



The State Bar of California

OPEN SESSION AGENDA ITEM JANUARY 2020 REGULATION AND DISCIPLINE COMMITTEE II.B

DATE: January 23, 2020

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: Formal Advisory Ethics Opinion 2020-201: Request for Approval for Publication

EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation and Discipline (RAD) approval for the publication of proposed Formal Ethics Advisory Opinion 2020-201 developed by the Committee on Professional Responsibility and Conduct (COPRAC or the Committee), following the close of two public comment periods.

BACKGROUND

COPRAC is charged with developing the State Bar's nonbinding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,² which provides that once the Committee has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

¹ Each published opinion includes the following statement: "This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although non-binding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility. (See, e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.

DISCUSSION

This agenda item requests approval for the publication of Proposed Formal Advisory Ethics Opinion 2020-201. Prior to being finalized for publication, while the opinion was still in development and out for public comment, it was styled as Proposed Formal Opinion Interim No. 13-0003.

Proposed Formal Opinion Interim No. 13-0003 was drafted by COPRAC and at its February 22, 2019 meeting, in accordance with COPRAC's Rules of Procedure, the Committee approved the opinion for an initial 90-day public comment distribution. Subsequently, at its July 26, 2019 meeting, COPRAC revised the opinion in response to public comments received and approved a further 60-day public comment period.

The full text of the proposed opinion is provided as Attachment A. The question addressed in the proposed opinion is: "What ethical obligations arise when a lawyer departs from her law firm?" The opinion digest states:

The departing lawyer and the law firm each have ethical obligations in connection with the departure and must prioritize their ethical obligations to each client above their own competing interests. Specifically, if the departure of the lawyer is a significant development to a particular client, the lawyer and the law firm each have 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 may make an informed choice regarding counsel going forward. During all phases of the departure, the lawyer and the law firm must also be mindful of their 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 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.

Public Comment

One public comment was received and it is provided as Attachment B. The commenter observed that a reference to "principle" should be "principal." The Committee agreed and made the revision.

At its October 25, 2019 meeting, following consideration of the public comment received, COPRAC approved the opinion for submission to RAD for formal publication. The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approve the publication of Formal Ethics Advisory Opinion No. 2020-201.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee, following publication for public comment and consideration of the comments received, and upon the recommendation of the State Bar Standing Committee on Professional Responsibility and Conduct, approve the publication of Formal Ethics Advisory Opinion 2020-201, attached hereto as Attachment A.

ATTACHMENT(S) LIST

- A.** Formal Ethics Advisory Opinion 2020-201
- B.** Full Text of Public Comment

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2020-201**

ISSUE: What ethical obligations arise when a lawyer departs from her law firm?

DIGEST: The departing lawyer and the law firm each have ethical obligations in connection with the departure and must prioritize their ethical obligations to each client above their own competing interests. Specifically, if the departure of the lawyer is a significant development to a particular client, the lawyer and the law firm each have 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 may make an informed choice regarding counsel going forward. During all phases of the departure, the lawyer and the law firm must also be mindful of their 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 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: Rule 1.1, 1.4, 1.7, 1.10, 1.16, 1.18, 5.1, 5.2, 7.1, 7.2, and 7.3 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068(e).

STATEMENT OF FACTS

A lawyer is leaving her law firm ("Law Firm") and transitioning 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

Lawyer mobility is a reality in today's legal marketplace. 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 or contentiousness between the departing lawyer(s) and the former law firm.

Almost all lawyer 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. Notwithstanding this tension, the primary directive is 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. These ethical obligations center around the fundamental concepts that the client has the right to the counsel of his or her choice and lawyers must protect their clients' interests during all phases of any transition.

This opinion will discuss the ethical obligations lawyers and law firms have to a client when a lawyer leaves her current law firm and moves 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 all issues of substantive law, it will identify issues that are often implicated in attorney transitions since many of these ethical obligations cannot be analyzed in isolation.

