



Photograph of El Morro fort by Luis A. Muñoz

NALP 2010
Annual Education Conference

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Ethics of Lawyer Recruiting Practices

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Mobility

The practice of law has become a mobile profession

Client Right to Counsel

- Client has an absolute right to counsel of his or her choice.
 - Constitutional grounds in the First and Sixth Amendments
 - State Statutes
 - State Rules of Professional Conduct

Attorney Rights

- ...To change employment
 - Noncompetition Agreements Prohibited
- ABA Model Rule 5.6 – Restrictions On Right To Practice
- A lawyer shall not participate in offering or making:
- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

Attorney Rights

- ...To change employment
 - Noncompetition Agreements Prohibited
- ABA Model Rule 5.6 – Restrictions On Right To Practice
- A lawyer shall not participate in offering or making:
- ... (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Client Right to Counsel

- State Rule Examples
 - California Rules of Professional Conduct
 - Rule 1-500(A)(1)
 - Allows Restrictive Agreements**
 - (in a limited circumstance)**
- part of an shareholders' agreement
- provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship

Client Right to Counsel

- State Rule Examples

Mass. Rules of Professional Conduct Rule 5.6

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy [*between private parties*].

Client Right to Counsel

- State Rule Examples

Illinois Rules of Professional Conduct Rule 5.6

Kentucky Supreme Court Rule SCR 3.130(5.6)

New York Rules of Professional Conduct Rule 5.6

Ohio Rules of Professional Conduct Rule 5.6

Attorney Rights

- ...To change employment

TX* Effective 3/1/05 **Has not amended Rule since the most recent amendments to the ABA Model Rules*

(b) Adds “except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.”

Attorney Rights

- ...To change employment

GA* Effective 1/1/01 **Has not amended Rule since the most recent amendments to the ABA Model Rules*

* * * * *

(b) [...] Adds “The maximum penalty for a violation of this Rule is a public reprimand.”

Attorney Rights

- ...To change employment

Some states have added the language:

“Except as permitted by Rule 1.17,” – Sale of Law Practice

(AK, ID, MI, MS, NY)

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17

conditions:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in which the practice has been conducted;

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17

conditions

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17 condition
- (c) The seller gives written notice to each of the seller's clients regarding:
- (1) the proposed sale;

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17 condition
- (c) The seller gives written notice to each of the seller's clients regarding:
- (2) the client's right to retain other counsel or to take possession of the file; and

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17 condition
- (c) The seller gives written notice to each of the seller's clients regarding:
- (3) "...the client's consent to the [file] transfer will be presumed" if there's no client action within ninety (90) days.

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17 conditions
- If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction.

Attorney Rights

- ...To change employment
 - Sale of Law Practice – ABA Model Rule 1.17 conditions

- (d) The fees charged clients shall not be increased by reason of the sale.

Fiduciary Duties

- Partners
 - The Duty of Loyalty
 - Owed to each other
 - Grounded in or arising out of partnership law

Fiduciary Duties

- Partners
 - The Duty of Loyalty
 - “...copartners, owe to one another ... the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties.”
 - Justice Benjamin Cardozo, *Meinhard v. Salmon*, 164 N.E. 545 (N.Y.S. 1928).

Fiduciary Duties

- Partners
 - The Duty of Loyalty
 - Rule of Thumb for Breach
 - Where one partner has advantaged herself over one of her partners or over the firm.

Fiduciary Duties

- Partners

- Notice to Partners
- When?

As soon as the **possibility** of departure changes to a **certainty** of departure.

Pennsylvania and Philadelphia Joint Ethics Op. 2007-300 (2007).

Fiduciary Duties

- Partners

- How long does a partner's fiduciary duty to her partners last?

Until the partner notifies the firm of her withdrawal.

Morris v. Crawford, 304 A.D.2d 1018, 757 N.Y.S.2d 383 (2003).

