Committee Opinion
January 10, 2006

LEGAL ETHICS OPINION 1822

WHETHER ATTORNEY, WHO LEAVES A FIRM, IS REQUIRED TO INFORM FIRM WHICH CLIENTS HE CONTACTED ABOUT HIS DEPARTURE AND ABOUT THE CONTENT OF THE COMMUNICATION.

You have presented a hypothetical involving a lawyer's departure from a firm. An associate attorney worked for six years in the trademark department and was supervised by the head of that department, who reported to the firm's Executive Committee. The associate worked primarily for firm clients, usually preparing correspondence for the signature of a firm partner but sometimes under his own signature. Many of the firm's trademark clients are foreign, especially Japanese companies and law firms. Partners in the firms have long-established relationships with firm clients, including personal relationships with some of the clients.

At the end of the six years, the associate left the firm and joined a second firm, also as an associate. At the time of his departure, there were four or five clients for whom the associate was the client originator.

After leaving the firm, the associate wrote letters to a number of clients, his own clients and the firm's clients. At least one of those letters stated as follows:

> After over 6 years, I have decided to leave First Firm to join Second Firm. The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: I can continue representing you in trademark matters, you can hire other counsel, or you can stay with First Firm.

The associate did not inform the first firm of his intention to contact the clients and did not copy the first firm on the letters to clients. After learning that the associate had been contacting clients, the first firm requested him to provide a list of the clients who were contacted and copies of those letters. The associate refused both requests.

Based on this hypothetical scenario, you have asked the Committee to opine on the following questions:

1) Whether it was unethical for the associate to refuse to provide the first firm with copies of the letters to the clients and the list of clients to whom the letters were sent, and
2) Whether the letter sent by the associate was misleading, or otherwise violated Rule 7.1 ("Communications Concerning a Lawyer's Services").

In determining the permissibility of this associate's letter-writing, this Committee will focus its remarks on whether the content and transmission of the letters conformed to the

requirements of the Rules of Professional Conduct, as interpretation of those rules is the role of this Committee. *See* Rules of the Virginia Supreme Court, Pt. 6, IV, Para. 10. There may be other sources governing this associate's conduct, such as a possible fiduciary relationship between the lawyer and his firm, which would be governed both by the general law regarding partnerships as well as this specific firm's partnership and/or employment agreements. Interpretation of that law or those agreements would be outside the purview of this Committee. This opinion exclusively addresses the application of the Rules of Professional Conduct to this attorney's departure.[1] The Committee endorses the following advice in this context:

> Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition.

ABA Formal Op. 99-414.

Your first inquiry questions the permissibility of the associate refusing to provide both the list of clients contacted and the content of the letters sent. The primary ethical provisions governing this firm departure are Rule 1.4 ("Communication") and Rule 1.16 ("Declining or Terminating Representation"). Rule 1.4 provides as follows:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
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> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
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> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Rule 1.16, in pertinent part, provides as follows:

> (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 other counsel, refunding any advance payment of fee

[1]The Committee notes that a serious breach of a clear fiduciary duty by an attorney in any context could rise to the level of some ethical impropriety, such as a violation of the prohibition against deliberately wrongful acts in Rule 8.4. Nevertheless, the identity of the parameters of the fiduciary duty and what constitutes a breach is, to reiterate, outside the purview of this Committee. Moreover, parameters can not be determined with the limited facts presented, especially without reference to any partnership or employment agreements in effect at this firm.

> that has not been earned and handling records as indicated in paragraph (e).

This Committee has addressed the ethical obligations of both a departing attorney and the firm he leaves in LEO 1332.[2] LEO 1332 discusses the duty of an attorney to notify clients of his departure from a firm. Rule 1.4 requires an attorney to inform clients of pertinent facts about their case and to keep them updated regarding the status of that case. That the attorney, or one of the attorneys, representing a client is departing the firm is the sort of information that must be provided to a client. 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.

LEO 1332, citing California Bar Op. 1985-86. This notion of a joint letter is also recommended in ABA Formal Op. 99-414. In addition to the above four items for inclusion in a departure notice letter, the ABA suggests that such a letter be written as follows:

> 1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);
> 2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
> 3) the departing attorney must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
> 4) the departing lawyer must not disparage the lawyer's former firm.

The Committee endorses this advice from the ABA.

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[2] The Committee clarifies that as this opinion request is specifically about the letters used as notice to clients when an attorney departs a firm, the discussion will focus on that issue and LEO 1332's prior discussion of it. However, the Committee notes the prior LEOs, involving departing attorneys, that address other ethical responsibilities in this situation. *See* LEO 1757 (provision of client list to departing attorney to perform conflicts checks); LEO 1732 (fee arrangement regarding cases departing attorney takes with him); LEO 1556 (financial arrangements with departing attorneys); LEO 1506 (firm's refusal to provide contact information for departed attorney); LEO 1403 (handling of client files and fees when attorney departs).

