

CHANGING LAW FIRMS or “BREAKING UP IS HARD TO DO”¹: ETHICAL ISSUES WHEN LAWYERS MOVE BETWEEN LAW FIRMS

“When one door of happiness closes, another opens, but often we look so long at the closed door that we do not see the one that has been opened for us.” Helen Keller

James M. McCauley, Ethics Counsel
Virginia State Bar

According to Robert W. Hillman, the nation’s foremost authority on “lawyer mobility,” “the law and ethics of lawyer mobility remain a contradictory and perplexing set of principles sorely in need of reconciliation.”² By far the most significant problem is a departing partner “leaving and grabbing,” taking with him or her that which many regard as the firm’s assets—it’s clients. The increasing “free agency” of “rainmaking” partners has led to instability in law firms, leading “to the widespread abandonment of lockstep compensation systems, at least in the United States.”³ Firms that want to stay viable in today’s environment need to accept and anticipate lateral movement between firms as a common and practical reality. Before preparing to leave one law firm for another, the departing lawyer should also inform herself of applicable law other than the ethics rules, including the law of fiduciaries, property and unfair competition.⁴

When a lawyer leaves a firm, the ethics rules and opinions tend to focus more on the rights of clients and less on the fiduciary duties owed to the other lawyers in the firm. Bar counsel generally do not investigate intra-firm squabbles over clients, fees and other issues unless there is a clear violation of duties owed to a client or dishonest conduct associated with a lawyer’s separation from a firm. From a “client-centered” ethical frame work, these are some of the issues raised when a lawyer plans to “jump ship” and leave a firm to join another:

1. *Conflicts of Interest*—when the lawyer that wants to leave negotiates employment with a firm that is representing an adverse party to a client the lawyer or his firm is representing in a pending or active matter. The ABA addressed this issue in Formal Op. 96-401:

A lawyer's pursuit of employment with a firm or party that he is opposing in a matter may materially limit his representation of his client, in violation of Model Rule 1.7(a)(2). Therefore, the lawyer must consult with his client and obtain the client's consent before that point in the discussions when such discussions are

¹ "Breaking Up Is Hard to Do" is a song recorded by Neil Sedaka, and co-written by Sedaka and Howard Greenfield. Sedaka recorded this song twice, in 1962 and 1975, in two vastly different arrangements. The song has been covered by many recording artists and was popularized by The Carpenters and Alvin and the Chipmunks.

² Robert W. Hillman, *Lawyer Mobility*, Preface to 2d Edition at p. viii (Aspen Publish. Co. 2009)

³ *Id.* at 1:7.

⁴ Va. LEO 1822 (2006) *citing* ABA Formal Op. 99-414 (1999).

reasonably likely to materially interfere with the lawyer's professional judgment. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to consult with his supervisor, rather than directly with the client. Generally, the time for consultation and consent will be the time at which the lawyer agrees to engage in substantive discussions of his experience, clients, or business potential, or the terms of a possible association, with the opposing firm or party. If client consent is not given, the lawyer may not pursue such discussions unless he is permitted to withdraw from the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. Lawyers in the law firm negotiating with the lawyer also have a conflict, requiring similar action to resolve, if their becoming associated with the lawyer would cause their firm's disqualification, or if the interest of any of those lawyers in the job-seeking lawyer's becoming associated with the firm may materially limit their representation of a client adverse to the job-seeking lawyer.⁵

2. *Notification and communication with the firm's clients.* Lawyers have a duty to inform or notify active clients when a lawyer that has been working on their matter intends to leave the firm. "Grabbing" refers to when the departing lawyer solicits clients for whom the lawyer has previously worked, to go with him or her to the new firm. "Grabbing" clients suggests that the law firm "owns" the clients that the departing lawyer is soliciting and has a prior claim of their "files." The ABA and other state bar rules that ban a lawyer from soliciting or recommending his or her own employment might be viewed as prohibiting "grabbing" but many of those rules carve out an exception if the person contacted is or has been a client of the lawyer. See ABA Model Rule 7.3(a)(3). The "prior professional relationship" exception in the rule is the hole in which most grabbing activity will occur. Virginia's version of this rule is even less restrictive because in-person solicitation is banned only if the solicitation employs "harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits." Va. Rule 7.3(a)(2).⁶