Fiduciary Duties

- Partners
 - Notice to Partners – *Earlier Notice*
 - Intention to join opposing counsel
 - ABA Formal Ethics Op. 96-400

Fiduciary Duties

- Partners
 - Notice to Partners – *Earlier Notice*
 - Current firm plans to incur major financial obligations based on lawyer's role in the firm
 - Pennsylvania and Philadelphia Joint Ethics Op. 2007-300

Fiduciary Duties

- Partners
 - Notice to Partners – *Earlier Notice*
 - If asked whether she is speaking with other firms or is in the process of making plans to leave
 - Pennsylvania and Philadelphia Joint Ethics Op. 2007-300

Fiduciary Duties

- Partners & Associates
 - The Duty of Loyalty
 - Owed during the partnership or employment relationship
 - Must avoid misleading the partners and the firm

Fiduciary Duties

- Associates
 - The Duty of Loyalty
 - Owed to their employers
 - Grounded in or arising out of agency law

Fiduciary Duties

- Associates
 - The Duty of Loyalty
 - Employment Agreement Provisions (example)
 - Firm invested its trust, confidence, and “a considerable amount of time and money” ...
 - Associate wouldn’t “interfere” with the firm’s business for two (2) years

Fiduciary Duties

- Associates
 - The Duty of Loyalty
 - Employment Agreement Provisions (example)
 - Seeking, directly or indirectly, any of Employer's clients;
 - Inducing any employee to quit or abandon the Employer;

Fiduciary Duties

- Associates
 - The Duty of Loyalty
 - Employment Agreement Provisions (example)
 - Employee acknowledges that prohibitions are reasonable and necessary covenants;
 - Sets out damages provisions.

Fiduciary Duties

- Associates
 - The Duty of Loyalty
 - Florida Board of Governor's approved an Ethics Opinion (Opinion 93-4, 2/17/95) stating:
 - A lawyer shall not participate in offering or making ... an agreement that restricts the rights of the lawyer to practice after termination of employment relationship.

Fiduciary Duties

- To Clients
 - Undivided loyalty and devotion on the part of the attorney
 - Duty to disclose material information

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Timing
 - Method of Solicitation
 - Intent of Departing Attorney
 - Scope

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Timing
 - Pre-resignation
 - Post-resignation

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Method of Solicitation
 - Pursuant to applicable Rule of Professional Conduct
 - Sudden, disparagingly

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Intent of Departing Attorney
 - Truly to permit client choice
 - Personal gain – enhancing the attorney's chance of getting offer at the "new" firm

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Scope
 - Attorney contacted only the clients with whom she had worked and had direct relationship
 - Solicitation of the firm’s largest clients

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct

“[n]othing more than appropriate client informational service” is permissible, while solicitation which is “surreptitious” and “for a partner’s personal gain is actionable.”

Krauss, G., Partner Departures and Lateral Moves: A Legal and Ethical Guide, p. 11, citing *Graubard Mollen Dannet & Horowitz*, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 1013, 653 N.E.2d 1179 (1995)

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Locating office space
 - Arranging utilities
 - Establish affiliations (with other attorneys)

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Inform clients – with whom they have had a prior professional relationship – about their impending withdrawal and new practice
 - Remind client of its freedom to retain counsel of its choice

Fiduciary Duties

- To Clients – Departing Attorney Solicitation
 - Focus on Conduct
 - Inform clients – with
 - had a prior relationship –
 - about withdrawal and
- AFTER notice to the firm of the attorney's plan to leave the firm.** Inform client of its freedom to retain counsel of its choice

Attorney Rights

- ...To contact clients
 - ABA Model Rule 1.4 Client Communication
 - (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;

Client Solicitation

- Timing

Client Solicitation

- Notice Clients – FL Rule 4-5.8(c)(1)
- [...] a lawyer who is leaving a law firm shall not unilaterally contact ...clients ... for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless ...

Client Solicitation

- Notice Clients – FL Rule 4-5.8(c)(1)
- [...] the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm **and** bona fide negotiations have been unsuccessful.

