govern any attorney departure. The departing lawyer and the
549 law firm each have ethical obligations related to the departure and must prioritize their ethical
550 obligations to clients over their own competing interests. These ethical obligations include
551 properly notifying relevant clients of the departure, protecting client confidences, avoiding
552 conflicts of interests with clients, ensuring that clients continue to have competent representation,
553 and avoiding reasonably foreseeable prejudice to the rights of clients during any changes in the
554 representation. Both the departing lawyer and the law firm also have a duty to cooperate in the
555 transition of any client matter.
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557 This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of
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559 California, its Board of Governors, any persons, or tribunals charged with regulatory
560 responsibilities, or any member of the State Bar.