

2015 ANNUAL EDUCATION CONFERENCE & RESOURCE CENTER EXHIBITION

CHICAGO

## The Legal Ethics Issues of Recruiting

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## Lawyer Misconduct

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### Maintaining the Integrity of the Profession

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## Lawyer Misconduct

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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, [...];

Model Rules of Professional Conduct (hereafter, “MRPC”), Rule 8.4(a)

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### Lawyer Misconduct

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; MRPC, Rule 8.4(c)

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### Lawyer Misconduct

A “Lawyer must comply with applicable rules at all times, whether or not acting in professional capacity.”

ABA Formal Ethics Opinion 336 (1974)

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### Scenario 1 - Issues

Non-Compete

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### Attorney Rights

- ...To change employment
  - Noncompetition Agreements Prohibited

ABA Model Rule 5.6 – Restrictions On Right To Practice

A lawyer shall not participate in ... making:  
(a) a partnership, shareholders, operating, employment, or other ... agreement that restricts the right of a lawyer to practice after termination of the relationship...

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### 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.

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### Attorney Rights

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

Seller must cease to engage in the private practice or area of practice that has been sold.

Neither Buyer nor Seller may bill clients for transition time issues.

ABA Formal Opinion 468, Oct 8, 2014

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### Attorney Rights

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- Prohibitions include limitations on
  - Geographic area
  - Substantive practice area
  - Direct or indirect penalties for competing
    - Forfeiture partnership interest credits
    - Stock value “if shareholder leaves”
    - Forfeiture of certain percentage of amounts owed

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### Scenario 1 - Issues

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Non-Compete

Prohibition on solicitation

(See generally MRPC Rule 5.6,  
Comments – Taking “Firm” Clients:  
Financial Disincentives)

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### Scenario 1 - Issues

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Non-Compete

Prohibition on solicitation

Fiduciary Duty to partners

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**Scenario 1 - Issues**

**Notice to Partners – Early Notice**

- When current firm plans to incur major financial obligations based on lawyer's role in the firm.

Pennsylvania and Philadelphia Joint Ethics Op. 2007-300

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**Scenario 1 - Issues**

**Notice to Partners – Early 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

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**Scenario 1 - Issues**

**Notice to Partners – Early Notice**

- Intention to join opposing counsel
- ABA Formal Ethics Op. 96-400

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### Scenario 3 – Due Diligence

- Areas of Inquiry
  - Professional History
  - Personal History
  - Anticipated Portable Work
  - Conflicts
  - Prior Firm Obligations

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### Scenario 3 – Due Diligence

- Anticipated Portable Work
  - Acceptable information – generally
    - Client names and addresses
    - General nature of the work
    - Non-public financial information about the client

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### Scenario 3 – Due Diligence

- Anticipated Portable Work
  - Avoid Client information
    - That goes beyond the basics needed to run a conflicts check
      - Opposing, aligned, affiliated parties and the attorneys representing them
      - Nature of the representation – not the specifics of the claims/work

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### Scenario 3 – Due Diligence

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- **Information to avoid** – generally
  - Former firm’s client lists
  - Non-public information about the former firm
  - Client-specific information
  - Financial or analytical documents from former firm’s systems

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### Scenario 4

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#### Conflicts of Interest Prohibitions

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### Scenario 4

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#### Conflicts of Interest Prohibitions

ABA Model Rules

- 1.10 Imputing a Conflict of Interest
- 1.7 Conflict with Current Client
- 1.8 Duties to Former Client

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### Scenario 4 – Imputing a Conflict

- 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...

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### Scenario 4 – Imputing a Conflict

...The 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 (Rule 1.10(a)(1));  
OR

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### Scenario 4 – Imputing a Conflict

– The Prohibition is based upon Rule 1.9 and arises out of the disqualified lawyer’s association with the prior firm (Rule 1.10(a)(2))  
AND...

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### Scenario 4 – Imputing a Conflict

written notice is 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; and...

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### Scenario 4 – Imputing a Conflict

...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.

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### Scenario 4 – Imputing a Conflict

Disqualifications may be waived by the affected client provided there is compliance with the conditions of Rule 1.7

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### Scenario 4 – Imputing a Conflict

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The screening of former government attorneys may be allowed:

Firm may only have to “notify” governmental agency **and**

State “how” firm will screen the former government attorney.

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### Scenario 5

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DRAFT Offer Letter

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### Scenario 5

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Partners’ Fiduciary Duties to Their Other Partners

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### Scenario 5 – Fiduciary Duties

- 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).

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### Scenario 5 – Fiduciary Duties

- Rule of Thumb for Breach

– Where one partner has advantaged himself over one of his partners or over the firm.

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### Scenario 5 – Fiduciary Duties

- 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).

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### Scenario 5 – Fiduciary Duties

- Duty Timeframe

- Until the partner notifies the firm of her withdrawal.