I. The Client's Freedom of Choice in Selection of Counsel and Protection of the Client's Best Interests are 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. State Bar Formal Opn. No. 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 Opn. No. 99-414 ["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 has a long history in American jurisprudence.^{1/} (*Echlin v. Superior Court of San Mateo County* (1939) 13 Cal.2d 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 *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385]; Code Civ. Proc., § 284; and *General Dynamics v. Superior Court (Rose)* (1994) 7 Cal.4th 1164, 1174–1175 [32 Cal.Rptr.2d 1].)

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 the legal services. Many law firms use compensation structures that are tied, in part, to rewarding attorneys for bringing in clients and generating matters for a particular client, often known as client origination credits. When those law

^{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 [25 Cal.Rptr.2d 80].) 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 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 a new counsel.

firms allocate compensation among certain attorneys, clients may be seen by lawyers at the firm as belonging to a particular attorney.^{2/} As the California Supreme Court has made clear, however, clients are not the property of any law firm or lawyer.^{3/} In a competitive legal marketplace, 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. Departing Lawyer and Law Firm Each Have Ethical Obligations to Clients in Connection with Lawyer's Departure

Departing Lawyer and Law Firm each have ethical obligations to all clients who will be materially affected by the departure and/or whose active matters on which Departing Lawyer is currently working. The ethical obligations are the same whether 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 [58 Cal.Rptr.3d 516] ["Unless there is an agreement to the contrary, the retention of an attorney in a law firm constitutes the retention of the entire firm."].

Departing Lawyer and Law Firm must be cognizant of the ethical obligations they have throughout the transition period, irrespective of whether the client decides to leave with Departing Lawyer, to stay at Law Firm, or choose otherwise. (See Cal. State Bar Opn. No.2014-190; see also rule 1.16.) These ethical obligations sometimes can be at odds with the business interests of Law Firm or Departing Lawyer. In such circumstances, the client's interest always remains paramount.

During the transition process, Departing Lawyer and Law Firm also may have legal obligations to one another, which could include fiduciary duties and contractual obligations. To the extent possible, when there is a conflict between a lawyer's and a law firm's ethical obligations to a client and a lawyer's and a law firm's obligations to each other, the former should prevail. For example, Law Firm should not attempt to enforce contractual obligations on Departing Lawyer that would prevent Departing Lawyer from complying with ethical obligations to clients or interfere with the client's right to choice of counsel.

^{2/} The Committee takes no position on law firm compensation structures, or the need and desire to compensate attorneys for bringing in valuable new business to law firms. It merely wishes to note that the scenario described sometimes contributes to a belief that a client belongs to a particular attorney at the law firm or the law firm itself. This also can create conflicts during an attorney departure where an origination credit is given to one attorney, but another attorney is actually handling the day-to-day aspects of the client relationship and managing most of the client's matters. The attorney who "originated" the matter who is staying with the firm sometimes objects to the departing lawyer, who is handling the day-to-day communications with the client, from communicating with the client about her departure. The fact that Departing Lawyer did not "originate" the matter is not a ground for prohibiting an otherwise required or permitted communication about the departure with the client.

^{3/} See *Heller Ehrman v. Davis Wright*, *supra*, (2018) 4 Cal.5th 467, 556 [299 Cal.Rptr.3d 371] ["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."]

With respect to a lawyer's departure, lawyers with managerial authority "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act." Rule 5.1(a). Further, a supervisory lawyer cannot prevent or otherwise obstruct a departing lawyer from complying with ethical obligations during a departure. Rule 5.1(b) and (c). A subordinate lawyer shall comply with the Rules of Professional Conduct and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person. Rule 5.2(a). A subordinate lawyer is permitted, but not required, to act in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. Rule 5.2(b) and Comment.

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

California Rule of Professional Conduct, rule 1.4(a)(3), 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 lawyer is providing meaningful legal services, as discussed below in subsection A. Thus, under rule 1.4(a)(3), Departing Lawyer and Law Firm must inform certain clients about Lawyer's departure 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. Cal. State Bar Formal Opn. No. 1985-86 states, in pertinent part: "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*, (1984) 156 Cal.App.3d 171 [203 Cal.Rptr. 13] and *Little v. Caldwell, supra*, (1894) 101 Cal. 553, and referring to former rule 2-111(A) related to an attorney's duties when withdrawing from employment.)

