KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-424
Issued: March 2005

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 8.3, which was renumbered to Rule 8.4. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Subject: Departure from a Law Firm

Question I.A.:When a lawyer terminates his or her relationship with a private law firm[1], must the departing lawyer, or the firm, communicate with current clients regarding the departure?

Answer: Yes. See discussion below.

Question I.B. When a lawyer terminates his or her relationship with a private law firm, may the departing lawyer communicate with individuals other than current clients, including former clients and "firm" clients, regarding the departure?

Answer: Qualified Yes. See discussion below.

Question II. When a lawyer terminates his or her relationship with a private law firm to continue in private practice, may the departing lawyer take the files of current clients whom the departing lawyer is representing?

Answer: Qualified Yes. See discussion below.

References: SCR 3.130-1.4, 1.10, 1.16, 5.1, 5.6, and 8.3; ABA Formal Opinion 99-414 (1999); S.C. Ethics Op. 02-17 (2002); Ct. Ethics Op. 00-25 (2000); Pa. Ethics Op. 99-100 (1999); Ohio Op. 98-5 (1998); Philadelphia Ethics Op. 92-8 (1992); N.Y. Co. Lawyers' Assn. Op. 679 (90-4) (1990).

[1] This opinion is limited to ethical issues arising when a private practitioner terminates his or her relationship with a private law firm. Although the issues facing departing government and entity lawyers are not addressed, it is noted that all lawyers, irrespective of where they work, have a responsibility to protect the interests of their clients upon terminations of the relationship. SCR 3.130-1.16(d).

Opinion

Traditions within the legal community have changed dramatically over the last fifty years and lawyers no longer join firms with the expectation that they will remain with the same firm for their entire career. The lateral movement of lawyers, from one practice to another, presents a number of ethical and legal issues to be considered by both the departing lawyer and those who remain behind. There are essentially three types of ethical issues to be addressed in these situations. One relates to the duties owed to current client by both the departing lawyer and the private law firm. These include the duty to communicate and keep the client informed and to otherwise protect the client's interests. Another issue relates to the propriety of the departing lawyer communicating with the public (including former and firm clients) about his or her changed affiliation and availability. Finally, there are issues related to the possession of client files.

While this opinion focuses on a lawyer's ethical duty to a client and communication with the public, the Committee acknowledges that there is an equally important set of issues relating to the economic and legal relationship between the departing lawyer and the former law firm. There may be questions as to the allocation of fees, the notice the departing lawyer must give to the firm, and entitlement to various firm assets. Lawyers who practice together have fiduciary responsibilities to one another and they have the duty to conduct themselves ethically, keeping in mind the mandates of RPC 8.3 (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation) and 5.6 (prohibiting restrictions of the right to practice law*)*. Much has been written about lawyers' duties to one another, both from an ethical standpoint and from a legal perspective. (*See, e.g.,* Robert W. Hillman, Hillman on Lawyer Mobility – The Law and Ethics of Partner Withdrawals and Law Firm Breakups (Second Edition 1998) and Robert W. Hillman, Loyalty in the Firm: A Statement Of General Principles on the Duties of Partners Withdrawing from Law Firms, 55 Wash. & Lee L. Rev. 997 (1998)). Although these economic and fairness issues are significant, they are primarily legal questions beyond this committee's authority and are not addressed in this opinion.

I. Communicating with Clients

Although Questions I.A. and I.B. both relate to communication about the lawyer's departure, they approach the issue from very different perspectives. Question I.A. asks whether a departing lawyer or the firm must communicate with current clients[2] regarding the departure. Although the question is phrased in terms of communication, the underlying issue relates to both communication and continued representation.

When a lawyer leaves a firm,[3] the relationship between the parties will change, but both the departing lawyer and the firm must take reasonable steps to ensure that client interests

[2] At the time of a break-up, it is very likely that the departing lawyer will view certain current clients as "his," and the firm will regard the same clients as "firm clients." Irrespective of how the departing lawyer or the firm views a particular client, the client is not property and does not "belong" to anyone.