Fiduciary Duties

- To Clients – Former Law Firm
 - Client calls to speak with departed attorney
 - firm obliged to provide contact info
 - thereafter, receptionist may ask if call concerns a legal matter and whether someone at the firm may assist

Philadelphia Ethics Op. 94-30 (1994)

Fiduciary Duties

- To Clients – Former Law Firm
 - Client calls to speak with departed attorney
 - If client makes clear that they only wish to speak with the departed attorney, the firm needs to take care not to violate Rule 7.3 (Direct Contact with Prospective Clients)

Philadelphia Ethics Op. 94-30 (1994)

Due Diligence

- Professional History
- Personal History
- Anticipated Portable Work
- Conflicts
- Prior firm obligations

Due Diligence

- Anticipated Portable Work
 - Acceptable Information – generally
 - Client names and addresses
 - Non-public financial info about the candidate

Due Diligence

- Anticipated Portable Work
 - Information to avoid – *generally*
 - **Soon to be former firm's** client list(s)
 - Non-public financial info about the candidate's current firm
 - Client specific information
 - Financial or analytical documents that are generated by the current firm's systems
 - Specific staffing information

Attorney Rights

- ...To change employment
 - Non-solicitation agreements between firms considering merger

Attorney Rights

- ...To change employment
 - Non-solicitation agreements between firms considering merger
 - “Non-solicitation agreements are merely ‘gentleman’s agreements’ I don’t know if any firm has ever thought they were enforceable.” *Daily Business Review*, September 25, 2008, quoting Lisa Smith, Hildebrandt International merger consultant.

Attorney Rights

- ...To change employment
 - Partnership (Shareholder) Agreements
 - Generally set out the rights and responsibilities among shareholders
 - Rights on withdrawal (subject to ABA Model Rule 5.6)

Attorney Rights

- ...To change employment

ABA Model Rule 8.4 – Misconduct; Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

 - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

Attorney Rights

- ...To change employment
ABA Model Rule 8.4 – Misconduct; Maintaining
The Integrity Of The Profession
It is professional misconduct for a lawyer to:
... (c) engage in conduct involving dishonesty,
fraud, deceit or misrepresentation; ...

Imputing a Conflict of Interest

- Model Rule 1.10
 - When 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 Rule 1.7 (*Conflict with Current Client*) or Rule 1.9 (*Duties to Former Clients*)

unless

Imputing a Conflict of Interest

- Model Rule 1.10
 - 1.10(a)(1) Prohibition is based on the personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation ... by the remaining lawyers in the firm;
- OR

Imputing a Conflict of Interest

- Model Rule 1.10
 - 1.10(a)(2) Prohibition is based upon Rule 1.9 and arises out of the disqualified lawyer's association with the prior firm
- AND

Imputing a Conflict of Interest

- Model Rule 1.10
 - (i) disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom...;

Imputing a Conflict of Interest

- Model Rule 1.10
 - (ii) written notice promptly given to affected former client ... including a description of the screening procedure(s) employed ...; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures;

Imputing a Conflict of Interest

- Model Rule 1.10
 - (iii) certifications of compliance with the Rules and screening procedures are provided to former client by [both]
 - The screened lawyer **and**
 - By a partner in the firm
 - At reasonable intervals upon the former client's request **and** upon termination of the screening procedure.

Imputing a Conflict of Interest

- Model Rule 1.10
 - (c) disqualifications under this Rule may be waived by the affected client provided there is compliance with the conditions of Rule 1.7

Imputing a Conflict of Interest

- Model Rule 1.10 – Adoption
 - Ability to Screen pursuant to ABA Model Rule adopted by twelve (12) states.
 - <http://www.abanet.org/cpr/ethics/screen-status.pdf>

Delaware	Michigan	Pennsylvania
Illinois	Montana	Rhode Island
Kentucky	North Carolina	Utah
Maryland	Oregon	Washington

Imputing a Conflict of Interest

- Model Rule 1.10 – Adoption
 - Ability to Screen pursuant to ABA Model Rule adopted ***in limited fashion*** by twelve (12) states.
 - <http://www.abanet.org/cpr/ethics/screen-status.pdf>

Arizona	Minnesota	North Dakota
Colorado	Nevada	Ohio
Indiana	New Jersey	Tennessee
Massachusetts	New Mexico	Wisconsin

Imputing a Conflict of Interest

- Model Rule 1.10 – Adoption
 - Ability to Screen pursuant to ABA Model Rule twenty-six (26) states say “NO.”
 - <http://www.abanet.org/cpr/ethics/screen-status.pdf>

Imputing a Conflict of Interest

- Florida Rules of Professional Conduct
- Rule 4-1.10
 - (b) [...], the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or [her former firm], had previously represented a client whose interests ...