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

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

Notice is only required as to clients whose matter(s) Departing Lawyer is responsible for, for whom she plays a principal role in Law Firm's delivery of legal services, and any client Departing Lawyer reasonably believes may wish to transfer its files to Departing Lawyer at New Firm.^{4/} (ABA Formal Opn. No. 99-414

^{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 Cal. State Bar Formal Opn. No. 2014-190, requires all attorneys employed by the firm to comply with 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.

[“[t]he 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 . . .”].)

The general test of whether a client should be informed of a lawyer’s departure is to consider it from the client’s point of view, since communications should always be “governed by the overall principle of what is in the best interest of the client.” (See, *Jewel* and Cal. State Bar Formal Opn. No. 1985-86.) If the client was asked who its attorney is, or attorneys are, Departing Lawyer would be one of the principal attorneys identified by the client. This does not mean that Departing Lawyer is necessarily the only attorney providing legal services to that client. For example, some clients may consider a group of attorneys to be their principal 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 Departing Lawyer had limited involvement in the client’s matter, or the client has had little to no communication with Departing Lawyer, it is unlikely the client would consider Lawyer’s departure as a “significant development” in its case. In those circumstances, notice to the client is not required. However, whether Departing Lawyer played a principal 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.

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

Determining when it is appropriate to notify a client of a lawyer’s departure depends on a variety of factors. Generally, notice to a client should be timely, fair and reasonable under the circumstances. It should enable Departing Lawyer and Law Firm to discharge their ethical obligations in a responsible and orderly way while facilitating client’s ability to choose 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. No. 99-414; PA Joint Formal Opn. No. 2007-300.) However, what is reasonable notice to a client of any transition is often fact-specific and may depend on the client and its needs.

With respect to Law Firm, any directive to Departing Lawyer not to contact a client, whether from management, other partners or Law Firm’s executive committee, should be viewed skeptically and as potentially violating rule 1.4(a)(3). As a preliminary matter, any suggestion that Departing Lawyer should not be permitted to communicate the fact of departure until after Departing Lawyer has left the Law Firm has been widely rejected. (See, e.g., ABA Formal Opn. No. 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 a 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 Departing Lawyer’s contact with a client after Law Firm has been given notice of Lawyer’s departure.^{5/} For example, if the policy or provision called for a short delay in contacting clients so that

^{5/} Furthermore, except as set forth in rule 5.6 and its comments, no partnership, shareholder or employment agreement can restrict a lawyer’s right to practice law following the lawyer’s departure.

Law Firm and Departing Lawyer could agree on an approach and joint message to send to clients about Lawyer's departure, this would likely be acceptable because it has a client-centered objective. However, if Law Firm's policy or provision were used to prevent or to delay Departing Lawyer from contacting clients, all the while 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 conflict with Law Firm's ethical obligations to prioritize its clients' interest in making an informed choice of counsel above their own competing interests during the transition.

With respect to Departing Lawyer, absent circumstances where a delay in doing so would prejudice the client's interests or interfere with its right to choice of counsel, Departing Lawyer should not tell clients she is leaving until she tells her Law Firm. This allows both Departing Lawyer and Law Firm the opportunity to communicate with the client 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 other legal issues. For example, any notification by Departing Lawyer to the client that she is leaving Law Firm prior to the time that she provides notice to Law Firm may be construed as a breach of Departing Lawyer's fiduciary duties or contractual obligations to Law Firm and its partners. However, such an analysis would be fact-specific and goes beyond the scope of this opinion.

Prompt notice to the client is also very important when Departing Lawyer does not intend to continue her representation of the client in her post-departure affiliation and/or Law Firm is unable or unwilling to continue on with the representation.^{6/} In such circumstances, if Law Firm and Departing Lawyer were seeking to terminate their attorney-client relationship with the client, they would need to comply with 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?

