Reprinted with permission from the New York State Bar Association Journal, November 2020, Vol. 92, No.8

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

TO THE FORUM:

After many years of practicing with Firm A, I have decided to strike out on my own. During my tenure at the firm, I have brought in clients with various needs that were serviced by other lawyers at Firm A. Given my lack of expertise in some of these areas, I do not feel comfortable representing these clients in my new practice. Some of these clients desire to come with me to my new firm despite my protestation. Others do not wish to remain at Firm A after I leave because of their longstanding relationship with me. What are my obligations to these clients?

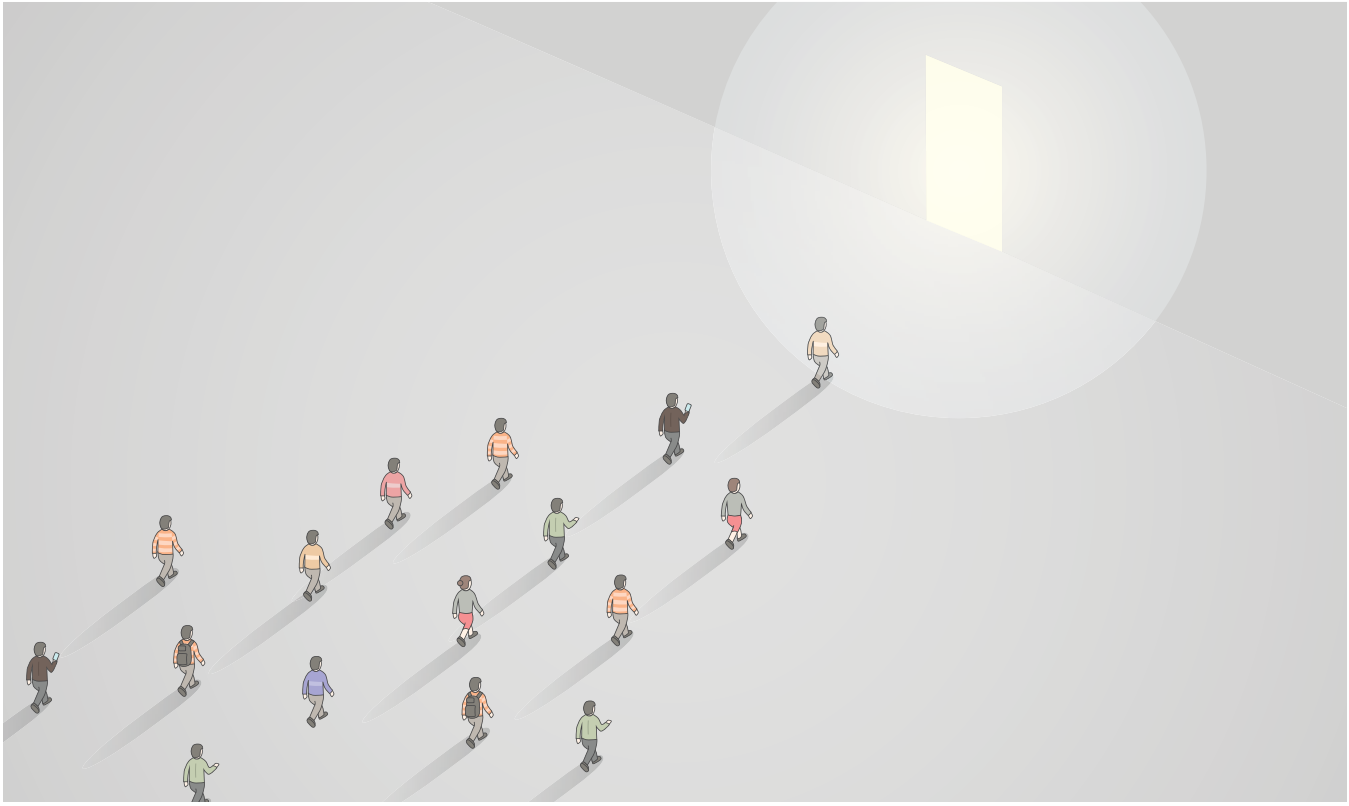
Sincerely,
Larry Lateral

DEAR LARRY,

There are several ethical and professional obligations that apply when lawyers change firms and bring clients with them.

Duty of Communication and a Client's Right to Choose

First and foremost, a lawyer has an ethical obligation to promptly inform his or her clients that the lawyer is changing firms. As discussed in a prior *Forum*, this obligation stems from Section 1.4 of Rules of Professional Conduct (RPC) which requires that lawyers promptly communicate relevant information to clients. *See* Vincent J. Syracuse, Carl F. Regelmann, Richard W. Trotter & Amanda M. Leone, Attorney Professionalism Forum, N.Y. St. B.J., September 2017, Vol. 89, No. 7. This is not



as simple as it may seem, since law firms are a business and those who remain at the firm may have concerns about losing a client.

