RISK MANAGEMENT CORNER

Moving Forward . . .

by John J. Brandt

We live in a much more mobile society than we did twenty years ago. Employees frequently move from company to company and from coast to coast.

And so do lawyers. Twenty years ago, after a young lawyer graduated from law school and passed the Virginia Bar, he or she carefully interviewed at law firms and made what he or she believed would be a "lifetime" decision on employment. Midlevel partners in law firms twenty years ago rarely would consider leaving a firm, and it was virtually unheard of that senior partners would leave their own firm to begin a new legal adventure.

However, all of that is changing as young lawyers leave firms, frequently with another associate, to begin their own. Midlevel partners, who have developed a specialty niche conclude that they can do better by beginning their own firm. And even senior partners believe they may be happier in their later years by starting a small firm or becoming of counsel to another law firm.

These departures result in hurt feelings, contentious relationships and a fight for the right to continue representation of clients, some of whom represent an enormous amount of fee income. Important to all lawyers, these disputes invariably concern the Virginia State Bar and expose attorneys to violations of the Rules of Professional Conduct.

To evaluate the problems which arise, imagine that a thirty-person law firm in Norfolk has practice groups in criminal defense, plaintiff personal injury and estate planning. Bill and Kathy are young attorneys in the plaintiff personal injury section, which comprises ten lawyers: a senior partner, a midlevel partner and eight associates, of which Bill and Kathy are senior, each having been employed at the firm for six years. They are convinced that partnership has permanently eluded them and that they can do better professionally and economically if they leave the firm and begin their own firm. They have been planning their departure for four months and have been careful not to perform any planning (location of new firm, new legal entity, letterhead and staff) on their current firm's time or premises. The work is all done in the evenings and on weekends. Unfortunately—or fortunately (depending upon your viewpoint), the senior partner discovers the plan and, after discussion at a hastily-called partnership meeting, the firm terminates Bill and Kathy immediately, takes their keys and evicts them forthwith, all the while reminding them that they signed a "three-hundred-mile covenant not to compete" when they were hired. Furthermore, Bill and Kathy are warned that all client files belong to the law firm and that the firm will take over the representation of all personal injury files relating to the multiple cases then being pursued by Bill and Kathy.

Shaken by the confrontation, Bill and Kathy take consolation in the belief that many of their clients will continue representation with them, based upon confidential telephone calls they had with each one before the lawyers were terminated. In those conversations, Bill and Kathy encouraged the clients to stay with them in their new firm and said nothing about the option of remaining with their old firm.

What are the ethical implications? First of all, neither Bill and Kathy nor their old law firm, "own" any client. Clients own themselves and always retain the right to terminate their attorney "at any time, with or without cause." Virginia Rules of Professional Conduct, Rule 1.16—comment [4] (2006-07). Once this basic premise is understood, the civilized and ethical steps to follow when a lawyer leaves a firm can be reasonably developed.

The firm violated Rule 5.6 when it obtained an agreement from Bill and Kathy not to compete. Any such agreement signed by the two associates is unenforceable unless it deals with retirement benefits.

LEO 1403 instructs that a firm cannot direct its attorneys not to contact a client regarding their termination until the firm had first contacted the client. See also Rule 1:16(d). The corollary appears to be that Bill and Kathy had the ethical right, if not a duty, to contact clients they had been representing to give notice that they were leaving the firm. However, they should have been cautious to inform the clients that they had three choices: leave with Bill or Kathy; stay with the firm; or select another attorney. LEO 1506. A "neutral letter" from the firm and Bill and Kathy is the preferred route, but may not be realistic in light of the emotionally charged atmosphere which typically pervades these situations.

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Bill and Kathy's telephone conferences with clients were defective because, as described above, they did not enunciate that each client had the option of continuing with the law firm or selecting another attorney. They also should have informed the client that they would be approaching the firm about a joint neutral letter to each client. If the firm refuses (in our hypothetical, Bill and Kathy were promptly fired), then they should send a neutral letter—as should the firm—and request a quick decision by the client.

File Access

The firm may not hold a client's file hostage and must immediately give the file to Bill or Kathy upon a client's decision to retain them. Rule 1:16(e). Remember, the file is the property of the client. Original documents must be returned; copies of all other documents must be made available. A reasonable copy fee may be imposed, but nonpayment is not a basis to refuse to turn over the file. Internal memoranda and billing records need not be released. The law firm may not condition the production of the client's file upon the client signing a release of liability. LEO 1332. Nor may the firm refuse to give Bill and Kathy's contact information (address and telephone numbers) upon request. LEO 1506.

As to fees owed by the clients whose work was being done by Bill and Kathy, the firm is probably entitled to a *quantum merit* payment for the time spent by Bill and Kathy up to the time of their departure. If the client refuses to pay the firm its *quantum merit* fee, the firm can ethically garnish that client's funds held in Bill and Kathy's trust account, after obtaining a judgment against the client—although this disposition is not recommended. LEO 1807. Contrastingly, Bill and Kathy are probably entitled to a division of fees earned, but not yet billed, at the time of their withdrawal. LEO 1556.

Ideally, when lawyers decide to leave their firms, all attorneys involved will act professionally, keep in mind that the client's interests are supreme, and aspire to act as Virginia ladies and gentlemen. ⚖