[3] The inquiry assumes that there is a legal relationship between the departing lawyer and the firm – i.e., the departing lawyer is a part of the organization as an employee, partner, shareholder, member or the like. Lawyers who merely share office space do not normally have the same duties as those described in this

are protected and that the requirements of RPC 1.16 are satisfied.[4] To that end, each client for whom the departing lawyer currently is responsible, or for whom the lawyer plays a significant role in the firm's delivery of services, must be notified of the departure and of the client's right to determine who will represent him or her in the future. (This is not to suggest that notice must be given to every client for whom a departing lawyer has done any work. Where the departing lawyer's connection with a client is so limited that the client will not be affected by the departure – for example where the departing lawyer's only involvement with a client was to undertake some research at the request of a supervising lawyer—no notice is required).

This duty to notify the client arises from the lawyer's duty to keep the client reasonably informed under SCR 3.130-1.4[5] and the client's right to counsel of his or her own choosing, as reflected in SCR 3.130-1.16[6] and 5.6.[7] Not only will the departing lawyer have an obligation to make sure that the client is informed about the change, but those who remain with the firm may have obligations as well. As noted by ABA Formal Opinion 99-414 (1999), "firm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, [8] and may have obligations as well under other law, to assure to the extent reasonably practicable that the withdrawal from the firm is accomplished without material adverse effect on any client's interests…." Recognizing this joint responsibility, the ABA Formal Opinion states that notice may come from the departing lawyer, from the firm, or from both. The Committee agrees with the ABA that joint notice is preferable, but recognizes that this is

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opinion. Obviously office sharers need to keep their clients informed of the office location, but there is no choice to be made by the client when office sharers part ways because, unlike the firm, office sharers do not have responsibilities for the clients of one another. If, however, office sharers give the appearance of a firm, then the same duties described above may apply. See SCR 3.130-1.10, Comment [1]. But see, KBA E396 (1997) and KBA E-311 (1986) describing the ethical problems of such associations.

[4] SCR 3.130-1.16(d) provides "(u)pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned." *See also,* Barbara Rea, Breaking Up is Hard to Do, *Ky. Bench & Bar* 36 (Spring 1996) on the lawyer's responsibility upon termination of the relationship with the client.

[5] SCR 3.130-1.4 provides:

> (a) A lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[6] SCR-3.130-1.16, Comment [4], provides, in part, "[a] client has a right to discharge a lawyer any time, with or without cause, subject to liability for payment of the lawyer's services."

[7] See Comment [1] expressing the view that one of the policy reasons that the rules prohibit restrictions on the right to practice law (non-competes) is that it "limits the freedom of clients to choose a lawyer."

[8] See SCR 3.130-5.1, which provides, in part:

> (a) A partner in a lawyer firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

not always practical. The critical point is that the client receives notice from someone associated with the firm and that the notice impartially and fairly provides the information necessary for the client to make an informed decision about future representation.

The Committee has reviewed a number of ethics opinions[9] from other jurisdictions on the subject of the notice's content and method of communication and concluded that the following principles should be followed where notice to current clients is required*:*

- Notice may be given in-person or in writing. Although in-person communication with current clients is not prohibited under RPC 7.09(1), the Committee believes that all parties will be better served by written notice.[10]

- Communication should not urge the client to terminate his or her relationship with the firm, but may indicate the departing lawyer's willingness and ability to continue to represent the client.[11]

- Communication must clearly state that the client has the right to decide who shall represent him or her in the future – this includes the firm, the departing lawyer or another lawyer.

- All communication with clients (whether initiated by the departing lawyer or the firm) should be respectful of the rights and professional abilities of all concerned and should not be disparaging in any way.

ABA Formal Opinion 99-414 concludes by noting that a lawyer does not necessarily violate the Rules of Professional Conduct by advising current clients of the departure, even before giving notice to the firm. Nevertheless, it reminds lawyers that such pre-notification communications may violate the lawyer's fiduciary duties or other legal responsibilities to the firm and expose the lawyer to potential civil liability. The Opinion emphasizes that "[b]efore preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm's information or other property." The Committee concurs in those cautions and strongly encourages departing lawyers to notify the firm before notifying clients.

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[9] See, e.g., ABA Formal Opinion 99-414; S.C. Ethics Op. 02-17 (2002); Ct. Ethics Op. 00-25 (2000); Pa. Ethics Op. 99-100 (1999); Ohio Op. 98-5 (1998); Philadelphia Ethics Op. 92-8 (1992); N.Y. Co. Lawyers' Assn. Op. 679 (90-4) (1990).

[10] Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Opinion 99-100 (1999) acknowledges the that there is no prohibition against in-person contact with existing clients, but the Committee notes that written communications will provide a record of such communications, presumably so there is no basis for dispute as to what the client was told regarding the departure.