Now 23 years old, Virginia Legal Ethics Op. 1332 (1990) still remains the principal guidance on the ethical considerations when a lawyer leaves a law firm. However, it is LEO 1506 (1993) that actually couched notification as an ethical duty⁷ and provided guidance on the manner in which clients are to be contacted when a lawyer has announced his or her intent to leave the firm. That opinion recommends a "neutral letter" issued jointly by the firm and the departing lawyer to current clients on whose matters the departing lawyer has worked giving the client the three

⁵ ABA Standing Comm. on Ethics and Prof'l Resp. Formal Op. 96-401 (1996)(opinion syllabus).

⁶ Until July 1, 2013, Virginia imposed a per se ban on in-person solicitation but limited the ban to in-person solicitation only in matters involving personal injury or wrongful death. See former Rule 7.3(f).

⁷ Va. LEO 1822(2006) concludes that the departing lawyer's duty to notify clients is required by Rule 1.4.

options of (1) remaining with the law firm; (2) going with the departing lawyer; or (3) choosing counsel other than the departing lawyer or the law firm. LEO 1332 recommends but does not require that the firm and the departing attorney prepare a joint letter to all appropriate clients that:

- (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.

With near unanimity, state bar ethics opinions say that if a lawyer has played a significant role in a client's representation, she must notify that client of her pending departure.⁸

ABA Formal Op. 99-414 (1999) takes the position that a lawyer leaving a law firm for another is under an ethical obligation, along with responsible members of the firm who remain, to notify clients in whose matters the departing lawyer has played a principal role, that he or she is leaving the firm. ABA MR 1.4 (duty to communicate). The departing lawyer does not violate Rule 7.3 when he or she provides this notification. Ideally, the departing lawyer and the firm will provide "joint notification" to clients with whom the departing lawyer has a current professional relationship. Further, according to the ABA opinion, it may be necessary for the departing lawyer to give unilateral notification if the remaining lawyers will not cooperate. Ky. Bar Ass'n Op. 424 (2005)(discussing the duty to notify and that joint notification is preferable but not always practical); Philadelphia Bar Ass'n Prof. Guidance Comm. and Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp., Joint Formal Op. 2007-300(reaffirming earlier conclusion that the departing lawyer and the firm each bear an obligation to notify clients of departure and "if one fails or refuses to do so, the other one must."); Virginia Legal Ethics Op. 1822 (2006) (In the end, the idea of a joint letter sent by a firm and departing attorney to clients about the upcoming

⁸ More recent state bar ethics opinions include Alaska Bar Opinion 2005-2 (2005), Kentucky Bar Association Opinion Kentucky Bar Association Opinion E-424 (2005), Oregon State Bar Opinion 2005-70 (2005), Joint Opinion 2007-300 (2007) of the Pennsylvania and Philadelphia Bar Associations, South Carolina Bar Opinion South Carolina Bar Opinion 02-17 (2002), and Virginia Legal Ethics Opinion 1822 (2006). The Florida State Bar has adopted an ethics rule that specifically addresses procedures for lawyers who depart from or engage in the dissolution of a law firm (see Rule 4-5.8 of the Florida Rules of Professional Conduct). With near unanimity, these opinions state that under Rule 1.4. Communication, a lawyer who has played a significant role in a client's representation must notify that client of his pending departure. However, Connecticut Bar Association Opinion 00-25 (2000) states that a lawyer may but is not required to notify clients of her upcoming departure from the law firm. Most state and local ethics opinions also agree that although it is not always possible, a joint notice from both the firm and the departing lawyer is preferable. All opinions note that both the departing lawyer and the firm must make it clear that clients have the ultimate right to decide who will represent them in the future.

departure is only a strong Committee recommendation, and not a requirement. Either the departing attorney or the attorneys in the remaining firm will have met their independent 1.4 obligation to provide notice to the clients of the employment change by unilaterally sending an appropriate letter).