To the extent practical, Law Firm and Departing Lawyer should attempt to agree upon and provide joint written notice to all clients on whose matter(s) Departing Lawyer is responsible or for whom she plays a principal role in Law Firm's delivery of legal services. (Cal. State Bar Formal Opn. No. 1985-86.) Joint notice, if it is truly the result of a cooperative endeavor between the parties, is preferable to unilateral notice because it is a better way in which to protect clients' interests. (ABA Formal Opn. No. 99-414.)

However, since not all departures are amicable, if the parties cannot agree on joint notice, or drafting 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

^{6/} 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), 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.

she currently is responsible or plays a principal role in the delivery of legal services...” (See, ABA Formal Opn. No. 99-414 at p. 5.) It is not imperative that both Departing Lawyer and Law Firm notify the client of an impending departure, although both are permitted to if they so choose. However, if one fails to notify a client, or refuses to do so, the other one must.

The notice, whether joint or unilateral, should provide the client with enough information for the client to understand both the significance of the departure on the representation and to permit the client to make an informed decision regarding the representation going forward. Rule 1.4(a)(3) and (b). As such, any notice^{7/} should inform the client:

- Departing Lawyer is leaving;
- The timing of the departure;
- Where Departing Lawyer is going and related contact information, both currently and after the lawyer’s actual departure;
- Departing Lawyer’s and Law Firm’s ability and willingness or inability and unwillingness to continue to represent the client;^{8/}
- The client may choose to stay with Law Firm, go with Departing Lawyer or choose another lawyer or law firm entirely; and
- Where the client’s file will be and who will be handling the client’s matter until the client expresses a choice.

D. Communications Related to the Lawyer’s Departure

In conjunction with providing notice to the client, both Departing Lawyer or any lawyer from Law Firm may, and in some instances, should, provide the client with additional information about Lawyer’s departure. In fact, as discussed, 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.” Rule 1.4(a)(3) also requires prompt compliance with reasonable client requests for information related to the future representation. For example, Departing Lawyer should provide the client with additional information reasonably necessary for the client to make an informed decision about future representation. Depending on the situation, this may include providing the client with an update on the

^{7/} There are certain factual scenarios that may require Departing Lawyer and Law Firm to address notice to clients differently. One example is when a tripartite attorney-client relationship exists with an insurer and an insured. In that situation, each client must be notified of the lawyer’s departure and the choice of counsel, however, choice of counsel may ultimately be determined by the terms of the insurance contract between the insurer and the insured. In accordance with rule 1.4, the notification to the insurer and the insured of the departure and choice of counsel should further inform such clients that the contract between the insurer and insured may determine choice of counsel should a conflict arise between the insurer and the insured as to continued representation.

^{8/} 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 be cautious about opining on the willingness, ability or competence of the other lawyer or law firm to handle the client’s matter. Making such statements poses a risk that the information could be false or misleading. Furthermore, as discussed herein, if neither Departing Lawyer nor Law Firm is willing and able to continue with the representation, each would need to comply with rule 1.16(d) before withdrawing as the lawyer(s) for the client.

status of the matter (if one has not been recently given), information on New Firm's billing rates, resources of New Firm, and who would be working on the client's matter(s) at New Firm. Similarly, Law Firm should also provide the client with relevant information related to the future representation. Depending on the situation, this may also include providing the client with an update on the status of its matter (if one has not been recently given), information on any changes to the billing arrangements at Law Firm, how client's matter(s) will be staffed at Law Firm, and competence of 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 Law Firm, Departing Lawyer, or some other firm will continue the representation. (ABA Formal Opn. No. 99-414.)

In some circumstances, Departing Lawyer may move on to New Firm prior to the time that the client has been given notice of the Lawyer's departure or chosen 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 Departing Lawyer has already left Law Firm this includes information related to where Departing Lawyer is now practicing law. In addition, Law Firm should never withhold information from any client that asks for the whereabouts of Departing Lawyer or mislead the client about Departing Lawyer in any way. Each lawyer should also refrain from making any false or misleading comments about the other when communicating to the client. (See, rule 8.4(c): "It is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.")

