

# The Return *of the* Sophisticated Traveler

By Jacob A. Stein and Joseph Hennessey

Seven years have passed since we last looked at lawyers going from one firm to another. It is time to take another look at the art form of leaving one firm and going to another without disrupting longstanding friendships.<sup>1</sup>

## Read the Partnership Agreement

When you consider changing firms, read your firm's partnership agreement. You will see you must give reasonable notice to your firm and such things as these:

- What you may disclose to prospective firms
- When and how to tell clients you are leaving

Illustrations by James Endicott/SIS



## When departing, there should be an effort to reach an agreement with former partners on how to divide earnings from open contingency fee cases.

- The transfer of funds of clients who will be leaving with you,
- The transfer of client files,
- When and how you get your capital account,
- The repayment to the firm of your monthly advances,
- Your billings, and
- Your contingent fee arrangements.

Law firm agreements contain unpleasant surprises. For example, if you are an equity partner, you might be surprised to learn that a departing partner must repay the firm the monthly advances paid in anticipation of future firm profits. Most fees arrive near the end of the year. If you leave before the firm has a positive balance, you may have to repay the advances. What an unpleasant surprise that is. Therefore, like many other things, timing is everything.

### The Departure: Who to Tell and When

Soliciting a client before notifying the partnership may be a breach of a fiduciary duty you owe your partners. The court in *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 120 (1995), found:

As a matter of principal [sic], pre-resignation surreptitious “solicitation” of firm clients for a partner’s personal gain . . . exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value—the loyalty owed to partners (including law partners), which distinguishes partnerships (including law partnerships) from bazaars.

It said that once a partner gives notice, his fiduciary duty ends. Then you may tell your clients of your departure. The clients are to be told they have a right to choose you, or remain with the firm, or go elsewhere. To avoid needless contention, you



agree on what should be said to clients about their choices.

You may have had the matter of leaving the firm under consideration for months. During this period, there may

be talks of enlarging the firm’s facilities and getting new software and a new lease. The presumption is that all the partners will remain at the firm. In such a case, you should disclose your general intent.

## The Staff

What about your associates, secretaries, assistants, and paralegals? When should they be told? Only after giving notice to the firm. The staff's allegiance is to the firm and not to you. The employees of the firm can, if they choose, negotiate their own agreement with your new firm.

## The Files

Your client files will be transferred when your client makes a request that they be transferred to you. The firm must have time to copy the files. If you need the files immediately, arrangements can be made.

## Division of Fees

An area of contention is the division of legal fees. You should reach an agreement on how to divide earnings from open contingency fee cases. If that is not included in your firm agreement, your former partners will be entitled to *quantum meruit* compensation. Courts use a number of ways to determine the value of work and ultimate compensation due an attorney who has worked on a contingency fee case.

In a frequently cited case, the Court of Appeals of Minnesota identified the issues. The case in question was one in which a number of attorneys split from their firm, taking a group of contingency fee cases with them. There was a dispute on how to divide the attorney's fees if and when awarded. *In re L-tryptophan Cases*, 518 N.W.2d 616, 619 (Minn. App. 1994). The Minnesota Court of Appeals rejected the notion that the former firm was owed merely a lodestar compensation based on the hours worked on the case. It adopted an approach whereby a number of objective and subjective factors were to be considered in dividing the client's award between the two law firms.

Among other factors, the court noted: (1) the length of time each firm spent on the case, (2) the proportion of funds invested by each firm, (3) the quality of representation, (4) the result of each firm's efforts, (5) the viability of the claim at transfer, and (6) the amount of recovery realized. In establishing these factors, the Court of Appeals sought to thwart the ambition of attorneys departing from their firms not only with the client but with a substantially prepared case.

## Special Conflicts That Jeopardize Former Clients' Confidences

There are special conflicts that arise, as in the case of a govern-

ment attorney who leaves and joins a firm.

A government lawyer with a security clearance must be mindful that information she has is not only a client secret, but, if it is classified information, any disclosure may be a criminal offense. Moreover, state and federal regulations, in addition to District of Columbia ethics rules, govern the conduct.<sup>2</sup>

Rule 1.11 of the D.C. Rules Professional Conduct identifies guidance that applies to attorneys who move from government to private practice, and from one section of the government to another. This separate rule is necessary because:

[I]f the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances . . . the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government.<sup>3</sup>

## Malpractice Coverage

You should read the terms of your malpractice insurance policy and consult with an insurance broker. Your departure must be done in such a way that your malpractice coverage remains in place.

## Help From the D.C. Bar

The D.C. Bar gives advice through the D.C. Bar Practice Management Advisory Service. The service provides free and confidential consultations with professionals who have expertise in practice management, financial management, risk management, client relations, office systems, office technology, and personnel issues. For more information, visit the Bar's Web site at [www.dcbar.org/pmas](http://www.dcbar.org/pmas).

## Make a List, Check It Twice

Here is a checklist to help you before, during, and after your departure:

- Read the agreements that govern your obligations to your fellow attorneys.
- Read your malpractice insurance and consider how your departure will affect your retirement accounts and health, life, and disability insurance.
- Understand the laws and regulations that apply to you and any agreements that you have signed.
- Check for possible client conflicts with your new firm.
- Prepare a statement announcing your departure.
- Assist your former firm in collecting outstanding fees.
- Check timesheets at your former firm to make sure they are accurate so that if any disputes arise, they demonstrate your honesty to your former partners and clients and serve as a basis for compensation on contingency fee matters.
- If a contingency fee client travels with you to your new firm, you should request that attorneys who worked on the matter provide contemporaneous timesheets. They will be one of the elements when compensation is awarded.
- Do not disparage your former colleagues.

## Notes

<sup>1</sup> See Jacob A. Stein & Joseph A. Hennessey, *The Return of the Sophisticated Traveler*, Wash. Lawyer, June 2004, at 30. Mr. Stein is the author of the *Law of Law Firms*, published by West. He also teaches law firm law at the Georgetown University Law Center. Mr. Hennessey has assisted and advised lawyers in the Washington metropolitan area concerning the practice of law. He has appeared on panels and published articles on the law practice.

<sup>2</sup> See, e.g., 32 C.F.R. § 776.30, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, Subpart B—Rules of Professional Conduct, Successive Government and Private Employment, 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch Final Regulation Issued by the U.S. Office of Government Ethics, Subpart F, "Seeking Other Employment."

<sup>3</sup> Rule 1.10, Comment 7.

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