Accordingly, the departing lawyer does not violate any Rules of Professional Conduct by notifying his or her current clients of the impending departure in-person, in writing or by telephone. The opinion makes clear that notification can be made *before the lawyer leaves the firm*, with these qualifications:

- A. The notice should be limited to clients whose active matters the lawyer has direct responsibility for at the time of the notice.
- B. The departing lawyer should not urge the client to sever its relationship with the firm, but may indicate that he or she is willing and prepared to continue responsibility for those matters or which he or she is currently working.
- C. The departing lawyer must make clear that the client has the right to make the ultimate decision who will continue or complete their matters.
- D. The departing lawyer may not disparage the law firm.

The opinion acknowledges the tension between its conclusion that the departing lawyer may contact clients before departure and the fiduciary norm of limiting pre-departure solicitation (grabbing) of clients. The thrust is that the departure should be “imminent” before notification is given; however, a particular client’s matter may require that notice be given sooner. However, one can argue that in many situations the current clients do not have an immediate *need* to be advised of the lawyer’s departure plans and pre-departure contacts with those clients for the purpose of “luring” those clients away from the firm breaches the fiduciary duty of loyalty and is an improper competition with the remaining lawyers in the firm. *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1264 (Mass. 1989) (permitting lawyers' "logistical arrangements" made before they left their firm, but condemning the lawyers' secret arrangement among themselves to lure away law firm associates and clients). See Robert W. Hillman, *Law Firms and Their Partners; The Law and Ethics of Grabbing and Leaving*, 67 Tex. L. Rev. 1 (1988).

The ABA Opinion created quite a stir as some read the opinion to say the departing lawyer was “ethically obligated” to communicate with firm clients before announcing his departure to the remaining lawyers. See *e.g.*, Conn. Bar Ass’n Comm. on Prof. Ethics, Informal Op. 00-25 (2000)(declining to follow ABA Formal Op. 99-14 insofar as the opinion mandates pre-departure notification of clients); Rules Regulating the Florida Bar, Rule 4-5.8(c)(2006)(requiring a departing lawyer to negotiate in good faith with the firm for joint notification of clients).

To sum up, the ABA opinion views these ethical issues as critical when a lawyer leaves her law firm:

- disclosing her pending departure in a timely fashion to clients for whose active members she is currently responsible or plays a principal role in the current delivery of legal services;
- ensuring that the matters to be transferred with the lawyer to her new firm do not create conflicts of interest in the new firm and can be competently managed there;
- protecting client files and property and ensuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal;
- avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; [and]
- maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the client's former firm.

LEO 1403 instructs that a firm cannot direct a lawyer not to contact a client regarding his termination until the firm had first contacted the client. In that opinion, the committee held that the firm's employment agreement with the departing associate forbidding contact with any firm clients regarding his termination until the client has made her election amounts to an unethical restriction on the lawyer's right to practice law under DR 2-106(A) [now Rule 5.6(a)]. In addition, the committee held that the law firm could not ethically require that the client first contact the firm before communicating with the departing lawyer.

As Professor Hillman notes: “[t]he freedom of clients to choose, discharge or replace a lawyer borders on the absolute.”⁹ This principle sets up and establishes the duties the remaining lawyers face when a client elects to have her matters completed by the departing lawyer.

3. Current Clients' Right of Access to Contact Information of Departing Lawyer, Departing Lawyer's Right of Access to Current Client Contact Information and Delivery of Files

In LEO 1506, the committee held that the remaining lawyers violated DR 2-18(D) [now Rule 1.16(d)] by refusing to give clients contact information when they asked how they could reach the departed lawyer. By electing to go with the departing lawyer, the client had “terminated” the remaining lawyers' representation and therefore they owed a duty to take reasonable steps for the continued protection of the former client including providing the departed lawyer's contact information to the client. The committee also held that by withholding such information, the remaining lawyers violated DR 5-106(B)[now Rule 1.8(f)] which provides that a lawyer shall

⁹ *Id.* at 2:24. A court has held that the client's right to decide to remain with the law firm or go with the departing lawyer means that the law firm has no cause of action for business interference if the client goes with the departing lawyer. *Koehler v. Wales*, 556 P.2d 233, 16 Wn.App. 304 (Wash. App. 1976).

not permit a person who recommends, employs, or pays him to render legal services for another to regulate his professional judgment in rendering such legal services. In having been terminated by the client, the law firm was a third party and could not control or interfere with the client's relationship with their attorney of choice—the departing lawyer. This theme may also be found in opinions that address the division of fees between the departing lawyer and the remaining lawyers.