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 Departing Lawyer to solicit^{9/} any client to come with her to New Firm.^{10/} For any client with whom 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.^{11/} (See rules 7.1-7.3.) Specifically, any lawyer is ethically permitted to solicit in person, by telephone or by email any client with whom the lawyer "has a family, close personal, or prior professional relationship," provided

^{9/} As used in rule 7.3(e), "the terms 'solicitation' and 'solicit' refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services."

^{10/} 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 Departing Lawyer and Law Firm must comply with California law in the post-departure competition for clients.

^{11/} We do not opine here on whether the clients with whom Departing Lawyer has a "prior professional relationship" under rule 7.3 are the same set of clients to whom notice would be required of Lawyer's departure (i.e., to whom Departing Lawyer plays a principal role in the law firm's delivery of legal services). However, we do note that the executive summary to rule 7.3 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 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.

that in the course of said solicitation the lawyer does not make any false or misleading communications to the client.

In addition, neither Departing Lawyer nor Law Firm should solicit, or continue to solicit, any client that has made it known that they do not want to be solicited, or in any “manner which involves intrusion, coercion, duress or harassment.” (Rule 7.3(b).) No lawyer should attempt to keep a client at a law firm by imposing conditions on how or when the 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 letter; or (3) improperly suggest that it would cost the client additional fees or costs to leave the firm. Such actions likely would violate rule 7.3(b).

Furthermore, once a client has chosen his or her counsel as to the particular legal matter at issue, neither Law Firm nor Departing Lawyer should engage in further conduct which could be viewed as violating rule 7.3(b) in an effort to get the client to change their mind about their stated choice for representation.

Finally, questions often arise about whether solicitation is permissible after Departing Lawyer provides notice to 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. However, this situation involves a decided intersection between the ethical rules requiring notice and permitting solicitation, the scope of the fiduciary duties among partners and potential contractual obligations between the parties. Thus, the question of whether such conduct would violate fiduciary duties between partners or amount to unfair competition is an open question that is likely to be a very fact-specific inquiry. It could be argued, however, 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.

V. Duty of Competence

When a client wants to transfer its matter to a departing lawyer at her new firm, the lawyer must ensure that she is competent to handle the representation. (Rule 1.1.) Specifically, Departing Lawyer would need to be sure that she has the skill, support and resources necessary to handle the matter at New Firm. Similarly, if the client elects to stay at Law Firm, it must ensure that there are other lawyers in the firm with the experience and ability to handle the client’s matters once Departing Lawyer leaves Law Firm. If neither Departing Lawyer nor Law Firm has 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. (Rule 1.1(c).) However, there is an obligation to withdraw if continued representation would result in violation of the rules. (Rule 1.16(a)(2).)

VI. Duty of Confidentiality

Pursuant to Business & Professions 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 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, Departing Lawyer should be mindful of her obligations to protect client confidences. This duty often is implicated when a departing lawyer must check for conflicts with a potential new law firm; however, it can also arise in the context of communicating with a 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 to protect and preserve confidential client information.

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

Both Departing Lawyer and Law Firm must protect the interests of clients during the period of transition and must take reasonable steps to assure that the withdrawal of Departing Lawyer, Law Firm, or both, is accomplished in a way that does not prejudice the rights of clients. (Rule 1.16(d).) In addition, both 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. (Rule 1.1.) Thus, Departing Lawyer and Law Firm have a duty to cooperate with each other during the transition process to protect clients’ interests. Law Firm should also “make reasonable efforts” to ensure that the Law Firm has measures in effect “giving reasonable assurance” that all lawyers in the firm comply with these rules and the State Bar Act. Rule 5.1.

Departing Lawyer, for example, may not delay or postpone work that must be done on a matter she expects to follow her to New Firm until after her departure in the hopes of generating more fees for New Firm. (PA Joint Formal Opn. No. 2007-300.) Prior to her departure, Departing Lawyer also should cooperate with any reasonable Law Firm protocols and requests for information from Law Firm where the goal is to evaluate Law Firm’s capacity to continue to service any client, facilitate the transition or comply with Law Firm’s ethical obligations to clients.

