



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-14
May 2012

Subject: Advertising and Solicitation; Communications with Client, Law Firm Partnership and Employment Agreements; Law Firms

Digest: After departure, an associate who has left a law firm may contact clients of the firm with whom he had an attorney-client relationship. The Rules of Professional Conduct do not preclude him from informing such clients that he has departed and that they have the right to continue with the firm or transfer the file to him. Notice to the client is mandatory where a departing associate has been involved in representing the client in such degree or kind that the departure could reasonably affect either the client's decisions regarding the representation or the means of accomplishing the client's objectives. In such case, the associate must ensure that he or the firm (or both) timely inform the client of his departure. Whether such notice must issue before the associate's departure will depend on the circumstances.

References: Illinois Rules of Professional Conduct, Rules 1.4, 1.16, 5.1, 5.2, 5.6, 7.1, and 7.3

ISBA Advisory Opinion Nos. 86-16 (May 1987)

Arizona Bar Ethics Opinion 10-02

ABA Formal Ethics Op. 99-414 (1990)

Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460 (Ill. 1998)

Dowd & Dowd, Ltd. v. Gleason, 352 Ill. App. 3d 365 (1st Dist. 2004)

FACTS

Three questions have been raised regarding the propriety of contacting clients of a firm when an associate attorney leaves a firm.

QUESTIONS

1. May an associate who has departed a firm contact clients of the firm with whom he had an attorney-client relationship, regardless of whether he brought the clients to the firm, to inform the clients that he has left the firm?
2. May the departed associate in question 1 inform a client that the client has the right to continue with the firm or transfer his file to the departed associate?
3. Conversely, must an associate who has formed an attorney-client relationship with a client of the firm inform the client that he will no longer be with the firm and representing the client?

OPINION

Questions 1 and 2

Questions 1 and 2 concern a former associate's post-departure communications with clients (with whom he had an attorney-client relationship) at his former firm. Because the departing associate had a "prior professional relationship" with these clients, Illinois Rule of Professional Conduct ("Rule") 7.3 does not preclude him from directly contacting these clients to inform them of his departure or to solicit their employment. Under Rule 7.1, any such communication must not be false or misleading.

Rule 5.6 prohibits the former employer from restricting the right of the departing associate "to practice after termination of the [employment] relationship," except where such restriction concerns retirement benefits. Therefore, a restriction placed by the former employer to prohibit the former associate from soliciting the firm's clients is generally improper. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 480-82 (Ill. 1998) ("*Dowd I*"). The "client has a right to discharge" the firm "at any time, with or without cause," and therefore is generally free to discharge the law firm and transfer the matter to the departed associate if the client so chooses. Rule 1.16 n.4; *see also* ISBA Op. No. 86-16 (May 1987)("[T]he clients in question are free to choose to be represented by the departing associate, the firm, or neither."). The Rules do not prohibit the departed associate from informing the client of the client's freedom to discharge the law firm and choose other counsel. The communication, however, should not mislead the client regarding the client's right to stay with the law firm.

The Committee expresses no opinion regarding whether any solicitation or contact would constitute tortious interference of contract or would violate any other substantive law. Further, importantly, Questions 1 and 2 do not involve pre-departure

communication while the associate is still employed by the firm, that is, at a time when the associate's fiduciary duties to his employer will place significant restrictions (beyond the Rules) on his communications with the firm's clients. *See Dowd I*, 181 Ill. 2d at 474.

Question 3

Question 3 concerns whether, and under what circumstances, notice to the client of the associate's departure is mandatory.

Rule 1.4 states:

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See also Rule 1.16(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, [*etc.*]"

Based on the foregoing, where an associate is substantially involved in the representation of a client, a duty may arise to timely inform the client of the associate's departure. The duty will arise where the associate's involvement is of such degree or kind that the associate's departure could reasonably affect the client's decisions regarding the representation or the means of accomplishing the client's objectives. *See* Rule 1.4(a)(2) and (b); Ariz. Bar Ethics. Op. 10-02 ("Whether the client needs to be informed of the lawyer's departure and reminded of the client's right to choose counsel depends on whether, viewed from the perspective of the client, the client's decision about who should continue the representation might depend on the continued involvement of the departing lawyer."). Conversely, where an associate has not had meaningful contact with the client, has had little involvement in currently active matters, or has acted solely in a subordinate role, notifying the client of the associate's departure is typically unnecessary.

Ordinarily notice to the client need not precede the associate's departure. Pre-departure notice is required only where failure to provide pre-departure notice would reasonably affect the means to accomplish the client's objectives or prejudice the client's ability to make an informed decision regarding the representation. In all events, this

opinion does not grant license to the associate to solicit the firm's clients for personal gain while still employed by the firm. Such solicitation may violate substantive law, including fiduciary duties owed by the associate to his employer. *See Dowd I*, 181 Ill. 2d. at 474 (“[P]retermination solicitation of clients by members of an existing firm for the benefit of a new firm rises to a breach of fiduciary duty.”); *see also* ABA Formal Op. 99-414 (“The departing lawyer also must consider legal obligations other than ethics rules that apply to her conduct when changing firms, as well as her fiduciary duties owed the former firm.”).

As was true in response to Questions 1 and 2, under Rule 7.1, any notification to the client must not be false or misleading. An appropriate notification may inform the client of the client's right to determine whether the current law firm, the departing lawyer, or a different lawyer or law firm altogether will represent the client. *See Dowd & Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 372 (1st Dist. 2004) (“[I]t is not improper for the lawyer to notify the client of his impending departure provided that he makes it clear that the legal representation is the client's choice.”).

Where a duty to notify the client arises, it governs both the law firm and the departing associate. *See* Rules 5.1 and 5.2; ABA Formal Op. 99-414 (“[B]oth the departing lawyer and the responsible members of the firm who remain have ethical responsibilities to clients on whose active matters the lawyer currently is working...”). Neither the associate nor the law firm should obstruct the other's compliance with ethical obligations. *See* Ariz. Bar Ethics. Op. 10-02. Rather, both the law firm and the associate should ensure that the client is adequately informed of the departure, whether the notification comes from the law firm, the associate, or both. Where feasible, joint notification may avoid duplicative or conflicting communications to clients as well as charges of impermissible solicitation. Nonetheless, if the law firm does not provide adequate and timely notification, the associate must do so. *See* ABA Formal Op. 99-414 (“When the departing lawyer reasonably anticipates that the firm will not cooperate on providing...joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services...”).

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