LEO 1506 also indicates that the remaining lawyers may not withhold from the departing lawyer contact information of those clients that have made an election to go with the departing lawyer. Again, this is because of the remaining lawyers' duty, upon termination of representation, to take reasonable steps for the continued protection of the former client's interests. DR 2-108(D), Rule 1.16(d). Likewise, LEO 1332 holds that it is improper for the remaining lawyers to deny the departing lawyer access to the office during normal business hours to preclude access to client files, again citing DR 2-108(D).

LEO 1332 took up the issue whether the remaining lawyers may withhold the client's file for non-payment of fees and assert a common law retaining lien. The answer 1332 gave was “no,” not if the former client or the departing lawyer needed access to the file for “the continued protection of the client's interest.” This part of the opinion, to the extent that it qualified the former client's right to the file, is overruled by the adoption of Rule 1.16(e) of the Rules of Professional Conduct in 2000 making clear that the law firm must deliver a copy of the client's file upon request, *even if the client owes fees to the remaining lawyers*. Thus, if the remaining lawyers withhold the files of clients that have elected to go with the departing lawyer, they will have breached Rule 1.16(d) and (e) if a request has been made for the file.

4. *Disputes Between Departing and Remaining Lawyers Over Division of Fees*

Disputes between the departing lawyer and the remaining lawyer over work in progress, division of fees and matters taken by the departing lawyer to the new firm usually fall outside the purview of the rules governing fee division between lawyers not in the same firm. Va. Rule 1.5(f). Usually these issues are addressed in employment, partnership or separation agreements that the departing lawyer signed before leaving the firm. Thus, the departing lawyer may be contractually obligated to share their “post-withdrawal” fees with the former firm provided such agreements are reasonable. LEO 1760 and Rule 1.5 (f). *Marks & Harrison v. Nathanson*, 13 Cir. LE24414, 48 Va. Cir. 407 (1999)(separation agreement providing for post-withdrawal division of fees without client consent enforceable). There are some limitations, though, as the agreement must not contain covenants that restrict the departing lawyer's right to practice law or interfere with a client's right to choose the departing lawyer to complete their matter. Depending on their agreement, the departing lawyer may be entitled to a division of fees earned, but not yet billed, at the time of their withdrawal. LEO 1556. In the absence of such an agreement, the common law default rule is that these fees remain assets of the firm. Thus, under the common law rule the withdrawing partner was not entitled to compensation for “unfinished business,”

even for work performed and fees earned (but not billed) prior to the withdrawing lawyer's departure! *Jewel v. Boxer*, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984).¹⁰

Interestingly, prior to the adoption of Rule 1.5(f) it was generally held that any agreement requiring the withdrawing lawyer to share post-withdrawal legal fees with the firm was unethical. For example, in LEO 1556(1994) the committee stated:

A lawyer who withdraws from a firm to compete with it and takes clients of the firm with him cannot be contractually obligated to divide his post-withdrawal fees from those clients with the firm. See, Texas Professional Ethics Committee, Op. No. 459, dated Oct. 7, 1988; Pennsylvania Committee on Legal Ethics & Professional Responsibility No. 87-105, dated Jan. 1988; and Illinois State Bar Association, Op. No. 86-16 (May 13, 1987).

The rationale given for this position really has little to do with the “fee-splitting” rule but rather that such an agreement interferes with the client's decision regarding counsel:

[T]he interjection of a fee [to the firm from which the lawyer withdrew] obviously impairs the creation of a lawyer-client relationship between the departing lawyer and client of his former firm. The impairment arises on both sides of the transaction. The attorney may be unwilling to work at substantially reduced rates for even his best clients, and pressure against acceptance in favor of clients paying full value to the firm would arise within the new [firm employing the departing lawyer]. The attorney would thus be compelled to decline employment and the client would be deprived of the attorney of his choice....

Under current Virginia authority, however, these agreements are not *per se* unethical and the courts will enforce reasonable fee-sharing agreements between the departed lawyer and his former law firm.