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

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### Scenario 5 – Fiduciary Duties

- Summary – Duty of Loyalty

- During the Partnership or employment relationship.

- Must avoid misleading partners / firm

- May have duty to disclose plans prior to plans becoming a “certainty.”

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### Scenario 5.1

- Do Associates owe the same duty of Loyalty?

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### Scenario 5.1

- Do Associates owe the same duty of Loyalty?
  - Yes
    - Duty is owed to their employers
    - This duty is grounded in or arises out of agency law

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### Scenario 6 – Attorney/Client

- Attorney/Client Fiduciary Duties

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### Scenario 6 – Attorney/Client

- Attorney/Client Fiduciary Duties
  - Undivided loyalty and devotion on the part of the attorney
  - Duty to disclose material information

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### Scenario 6 – Attorney/Client

- Client Solicitation
  - The Focus is on Conduct
    - Timing
    - Method of Solicitation
    - Intent of Departing Attorney
    - Scope of Solicitation

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### Client's 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

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### Client's Right to Counsel

- State Rule
  - 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

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### Client's Right to Counsel

- State Rule Example

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*].

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### Scenario 6 – Attorney/Client

- Client Solicitation

– The Focus is on Conduct

- Timing

– Pre-resignation

– Post-resignation

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### Scenario 6 – Attorney/Client

- Client Solicitation

– 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; ....

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### Scenario 6 – Attorney/Client

- Client Solicitation
  - Method

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### Scenario 6 – Attorney/Client

- Client Solicitation
  - [...] 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 ...

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### Scenario 6 – Attorney/Client

- Client Solicitation
    - [...] 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.
- FL Rule 4-5.8(c)(1)

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### Scenario 6 – Attorney/Client

- Client Solicitation
    - Departing lawyer and former firm – *not the new law firm* – have the obligation discuss how they will contact clients.
- FL Rule 4-5.8(c)(1)

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### Scenario 7 – Attorney/Client

Former firm client calls to speak with the departing / departed attorney.

How should the firm ethically respond to the client's request?

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### Scenario 7 – Attorney/Client

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)

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### Scenario 7 – Attorney/Client

The firm is obliged to provide the contact info requested.

Thereafter, Firm is allowed to ask if there is anyone else who may help the Client

Philadelphia Ethics Op. 94-30 (1994)

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### Scenario 7 – Attorney/Client

- Client Solicitation

- The Focus is on Conduct

- Method of Solicitation

- Pursuant to applicable Rule of Professional Conduct

- Sudden, disparagingly

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### Scenario 7 – Attorney/Client

- Client Solicitation

- Scope

- Attorney contacted only the clients with whom she had worked and had direct relationship

- Solicitation of the firm's largest clients

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### Scenario 8

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Client files

Form files

    Firm

    Practice group

    Personal

“Privileged/Confidential” documents

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### Scenario 8

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Personal desk copies of client correspondence

Attorney’s client list

Publicly filed documents

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### Lateral Hiring Claims

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- 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

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### Lateral Hiring Claims

- Claims may be brought against the lateral attorney or – in some cases – the hiring firm
  - Unfair Competition
  - Misappropriation of Confidential Information

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### Lateral Hiring Claims

- 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)

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### Lateral Hiring Claims

- 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)

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### Lateral Hiring Claims

- Removing and using confidential client records.
- 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)

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### Lateral Hiring Claims

- Accessing password protected databases for names, addresses
- Fostering employee discontent
- Erasing computer files before resigning

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

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### Lateral Hiring Claims

- Resigning without notice
- Soliciting key employees
- Failure to cooperate on joint notice matters

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

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### Lateral Hiring Claims

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

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### 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

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### Lateral Hiring Claims

- Tortious Interference
    - With a contract
    - With a prospective economic advantage
      - **Majority Rule** – Intentional and improper interference with another's prospective contractual relationship...
- Restatement (Second) of Torts § 766B*

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### Lateral Hiring Claims

- Tortious Interference
  - With a contract
  - 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

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### Lateral Hiring Claims

- Defamation
  - False and defamatory statement
  - Unprivileged communication to 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

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### Lateral Hiring Claims

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

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## Lateral Hiring Claims

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

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## Resources

ABA's Center for Professional Responsibility link to online Model Rules of Professional Conduct  
[http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html)

Linda Sorenson Ewald, *Agreements Restricting the Practice of Law: A New Look at an Old Paradox*, 26 J. Legal Prof. 1 (2001–2002)

Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 Hofstra L. Rev. 65 (Fall 2007)

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## Resources

E. Bennett, E. Cohen, M. Whittaker, Annotated Model Rules of Professional Conduct, Seventh Ed. (ABA, 2011)

Geri Krauss, Partner Departures and Lateral Moves – A Legal and Ethical Guide, 2009

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