However, Law Firm may not, after being notified of Departing Lawyer’s intent to leave, render Departing Lawyer’s continued representation of any client unreasonably difficult or impossible. For example, Law Firm should not deprive Departing Lawyer access to documents or information needed to carry out the continued representation; nor should Law Firm take Departing Lawyer off of an ongoing matter that she is principally handling before she has actually left Law Firm, unless the client has already made the choice to stay with Law Firm notwithstanding Lawyer’s departure.

VIII. Conflicts of Interest

Various potential conflict issues may arise during any attorney transition. It is imperative that a detailed conflicts check is conducted with respect to Departing Lawyer’s client relationships and those of New Firm that she will be joining. Such a comprehensive inquiry should not only bring to light whether any of Departing Lawyer’s clients will have a conflict or potential conflict with New Firm, but also whether Departing Lawyer may have a conflict with any clients of New Firm by virtue of its current, and sometimes former, client relationships. (See rule 1.7 for discussion on what constitutes a conflict with a client.) Departing Lawyer and New Firm also should consider whether any screening protocols should be implemented once Departing Lawyer joins New Firm (rule 1.10) and whether there are potential conflicts with respect to prospective clients (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 Departing Lawyer must provide information to New Firm related to her present and former client relationships in order for the New Firm to run a conflicts check, Departing Lawyer should be mindful of her duties under rule 1.6.¹² 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.

IX. Withdrawal by Law Firm or Departing Lawyer

Most attorney transitions involve the termination of the attorney-client relationship by either Departing Lawyer, Law Firm, or both, which requires that all lawyers involved in the transition comply with rule 1.16.¹³ Specifically, 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; and
- Refunding any unearned fee

In situations where neither Departing Lawyer nor 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. Departing Lawyer and Law Firm must bear in mind the ethical obligations regarding competent and diligent representation, communication, and termination of representation.

X. 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,

^{12/} ABA Formal Opinion 09-455, entitled “Disclosure of Conflicts Information When Lawyers Move Between Law Firms,” may be instructive and provide guidance on how to best navigate disclosure of confidential information in order to avoid conflicts. However, it should be noted that the ABA model rule 1.6 is not identical to California’s rule 1.6, and, as stated in section VI above, California lawyers have an independent obligation to maintain client confidences under Business and Professions Code section 6068(e).

^{13/} In circumstances where the client chooses to remain at Law Firm, notwithstanding the departure of Lawyer, the client representation has not been terminated with Law Firm and Departing Lawyer is not obligated to comply with rule 1.16(e).

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 Departing Lawyer or retains another firm, 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, Law Firm and Departing Lawyer should have reasonable access to the file in order to protect the client's interests. 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, Law Firm should be given reasonable notice and an opportunity to copy the file. However, 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.

In addition, if the client is leaving a 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 [262 Cal.Rptr. 702].) 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 California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 1005-06 [24 Cal.Rptr. 668]; See also Cal. State Bar Formal Opn. No. 1994-134 and Cal. State Bar Formal Opn. No. 2001-157.)

CONCLUSION

The client's right to the counsel of its choice and the protection of the client's best interests are the ethical principles that should guide any attorney departure. Departing Lawyer and Law Firm each have ethical obligations related to the departure and must prioritize their ethical obligations to clients over their own competing interests. These ethical obligations include properly notifying relevant clients of the departure, protecting client confidences, addressing conflicts of interests with clients, ensuring that clients continue to have competent representation, and avoiding reasonably foreseeable prejudice to the rights of clients during any changes in the representation. Both Departing Lawyer and Law Firm also have a duty to cooperate in the transition of any client matter.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.

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From: Eaton, Dan <eaton@scmv.com>
Sent: Wednesday, August 21, 2019 1:52 PM
To: Marlaud, Angela
Subject: Proposed Formal Opinion Interim No. 13-0003

Good opinion. I have no substantive suggested revisions. Minor nit: The word "principle" at III, C, p. 6, the third line down, should be "principal."

Dan Eaton

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