[11] The departing lawyer must be careful to avoid conflicts of interest occasioned by his or her new affiliation. *See,* SCR 3.130-1.10.

The above discussion relates to communications between the departing lawyer, or the firm, and current clients. Question I.B. raises issues with regard to communications with former clients (those for whom the departing lawyer has done significant work in the past), firm clients (those who have been or are represented by other lawyers in the firm, but for whom the departing lawyer has done no work) and others. The duty to communicate under RPC 1.4 would, by its terms, appear to apply only to current clients. Thus a departing lawyer has no obligation to communicate about his or her departure with former clients or with firm clients. On the other hand, the departing lawyer may wish to advise former clients, as well as firm clients with whom the lawyer has had no association and others, of the change in affiliation. In such a cases the lawyer must consult Kentucky's advertising rules, contained in SCR 3.130-7.01- 7.50 and SCR 3.130-8.3 (misconduct). Of particular applicability is SCR 3.130-7.09 (direct contact with prospective clients); SCR 3.130-7.15 (communications concerning a lawyer's services); SCR 3.130-7.20 (advertising); and SCR 3.130-8.3 (misconduct).

II. Retention of Client Files

One of the most difficult questions in any departure relates to the possession of client files – may the departing lawyer take the files to the new firm or does the former firm have the right to retain the files? As a general rule, client files and property must be handled in accordance with the client's wishes and this is a matter that should be addressed in conjunction with the client's decision regarding future representation. SCR 3.130-1.16(d), dealing with termination of representation, provides in part that "[u]pon termination of the representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as … surrendering papers and property to which the client is entitled…." (*See*, KBA E-395 (1997) and KBA E-235 (1980) for examples of items that must be returned to the client). Thus, if the client effectively terminates his or her relationship with the former firm and elects to be represented by the departing lawyer, the departing lawyer may take the client's active file to the new firm. Likewise, where the client elects to remain with the former firm, the firm is entitled to keep the file.

In order to protect the client, the departing lawyer and the firm, the removal of any files from the firm should be authorized by the client in writing. The fact that the departing lawyer may have authority to remove a file, because the client has authorized it, does not mean that the firm has no interest in it. Likewise, the departing lawyer may have an interest in the file where the client has elected to be represented by the firm. Irrespective of who is entitled to the original file, the other may have a legitimate interest in its content, because, among other reasons, it would be essential in defending a later malpractice action.[12] To safeguard all of these interests, the departing lawyer should not remove files without giving notice to the firm. This will assist in an orderly transition, permit the firm or the departing lawyer to make copies and ensure that the removal is properly documented. Moreover, all lawyers must take care to ensure that confidential information is protected as required by SCR 3.130-1.6 and 1.9.

[12]See, e.g., D.C. Bar Legal Ethics Comm. Op. 168 (1986) (concluding that a firm may copy transferred files at its own expense).

One final issue may arise with respect to client files. Where the client elects to follow the departing lawyer in his or her continued private practice, the former firm might assert that it is entitled to retain "the file" until such time as it has been paid for services previously rendered. Although the client has the unfettered right to terminate the relationship with the former firm, he or she is still liable for payment for past services. *See*, SCR 3.130-1.16 Comment [4]. This does not mean, however, that the former firm may hold the client's file hostage. Comment [9] to SCR 3.130-1.16 provides that a "lawyer may retain papers as security for a fee only to the extent permitted by law." In KBA E-395 (1997), this Committee noted that although Kentucky law provided for "charging liens" (a lien on funds or property recovered), there was no similar provision for an attorney to assert a "retaining lien." The Committee went on to note that even in those states where the assertion of a retaining lien is legal, there may be ethical limits on its exercise, citing ABA Annotated Model Rules pp 257-58. It concluded that "[w]hile the lawyer is entitled to reimbursement for costs incurred … the lawyer should 'surrender' the file even if reimbursement is not forthcoming." The one exception noted in KBA E-395 relates to "work product." Where a client has not paid the former firm for specific work, the firm is entitled to retain that work product for which it has not been paid. All other materials in the file must be provided to the client or his or her lawyer upon termination.

Both Question I and Question II frequently involve conflicts between departing lawyers and their former firm – both are trying to retain lucrative clients, maintain financial stability and protect their professional reputations. Although such conflicts may be unavoidable, all lawyers involved must remember that their primary obligation is to the client and that each has a duty to protect the client's interest.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.