Imputing a Conflict of Interest

- Florida Rules of Professional Conduct
- Rule 4-1.10
 - (b) ... are materially adverse to that person and about whom the lawyer had acquired [protected] information ... that is material to the matter.

Imputing a Conflict of Interest

- Florida Rules of Professional Conduct
- Rule 4-1.10
 - (e) Government Lawyers. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 4-1.11.

Imputing a Conflict of Interest

- Florida Rules of Professional Conduct
- Rule 4-1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees

Imputing a Conflict of Interest

- Florida Rules of Professional Conduct
- Rule 4-1.11 – A former government lawyer – (a)(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially ... , unless the government agency gives its informed consent, confirmed in writing

Imputing a Conflict of Interest

- Florida Rules of Professional Conduct
- Rule 4-1.11 –
 - (b) (1) the disqualified lawyer is timely screened from any participation in the matter and is directly apportioned no part of the fee ... ; and

Imputing a Conflict of Interest

- Florida Rules of Professional Conduct
- Rule 4-1.11 –
 - (b) (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Files

- General prohibition against
 - Taking any privileged or confidential documents
 - Downloading all form files in firm / practice area / department
 - Any client files – absent a release from the client

Files

- Generally allowed to take
 - Personal desk copies of client correspondence (ambiguity on issue of confidential information contained therein)
 - Personal client list(s)
 - Personal copies of documents / forms the attorney drafted
 - Publicly filed documents

Files

- Contractual / Partnership Agreements
 - Generally, provisions will be held valid if reasonable
 - “Won’t remove any forms or files” – regardless of whether she created them or whether she brought them to the current firm
 - (argument against) – prevents the attorney from practicing as her forms are her stock in trade

Lateral Hiring Claims

- Claims may be brought against the lateral attorney or – in some cases – the hiring firm
 - Breach of Fiduciary Duty
 - Tortious Interference with firm’s clients, employees, and/or business relationships
 - Unfair Competition
 - Confidential Information

Lateral Hiring Claims

- Claims may be brought against the lateral attorney or the hiring firm
 - Breach of fiduciary duty, breach of employment contract, tortious interference with prospective economic advantage and civil conspiracy.
- Dowd & Dowd, Ltd v. Gleason, 352 Ill App.3d 365, 816 N.E.2d 754 (2004)

Lateral Hiring Claims

- Claims may be brought against the lateral attorney or the hiring firm
 - Voting and accepting large bonuses for themselves, friends, and family without disclosing that they would be leaving (depleting the firm of its cash reserves)
- Dowd & Dowd, Ltd v. Gleason, 352 Ill App.3d 365, 816 N.E.2d 754 (2004)

Lateral Hiring Claims

- Claims may be brought against the lateral attorney or the hiring firm
 - Using and removing confidential client records
Dowd & Dowd, Ltd v. Gleason, 352 Ill App.3d 365, 816 N.E.2d 754 (2004)

Lateral Hiring Claims

- Claims may be brought against the lateral attorney or the hiring firm
 - Arranging a mass exodus of firm employees prior to the withdrawal notification date
Dowd & Dowd, Ltd v. Gleason, 352 Ill App.3d 365, 816 N.E.2d 754 (2004)

Lateral Hiring Claims

- Claims may be brought against the lateral attorney or the hiring firm
 - Accessing password protected databases for names, addresses, etc.
 - Fostering employee discontent
 - Erasing computer files before resigning
 - Resigning without notice
 - Departing without preparing matter / status reports
 - Soliciting key employees
 - Not cooperating on joint notice

Lateral Hiring Claims

- Claims may be brought against the lateral attorney or the hiring firm
 - Accessing password protected databases for names, addresses, etc.
 - Fostering employee discontent
 - Erasing computer files before resigning
 - Resigning without notice
 - Departing without preparing matter / status reports
 - Soliciting key employees

Reeves v. Hanlon, 33 Cal.4th 1140, 95 P.3d 513 (2004)

Lateral Hiring Claims

- Breach of Fiduciary Duty
 - Existence of a fiduciary duty
 - Breach of that duty
 - Damages proximately caused by the breach to the plaintiff

Lateral Hiring Claims

- Aiding and Abetting a Breach of Fiduciary Duty
 - Breach of a fiduciary duty owed to plaintiff
 - Defendant knowingly inducing or participating in the breach
 - Damages caused by the breach

Lateral Hiring Claims

- Tortious Interference
 - With a contract
 - With a prospective economic advantage

Lateral Hiring Claims

- Tortious Interference
 - With a Prospective Economic Advantage
 - **Majority Rule** – Intentional and improper interference with another's prospective contractual relationship (...except a contract to marry)...
- Restatement (Second) of Torts § 766B*

Lateral Hiring Claims

- Tortious Interference
 - With a Prospective Economic Advantage
 - **Minority Rule (more stringent)** – Defendant must have accomplished the interference by wrongful means or act proscribed by law, regulation, or standard.

