

Committee Opinion
April 20, 1990

LEGAL ETHICS OPINION 1332

PARTNERSHIPS/EMPLOYMENT
AGREEMENTS – ADVERTISING AND
SOLICITATION – FEES – FILES –
LIMITING PROFESSIONAL LIABILITY:
CONDUCT REGARDING DISSOLUTION
OF LAW FIRM.

You have advised that Partner A, with the concurrence and at the request of the other partners, withdrew from a professional legal corporation which had consisted of three partners and one associate prior to the withdrawal of Partner A. In addition, you advised that all written retainer agreements with clients are in the firm name, although, generally only one attorney performs services or is primarily responsible for a particular client and/or case. Finally, you have indicated that the partners orally agreed to notify, in writing, the withdrawing partner's clients of the dissolution and to offer each the choice of continuing with the firm, continuing with the withdrawing partner, or choosing another lawyer or law firm.

You have asked the Committee to consider ethical implications involving several issues related to the partnership dissolution.

Remaining Partners' Contact with Clients Serviced Primarily by Withdrawing Partner.

You have asked if, prior or subsequent to the dissolution of the partnership, it is ethically permissible for a remaining partner to (a) contact a client serviced primarily, if not exclusively, by the withdrawing partner; (b) attempt to influence the client to remain with the firm by informing the client, in writing, that the firm will continue to represent him; and (c) neglect to inform the client of his right to select counsel of his choice, which may include the departing attorney. You have also inquired as to the propriety of the remaining partner arranging a meeting with the client, possibly in order to attempt to influence the client to retain the firm for representation on a pending matter originated by the withdrawing partner, when the client contacts the firm to advise that his choice is to continue with the withdrawing partner. Finally, you have asked about the propriety of the remaining partner's arranging to meet with a client of the withdrawing partner when that client arrives at the former firm's offices to pick-up certain files as part of a document production in a pending matter.

The appropriate and controlling Disciplinary Rule relative to the above inquiry is DR:2-103(A) which provides that a lawyer shall not, by in-person communication, solicit employment for himself, his partner, or associate or any other lawyer affiliated with him or his firm from a nonlawyer who has not sought his advice regarding employment of a lawyer if (1) such communication contains a false, fraudulent, misleading or deceptive statement or claim; or, (2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct in light of the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the

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communication is made. Thus, the Committee believes that if the client contact was made in-person or by telephone and the attorney attempted to influence or persuade the client to remain with the firm, such communication would be improper under the Code of Professional Responsibility's mandates regarding acceptable communication and solicitation of employment. The Committee is of the opinion that such contact is especially unacceptable if couched in terms of giving notice to a client of a change in the firm as in the case of a dissolution, or the departure of an attorney who is directly responsible for the representation of a client.

The Committee directs your attention to State Bar of California Opinion 1985-86 (undated), which provides appropriate guidelines for a firm's notice of dissolution to a client. The opinion states in part that nothing in the written notice should contain false, misleading or deceptive advertising. Also, where feasible, the attorneys should prepare a joint notice which (1) identifies the withdrawing attorneys; (2) identifies the field in which the withdrawing attorneys will be practicing law, gives their addresses and telephone numbers; (3) provides information as to whether the former firm will continue to handle similar legal matters, and; (4) explains who will be handling ongoing legal work during the transition. In addition, the opinion states that "a lawyer . . . may not attempt to influence the client's choice of counsel by communicating with clients in person, by telephone or through agents." (See also LE Op. 381, LE Op. 1113 for other examples of permissible communication or notice to clients.)

Remaining Partners' Contact with Opposing Counsel in Pending Matters.

You have inquired if it is ethically permissible for a remaining partner to contact opposing counsel in a pending matter to inform him that the remaining partner will be the attorney for firm's client after client has informed remaining partner that he wishes to be represented by the withdrawing partner. In addition, you have asked if one of the remaining partners may enter into settlement negotiations with an opposing party and also request that the client, who has sought representation by the withdrawing partner, assign a portion of the proceeds of that settlement to the (remaining) firm to satisfy an outstanding bill for legal services.

The appropriate and controlling Disciplinary Rules relative to this second issue are DR:1-102(A)(4), and DR:2-105(D) governing misconduct and sharing fees between lawyers respectively. The rules provide as follows:

DR:1-102(A)(4)

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

DR:2-105(D)

A division of fees between lawyers who are not in the same firm may be made only if the client consents to the employment of additional counsel; both attorneys expressly

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assume responsibility to the client; and the terms of the division of the fee are disclosed to the client and the client consents thereto.