The recommendation is for a *joint* letter. However, should a departing attorney conclude that his firm is being uncooperative regarding such a letter, either by a direct refusal or by stalling the actual production and transmission of the letter, then the departing attorney should send the letter unilaterally. In the present scenario, there is no indication that the attorney ever sought that cooperation from the firm before sending his letters, but the Committee would recommend that departing attorneys, where feasible, do so. However, as noted in ABA Formal Op. 99-414:

> Unfortunately, this [joint letters] is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt her immediate termination. When the departing attorney reasonably anticipates that the firm will not cooperate on providing such a 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…

The facts provided with the present scenario do not shed light on the climate of this firm and the nature of its relationship with this attorney to allow for determination of whether a joint letter was feasible. In the facts you present, the departing associate did not write his letters until after he left the firm. In the end, the idea of a joint letter sent by a firm and departing attorney to clients about the upcoming 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.[3] Of course, a firm that would like all departures to go smoothly could develop a firm policy, with formal agreement by all partners and associates, laying out the procedure to be followed by any attorney departing the firm. Such a policy could include a requirement that a joint letter be sent, containing language in line with the discussion in this opinion and LEO 1332 regarding proper notice to clients.

In considering whether this attorney was required to provide to the firm the list of clients to whom he sent the letter as well as the content of the letter, the standard of Rule 1.16(d) governs. That standard is not one of courtesy to colleagues, but rather avoiding prejudice to clients. While certainly the departing attorney's secretive manner regarding these letters may sour his relationship with the firm, that manner is not *per se* prohibited. The issue for ethical permissibility is whether that secretiveness hurt the clients in some way. Rule 1.16(d) requires that termination of representation includes "steps to the extent reasonably necessary to protect a client's interest." Thus, an attorney may not simply disappear; he must depart a firm and clients in a way that protects the clients. However, the Committee does not see any facts in the present scenario indicating that notice to the clients was insufficient protection such that providing the firm with a mailing list and a copy of the letters was in some way essential for client protection. So

[3] The Committee notes from the facts that the departing attorney actually sent the letters to clients *after* departure from the firm. The limited facts provided do not allow the Committee to determine whether the timing of those letters rendered their transmission insufficient to fulfill the attorney's Rule 1.4 communication obligation to clients. *See* LEO 1332.

long as the letters contained the appropriate notice language, as discussed above and in LEO 1332, then the requisite protection had already occurred with no further action required, including this sharing of information with the firm.[4]

The request raises the concern as to how the firm is to ensure that the letters are appropriate in content and the list of clients contacted is not overly inclusive if the departing attorney is not required to provide that information. The Committee opines that while the departing attorney has this duty to communicate, nothing in the rules establishes a right on the part of the firm to police the exercise of that duty. The Committee sees no provision in the Rules of Professional Conduct creating an affirmative duty to provide that information to the firm. Nonetheless, the Committee recognizes that this sort of lack of cooperation serves no valuable purpose beyond continuing the hostilities between a departing attorney and the firm which he leaves.

Your second question asks whether the letters themselves were misleading. The facts do not provide the content of most of the letters but do provide language from one letter. The Committee can only answer this question with regard to that language; consideration of any other letters would only be speculative.

Your question regarding whether these letters were misleading refers to Rule 7.1 ("Communications Concerning a Lawyer's Services"). Rule 7.1 states, in pertinent part, as follows:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> (1) contains false or misleading information;…

Your request suggests three different aspects of the present situation that potentially render the quoted language as misleading. The first is that the letter refers to the Virginia State Bar. Specifically, the letter states:

> The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: …

The implication in your request is that this reference to the Bar's Ethics Counsel creates an impression on the reader that the firm is in some sort of ethical trouble, perhaps triggering this attorney's departure. While it is not implausible that some reader might

[4] The Committee reiterates at this point that, as discussed at the introduction of this opinion, the conclusions drawn here analyze exclusively the obligations of the attorney under the Rules of Professional Conduct and not the law of fiduciary relationships or any partnership/employment agreements that may have been in effect.

draw that particular conclusion, there are no facts to support that such was the case. On the contrary, the language presumably is intended to formalize advice the attorney apparently obtained from Ethics Counsel as to his obligations when departing the firm, with the letter serving as the implementation of that advice. Was it necessary to explain to the clients that the attorney consulted with Ethics Counsel? No. Was it misleading to reference that consultation? No. Any confusion on the part of the reader regarding this language would be speculative at best, with nothing indicating that the attorney intended anything other than a recitation of his notice obligation.

A second aspect of the present situation that your request implies renders the letter misleading is the identity of these particular clients. Specifically, the clients are foreign citizens living overseas. Thus, the implication is that these clients would more easily be confused by the quoted language. Again, while the Committee understands the concern, the Committee finds it to be too speculative to support a determination that the attorney impermissibly used misleading language. Certainly, with all client communications, an attorney must be cognizant of any language or cultural barrier or disability calling for extra effort to ensure effective communication. However, the mere fact that these clients are from another country does not render this letter to them misleading; the language is not especially technical or complex. Absent any additional facts, the Committee does not consider the citizenship or residency of the clients alone sufficient to render this language misleading.

Finally, your request suggests that the language is misleading in that the order of options presented places the choice of staying with the firm *last*. While the Committee recognizes a time-honored etiquette tradition of always mentioning oneself last, the Committee finds no provision in the Rules of Professional Conduct requiring that particular courtesy in these departure letters. So long as nothing in the language attempts to persuade the client to make one choice over another regarding choice of counsel, the particular order in which the choices are presented is not an issue. The listing of the choices in the quoted language comports with proper notice requirements as articulated earlier in this opinion and in LEO 1332.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.