5. Penalty Provisions that Punish the Lawyer for Withdrawing From and Competing with the Firm

In a leading case, *Cohen v. Lord Day & Lord*, 75 N.Y.2d 95 (1989) the New York Court of Appeals applied DR 2-108 – the identical Code predecessor to Rule 5.6(a) – to void a partnership agreement that required a departing partner to forfeit certain financial benefits due him if he competed with his firm after he left. The court made clear that the purpose of the rule “is to

¹⁰ *Jewel* has been consistently followed in other jurisdictions and has been applied to situations when a lawyer withdraws from a law firm organized as a limited liability entity as opposed to a partnership. See, e.g., *Robinson v. Nussbaum*, 11 F. Supp. 2d 1 (D.D.C. 1997); *In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318 (Bankr. N.D. Cal. 2009); *Official Comm. of Unsecured Creditors v. Ashdale*, 227 B.R. 391 (Bankr. E.D. Pa. 1998); *In re Coudert Bros LLP Law Firm Adversary Proceedings*, 447 B.R. 706, 712-13 (S.D.N.Y. 2011) (finding that the “unfinished business” doctrine applies to hourly fee cases simply because “authorities in other jurisdictions uniformly hold” that it does).

ensure that the public has a choice of counsel,” and “the forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client’s choice of counsel.” *Id.* at 98. It is unclear, however, whether this case would overrule the common law rule of “no compensation for unfinished business” when a lawyer leaves a firm because that was not the issue presented in that case.

Virginia LEOs reach the same conclusion as *Cohen v. Lord Day & Lord* that provisions in law firm agreements that penalize the withdrawing lawyer for competing with the firm are unethical. In LEO 1232, the committee cited *Dwyer v. Jung*, 336 A.2d 498, 500 (N.J. 1975) citing *Drinker*, Legal Ethics, at 89 *et seq.* (1965):

a covenant restricting a lawyer after leaving a partnership from accepting employment by persons who were theretofore clients of the partnership, or from otherwise fully practicing his profession, is 'an unwarranted restriction' on the right of the lawyer to choose his clients in the event they seek his services and an unwarranted restriction on the right of the client to choose the lawyer he wishes to represent him.

Dwyer, at 501. See also Va. LEO 880. Provisions in the agreement that penalize the withdrawing lawyer by reduction, forfeiture or delay of paying out benefits including severance benefits, profit-sharing, return of capital contribution, stock repurchase, etc., are viewed as an unethical restriction on the lawyer’s right to continue practicing law in competition with the former law firm. LEO 1556.

The inquiry in LEO 985 was whether it was permissible for a lawyer and a law firm, incorporated as a professional corporation, to have an agreement which provided for a reduction in the value of the stock of a withdrawn lawyer if he (a) withdrew in concert with other lawyers, and/or (b) took clients of the law firm with him. Interestingly, the Committee concluded that the agreement did not violate DR 2-106(A), stating: “[t]he Committee opines that only those agreements that restrict the right of a lawyer to practice law after the termination of the relationship are prohibited[;] there is no prohibition on agreements that affect the termination of the relationship itself. However, LEO 1556 overruled LEO 985 and the committee stated:

Significantly, the linchpin of the reduction in value of the stock was withdrawing from the law firm in concert with others and/or taking clients of the law firm. The agreement did not bar or by its terms restrict the withdrawn lawyer from practice in competition with the law firm, either generally or within a particular area for a specified period of time following his withdrawal, yet it exacted a financial penalty if law firm clients elected to go with the withdrawn lawyer.

The opinion expressed in LEO No. 985 is overbroad. Whatever the occasion for a law firm's break up, the clients' interests remain paramount. In LEO No. 1403, for

example, the Committee concluded that a law firm's employment agreement prohibiting a withdrawn lawyer from contacting clients about his withdrawal until the firm had done so constituted a restrictive covenant in violation of DR 2-106(A), stating:

The policy behind the ban on such restrictions is to protect the ability of clients to freely choose counsel and to protect the autonomy of that counsel. The agreement provision restricts the ability of the client [of the law firm] to make an informed and free choice of counsel. See also LEO No. 1506.