Lateral Hiring Claims

- Defamation
 - False and defamatory statement (about the plaintiff)
 - Unprivileged communication to a third party
 - Fault (at least negligence)
 - The nature of the statement makes it actionable *per se*; or its publication caused a special harm to the plaintiff.

Lateral Hiring Claims

- Civil Conspiracy
- Raiding
- Unfair Competition
- Violation of Trade Secrets Acts
- Fraudulent Inducement

Lateral Hiring Claims

- Damages
 - Compensatory Damages
 - Forfeiture of Compensation
 - Lost Profits
 - Punitive Damages

ABA Center for Prof. Resp.

<http://www.abanet.org/cpr/links.html#States>



Resources

- ABA Chart Charts Comparing Professional Conduct Rules – As Adopted by States – to the ABA Model Rules

<http://www.abanet.org/cpr/jclr/charts.html>

ABA Model Rules

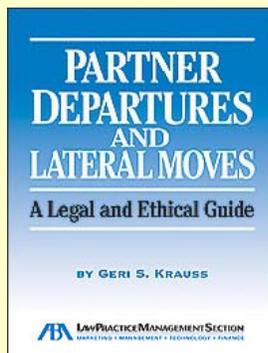
- ABA Chart

As of November 24, 2009

Comparison of Newly Adopted Florida Rules of Professional Conduct with ABA Model Rules

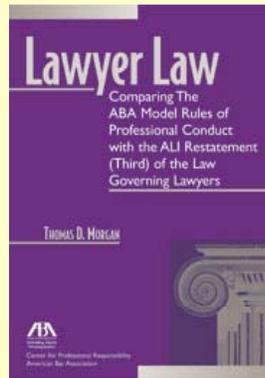
FLORIDA	
	<p>New rules as adopted by Florida Supreme Court to be effective 5/22/06. Revision to Rule 1.5(f) effective 9/29/06. Revisions to Rules 7.1 – 7.6 and 7.7 – 7.10 effective 1/1/07. Revisions to Rules 7.1 – 7.10 effective 2/1/08. Revisions to Rules 1.5 and 6.5 effective 3/1/08. Revisions to Rule 7.6 effective 1/1/10. Revisions to Rules 1.5, 1.9, 3.3, 7.2, 7.4, 7.7, 7.10, and 8.4 effective 2/1/10. Variations from the Model Rules are noted. Rules only; Comment comparison not included.</p>
Preamble	<p>Does not number paragraphs Fourth paragraph: same as MR [4] but replaces “other” with “by” in last sentence Seventh paragraph: same as MR [7] but replaces “as well as” with “and in” Eighth paragraph: same as MR [8] but changes second sentence “Zealous</p>

Resources



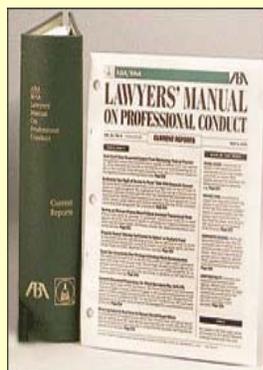
Partner Departures and Lateral Moves: A Legal and Ethical Guide (2009)

Resources



Lawyer Law: Comparing the ABA Model Rules of Professional Conduct with the ALI Restatement (Third) of the Law Governing Lawyers (2005)

Resources



ABA/BNA Lawyers' Manual on Professional Conduct (loose-leaf binder – periodic updates with commentary)

Resources

ABA's Center *for* Professional Responsibility link to the Model Rules of Professional Conduct

http://www.abanet.org/cpr/mrpc/mrpc_toc.html



Photograph of El Morro castle by Luis A. Muñoz

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