

Bankruptcy plan doesn't toll time limit for asbestos claims

ABA reminds us to play nice when lawyers leave

By Erin K. Higgins and Thomas E. Peisch

ETHICAL QUESTIONS & DILEMMAS

Monday morning for a firm's managing partner brings a request from one of his partners for a sit-down. This is followed by an announcement from the partner that she is leaving the firm to open the Boston office of a larger regional firm.

The partner presents the managing partner with a proposed form of joint letter announcing her imminent departure to all of the firm clients with which she has had significant client contact, including two of the firm's more significant accounts.

The managing partner is furious, as he brought that very partner on as a second on one of those significant accounts, and worked hard to engender the client's trust in her. Now, in what he perceives to be an act of disloyalty, that younger partner is threatening to take that hard-earned business to a new firm. The managing partner immediately walks the departing partner out of the law firm and tells her that she can make arrangements later to pick up her personal belongings. He then calls an emergency meeting of the firm's management committee, and the firm's partnership agreement is reviewed.

Aha! The agreement required the partner to provide the firm with 60 days' notice of her intent to leave the firm.

The firm notifies the departing partner that she has breached her notice obligation under the partnership agreement; that the firm as a sanction has terminated her access to the firm's network; and that the firm will be reaching out

unilaterally to the partner's clients to advise of her departure and of each client's options with respect to future handling of its work.

All kosher? According to the American Bar Association, not so much. In December 2019, the ABA's Standing Committee on Ethics and Professional Responsibility issued its latest pronouncement on the ethical obligations of departing lawyers and the law firms they leave, ABA Formal Op. No. 19-489. In the opinion, the ABA reiterates that the focus when lawyers move between firms must be on the protection of client interests, which include both the right to receive competent and diligent representation, see Model R. Prof. C. 1.3; the right to receive timely information about their legal matters, see Model R. Prof. C. 1.4; and the right to have their matters handled by their counsel of choice, see Model R. Prof. C. 5.6(a).

The opinion emphasizes that both the departing lawyer and law firm management are ethically obligated "to assure the orderly transition of client matters," and that the attorney and the law firm should be working together to ensure that the client matters are transitioned with a minimum amount of disruption.

From the departing lawyer's perspective, this means notifying clients promptly of an anticipated departure, and providing the firm with sufficient notice of the departure to allow an orderly transition of the matter.

Regarding the notice to clients, the ABA long has espoused as a "best practice" a joint communique from the firm and departing lawyer, advising of the attorney's departure and providing clients with the options of leaving the work with the firm, transferring the work to the lawyer's new firm, or transferring the work to another lawyer. See, e.g., ABA Formal Op. No. 99-414.

If the firm is unwilling to send a joint letter, the departing lawyer is obligated to notify clients directly. Prior to departure, the notice should be limited to those clients for whose active matters the lawyer has direct professional responsibility, and with whom the lawyer had significant contact.

After the lawyer's departure, of course, the lawyer is free to solicit

any client of the former firm, subject to pertinent professional rules. See Model R. Prof. C. 7.3.

The departing lawyer is ethically obligated to work toward an orderly transition of all client matters, even those that will remain with the firm. The attorney must assist in organizing and updating client files, and in updating other lawyers as to the status of matters that will remain at the firm. The lawyer also must cooperate reasonably in billing and collections activity.

The lawyer's duty to provide this assistance may extend to post-departure activity, depending on the complexity of the client matter. A departing lawyer also may be required to return or account for firm property, and to allow firm data to be deleted from all devices retained by the departing attorney, unless the data is part of the client files transitioning with the departing lawyer.

Law firm management, for its part, cannot impede the departing lawyer in providing prompt notice to clients of an anticipated departure, after the firm has been notified of the lawyer's intent to depart.

A law firm may require that the lawyer provide the firm with some period of notice in advance of the lawyer's intended departure date, but only as is necessary to ensure the orderly transition of client files. The opinion cautions that such a notice period cannot be used "to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client."

Moreover, an attorney may not be held to a fixed period of notice if in fact all of the lawyer's files are updated, client elections have been received, and the lawyer has agreed to cooperate post-departure in any remaining transition activities.

Per the opinion, law firm management also cannot impede the departing lawyer in carrying out his or her ethical responsibilities to firm clients following announcement of a departure.

The lawyer cannot be required to work from home or remotely, nor can the lawyer be deprived of access to the firm's support staff, or the firm's email, voicemail and document management systems,



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where access to such support and systems are necessary for the departing lawyer to represent the clients competently during the transition period.

Further, once the attorney has departed, the firm should set automatic email responses and voicemail messages advising of the lawyer's departure, and providing an alternative contact person at the firm for inquiries.

Additionally, the firm should monitor the departing lawyer's mail, email and voicemail messages for a reasonable period of time, to ensure that any communications regarding client matters are handled appropriately.

Returning to the scenario outlined at the beginning of this column, it is clear that our managing partner let his emotions get the better of him. Walking the departing partner out of the firm's offices, and immediately cutting off her access to the firm's email and document management systems, likely impeded the departing attorney's ability to smoothly transition client matters to her new firm.

The firm's refusal to send a joint letter to clients, as recommended by the ABA, likely complicated the process of promptly notifying clients of an intended departure, and also likely left the impression with firm clients that the attorney's departure represented a significant loss to the firm.

And finally, any attempt to enforce the 60-day notice requirement in the firm's partnership agreement clearly would have run afoul of the firm's ethical obligations, as spelled out in the opinion.