The fundamental premises, though at times unspoken, are that clients of a law firm are not commodities, and that the law firm is not a merchant. If there is a break up of the firm initially chosen by a client, the client selects the lawyer or law firm to represent him thereafter. Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups, *supra*, at 1064-65. A client's freedom to hire counsel of his choice transcends a law firm's interest in being protected against "unfair" competition.

ABA/BNA Lawyers' Manual on Professional Conduct 51: 202.

Hence, LEO No. 985 is overruled to the extent that it approves a provision in an employment agreement permitting a law firm to exact a financial penalty from a lawyer (or lawyers) who withdraw and take clients of the law firm with them. Clients are not "taken;" they have an unfettered right to choose their lawyer. Correspondingly, lawyers withdrawing from a law firm have an unfettered right to represent clients who choose them rather than choose to remain with the law firm.

6. Sharing Client Information With New Law Firm to Check for Conflicts

Firms worry, when considering lateral hiring, whether the new lawyer will create conflicts with existing clients. To address this issue, the ABA issued Formal Op. 09-455 which stated:

When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. Although Rule 1.6(a) generally protects conflicts information (typically the "persons and issues involved" in a matter), disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations. Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving

conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.

Critics of the opinion complained that it was not a rule-based opinion even though the reasoning of the opinion is persuasive. There was nothing in the Model Rules that permitted the lateral hire to disclose information protected under Rule 1.6. Because of the stir, the ABA amended MR 1.6 in August 2012, adding a new subsection (7) to paragraph (b) of MR 1.6 to provide that” [a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.” Comments 13 and 14 to Rule 1.6 were added to explain this new rule amendment:

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer’s fiduciary duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of

interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Virginia has not adopted this amendment to Rule 1.6, however, it would seem that the lateral hire could disclose limited information under Virginia's Rule 1.6 unless the client has directed that the information not be disclosed or disclosure would likely be "detrimental or embarrassing" to the client. Except in rare situations, provided that the strictures set out in Formal Op. 09-455 and Comments 13 and 14 are followed, the lateral hire's former or current clients should not be affected by this limited disclosure. It is also difficult to imagine that such disclosures were not routine in lateral hire decisions even before the ABA carved out this limited exception to the duty of confidentiality. Although critics of the ABA approach argue that the interests of clients have been sacrificed for lawyer mobility and employment, the RPC are rules of reason and have to address the practical realities of an environment where lawyers move in between firms frequently.

7. Conflict of Interest When Lawyers Switch Firms

HYPOTHETICAL: You are about 10 days away from trial in a case. Your associate, who has worked extensively on the matter, interrupts your frantic preparation to announce that she is leaving on Friday and will be taking a few clients with her. On top of that, she announces that she is joining the firm that represents the adverse party in your case. But she says, "don't worry, I will be screened." You discuss this matter with in-house counsel of your corporate client who "goes ballistic" calling for the associate's immediate disbarment.

On the day of trial, and at your client's emphatic direction, you move to disqualify the opposing firm. What result?

Before we get to that question: Should this associate even be able to withdraw from representing your client at all if she played a key role in the development of the case? Rule 1.16 permits withdrawal for various reasons none of which include "side switching." And a voluntary withdrawal for none of the reasons set out in Rule 1.16 must be accomplished "without material adverse effect" on the client. Rule 1.16 (a). The loss of a key player on the team is very damaging. One can easily imagine how distressed the client will be when the client learns it has not only been abandoned but its lawyer is now working for the adversary's law firm!

Moreover, if the associate is counsel of record in the case, it may be necessary for her to seek leave of court to withdraw. How will the court react when it learns of these facts?

Setting aside these issues, let's assume that the associate either need not or does not seek leave of court to withdraw, her new firm issues a "notice of screen" letter to you in accordance with Model Rule 1.10, which reads in pertinent part:

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
 - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

In other words, over your client's objection, the associate's prior representation of your client is not "imputed" to the lawyers in the new firm she has joined provided the "screening" procedures set out in the rule are followed. This is called "non-consensual screening." Prior to the ABA's amendment of Rule 1.10 in 2009, your adversary's law firm would have been disqualified, because the associate was "personally and substantially involved" in the representation your client and has now joined a law firm that represents a client "directly adverse" in the same matter!