The Committee is of the opinion that unauthorized communications made to opposing counsel in a pending matter may be deceitful and a misrepresentation. Such deceit and misrepresentation may be determined by an appropriate finder of fact to reflect adversely on the lawyer's fitness to practice law. Assuming that the opposing party was not represented by counsel and, therefore DR:7-103(A) (which prohibits a lawyer's direct communication with a represented party) is not an issue, the Committee is of the opinion that unauthorized settlement negotiations and any assignment of settlement proceeds to the remaining firm may be violative of DR:1-102(A)(4). Furthermore, the committee believes an assignment of settlement proceeds to the former firm may be violative of DR:2-105(D) since, under the facts of the inquiry, there is no evidence that the client requested additional counsel, nor is there any indication that both attorneys agree to assume responsibility to the client or that the client had consented to an agreed upon division of fees between both lawyers. Thus, while the assertion of a lien against the proceeds by the former firm may be permissible, the Committee views any attempt to influence the client to execute an assignment of settlement proceeds as potentially improper. (See also LE Op. 794)

Requirement of Release of Liability for Previous Legal Representation.

You have requested that the Committee opine as to the propriety of the former firm's requirement that the client execute a release of liability to the firm for all previous legal representation and all representations made by the departing partner of the firm prior to the firm's release of that client's files to the withdrawing partner.

The Committee is of the view that such an agreement is *per se* unethical and violative of DR:6-102(A) which provides that a lawyer shall not limit his liability to his client for his personal malpractice. Ethical Consideration 6-6 [EC:6-6] provides further guidance in urging, first, that a lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice, and then goes on to state that a lawyer who has handled the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who has not should not be permitted to do so.

Requiring Payment of Legal Fees Prior to Releasing Client Files.

You have asked if the former firm may require payment of outstanding legal fees prior to releasing the client's files to the withdrawing partner in active pending matters in which court hearings have been scheduled.

Disciplinary Rule 2-108(D) [DR:2-108] is the appropriate and controlling rule regarding this inquiry. That rule provides that upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including giving reasonable notice to the client, allowing time for employment of other

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counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers of the client to the extent permitted by applicable law. The Committee is of the opinion that prior LE Op. 1176 is dispositive of this issue. That opinion indicates that, even if applicable law permits the attorney to retain the client's papers, under certain circumstances, retention of papers relating to the client may be inconsistent with taking "reasonable steps for the continued protection of a client's interest," as required by DR:2-108(D). It is thus the opinion of the committee that, in certain circumstances where fees are owing, the attorney must make the file available to the client or his designee for review and possibly for copying, but may not be required to release the file if to do so would defeat the attorney's legal rights to preserve any statutory or common law lien. See also LE Op. 1176. Thus, conditioning the release of client files upon payment of past legal fees when the matter is pending a scheduled hearing would be detrimental to the client and, as such, violative of DR:2-108(D) if the client cannot meet the obligation financially.

Withholding of Departing Partner's Severance Pay for Remittance of Incurred Costs.

You have asked that the Committee consider the propriety of the former firm's withholding, from severance pay due the withdrawing partner, of advanced costs (such as court reporter fees) incurred by the firm on behalf of a client but not yet remitted to the third party by either the firm or the client.

In pertinent part, Disciplinary Rule 5-103(B) [DR:5-103] provides that in contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that he may guarantee the expenses of litigation provided that the client remains ultimately responsible for such expenses. Since a lawyer may not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for his client (DR:5-103(A)), a client must be ultimately liable for expenses such as court reporter fees. Whether the departing attorney advances such costs and later bills the client or whether the former firm chooses to advance the costs and later bill the client, is a business decision and any subsequent responsibility of the withdrawing partner for such fees is a legal matter. Neither situation poses any ethical question and therefore is not within the purview of this Committee.

Restricting Withdrawing Partner's Access to Office, Files, and Personal Possessions.

Finally, you have inquired if the former firm, on the day of the dissolution, may change the locks for the office and deny the withdrawing partner access to office and files. You have also inquired as to the propriety of a remaining partner's culling through the withdrawing partner's files and personal possessions during that time.

The Committee is of the view that if access to office and files of clients was being denied even during office hours, such conduct may be violative of DR:2-108(D) if a finder of fact were to determine that the intention was to preclude access to or to sequester the client files or copies of client files from the withdrawing partner. Whether

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the remaining partner was within his rights to search through the departing attorney's personal possessions is a legal question beyond the purview of this Committee.

In conclusion, the Committee directs your attention to DR:1-103(A) regarding a lawyer's obligation to report another attorney's misconduct. The rule mandates that if the ethical violation raises a substantial question as to that lawyer's fitness to practice law in other respects, a lawyer having such information is mandated to report such information to the appropriate professional authority, unless such information is protected by Canon 4 (Preservation of Confidences and Secrets of a Client).

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Legal Ethics Committee Notes. Rule 1.6(e) governs a lawyer's duty to provide files to a former client.