Only about half of the jurisdictions in the United States offer some version of non-consensual screening to avoid former client conflicts imputation when a lawyer moves in between firms. However, even if the jurisdiction has a non-consensual screening provision like ABA MR 1.10, the court may nonetheless disqualify the firm that the switching lawyer has joined,

notwithstanding the non-consensual screen. *Twenty-First Century Rail Corp. v. N.J. Transit Corp.*, 44 A.3d 592 (N.J. 2012) (no screen allowed without former client's consent in subsequent adverse representation in same matter); *Beltran v. Avon Products Inc.*, 2012 U.S. Dist. LEXIS 83060 (C.D. Cal.) (screen does not block firm's imputed disqualification when screened lawyer has key confidential information from substantially related cases); *Norfolk S. Ry.. Co., v. Reading Blue Mountain & N. R.R. Co.*, 397 F. Supp. 2d 551 (M.D. Pa. 2005) (screen not adequate in side-switching case because no affidavit that firm will not share its fee with screened lawyer or indication of strong sanctions if screen is breached, as well as no time lapse between former and current representations, substantiality of former lawyer's involvement, and 10-lawyer size of new firm, despite timely implementation of screen and restrictions on new lawyer's access to case and prohibition on discussing case with new lawyer); *City Natl. Bank v. Adams*, 117 Cal. Rptr. 2d 125 (Cal. App. 2002) (collecting cases); *Kala v. Aluminum Smelting & Refining Co. Inc.*, 688 N.E.2d 258 (Ohio 1998) (screens not allowed in side-switching cases despite availability of such a remedy in other former-client conflict situations); *See also, CSX Transp. Inc., v. Gilkison, Peirce, Raimond & Coulter, P.C.*, 2006 U.S. Dist. LEXIS 81019 (N.D. W. Va.) (overlap in parties, potential witnesses, and facts and circumstances from which alleged physical injuries or lack thereof arose created substantial relationship and warrant disqualification which cannot be cured by screening).

Factors the courts seem to consider include the size of the firm, the extent of the side-switching lawyer's involvement in the former client's matter, access to confidential information, establishment of the screen prior to the switching lawyer's arrival, notice given to parties of the screen, and the screening procedures implemented. *Silicon Graphics, Inc. v. ATI Techs. Inc.*, 741 F. Supp.2d 970 (W.D. Wis. 2010) (screening appropriate in side-switching case, even if lawyer performed substantial work on matter, where lawyer will not have contact with lawyers in another city working on the matter and will not attend any meetings on any subject with any lawyer who has worked on the case); *Krutzfeldt Ranch LLC v. Pinnacle Bank*, 272 P.3d 635 (Mont. 2012) (lawyer who did not overtly end a client representation before joining a new firm deemed to continue representing client; new firm disqualified from its representation of opposing client in litigation and could not establish a screen. Migrating lawyer should have delayed move to new firm until trial was over or asked client and court for permission to withdraw before moving to new firm); *Chinese Auto. Distrib. of Am. LLC v. Bricklin*, 2009 U.S. Dist. LEXIS 2647 (S.D.N.Y) (screen in substantially related matter established three months after lawyer joined firm not timely); *Hempstead Video, Inc., v. Inc. Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005) (screen appropriate to cure any conflict of lawyer who became "of counsel" to firm solely to transition several of his clients to new firm upon his retirement); *Norfolk S.. Ry.. Co., v. Reading Blue Mountain & N. R.R. Co.*, 397 F. Supp. 2d 551 (M.D. Pa. 2005) (former lawyer who was lead counsel with a significant role in current case had too significant a role in the matter to make screening effective); ABA Formal Op. 99-14, Ethical Obligations When a Lawyer Changes Firms.

The Virginia Rules would impute the former client conflict to all the lawyers in the new firm under the circumstances of this hypothetical because the switching lawyer was personally and substantially involved in the representation of the former client at the old firm and obtained confidential information. If the former client objects, the “screening” mechanism under ABA Model Rule 1.10 is not acceptable. The comments to Rule 1.9 specifically address the side switching lawyer moving between firms.¹¹

¹¹ [4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4a] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[4b] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the *Virginia Code*. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since “impropriety” is undefined, the term “appearance of impropriety” is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm; and Rule 1.11(d) for restrictions regarding a lawyer moving from private employment to public employment.