Formal Opinion 489 tells us that it is proper for departing lawyers to unilaterally inform a client that the lawyer is changing firms; however, that said, in our view it is preferable that the firm and the departing lawyer work out a "joint communication" to all clients with whom the departing lawyer has had significant contact. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 489 (2019). Proper planning in this area is in the best interests of clients and is also likely to reduce the risk of disputes that often occur when a lawyer leaves a firm. The opinion emphasizes that prompt communication of an attorney's plans to change firms is important because, put in basic terms, clients have a fundamental right to choose counsel. *Id.* The RPC gives great deference to the client's right to choose its counsel and, as a result, there are very few circumstances where a client is prohibited from moving to the new firm with the lawyer. Thus, attorneys must give careful consideration to the client's desire to move to the new firm and should examine such desires in the light of the ethical rules outlined below.

In the end, the decision to move firms is up to the client and you should work with your client if it wants to make the transition with you to your new firm.

As an initial matter, in considering the client's desire to retain the attorney's new firm, attorneys must not overlook RPC 1.1, which requires that attorneys provide competent representation to a client. The plain language of RPC 1.1(b) explicitly prohibits a lawyer from representing a client in a legal matter that "the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." RPC 1.1(b). In determining whether a lawyer has the requisite competence to handle a matter, the lawyer should consider factors such as "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question." RPC 1.1 Comment [1]. However, inexperience in a certain area of the law will not automatically bar an attorney from representing a client at his or her new firm. Rather, Comment 2 to RPC 1.1 states that "a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar . . . Competent representation can also be provided through the association of a lawyer of established competence in the field in question." RPC 1.1 Comment [2]. Thus, if one of your colleagues at your new firm has the relevant experience and knowledge in the area of the law that is required to properly represent the client, competent representation may be provided to the client by your association with your colleague.

It may well be that the RPC prohibits you from representing the client at your new firm if there is no lawyer at your new firm equipped to handle your client's matter competently and you do not believe you will be able to develop the requisite knowledge through sufficient preparation. Nevertheless, given the client's fundamental right to choose their counsel, it is of upmost importance to communicate this fact to your client and discuss all of their available options.

Conflict Checks

It should be no surprise that when a lawyer joins a firm with clients from a former firm, it is necessary for the new firm to run a conflict check under RPC 1.10(e)(3). This is especially true in the context of a lateral hiring where the newly associated lawyer's former clients become the new law firm's former clients. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 663 (2019 ed.), citing NYSBA Comm. on Prof'l Ethics, Op. 720 (1999).

RPC 1.9 governs an attorney's ethical obligations to former clients and provides, among other things, that a lawyer may not represent a client adverse to a former client in a matter that is the same or substantially related to the matter in which the transitioning attorney represented the former client. *See* RPC 1.9(a). In addition, RPC 1.9 prohibits a lawyer from revealing the confidential

information of former clients protected by RPC 1.6. *See* RPC 1.9(c). A former client may waive the protections of RPC 1.9(c) provided the waiver is based on informed consent and is confirmed in writing. *See* NYSBA Comm. on Prof'l Ethics, Op. 1061 (2015). If the client does not waive the conflict, the transitioning attorney and the new firm have a conflict that may prevent them from representing the client, an issue that we have previously covered in several prior *Forums*. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., June 2012, Vol. 84, No. 5; *See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2018, Vol. 90, No. 9; *See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., January/February 2019, Vol. 91, No. 1.

When running conflict checks, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational and other practical issues. *See* RPC 1.6, Comment [18A]. This can get tricky because the need to determine the existence of a conflict does not automatically allow the attorney to disregard its confidentiality obligations to clients. RPC 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6. *Id.* If the transitioning attorney does not have the client's consent to disclose confidential information when considering a possible lateral move, the attorney may only disclose information that is not "confidential information" within the meaning of RPC 1.6, such as: "(i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each lawyer-client relationship; and (vi) information about aggregate current and historical payment of fees." RPC 1.6 Comment [18B]. Conversely, if the information is ordinarily protected by RPC 1.6(a), 1.9(c) or 1.18(b), disclosure without client consent is *not* permitted. *See* RPC 1.6 Comment [18C]. This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. *Id.*

Comment [18F] to RPC 1.6 gives important guidance to attorneys considering a possible lateral move. "Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b)." RPC 1.6 Comment [18F]. Under RPC 1.6, such steps might include: "(1) disclosing client information in stages; initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process." RPC 1.6 Comment [18F].

Conflicts of Interest

If it turns out that the transitioning attorney's former client was, or is, adverse to a client at the new firm, a conflict of interest may be imputed to the new firm under RPC 1.10(c). Much like RPC 1.9(c), RPC 1.10(c) provides that, "[w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter." RPC 1.10(c) is triggered whenever a new attorney joins or otherwise becomes associated with a firm and overlaps with RPC 1.10(e)(3), requiring conflict checks. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 642. RPC 1.10(c) applies whenever the newly associated lawyer "personally represented" a client that the firm is currently opposing or has been asked to oppose. *Id.* However, RPC 1.10(c) may also apply if the newly associated lawyer did not personally represent the person that the firm is currently opposing or has been asked to oppose, but the firm where the newly associated lawyer used to work did represent that person. *Id.*

When read in isolation, RPC 1.10(c) appears to place an outright ban on representing the transitioning attorney's clients in the presence of a conflict of interest. That is certainly not the goal of rule. A strict reading of RPC 1.10 could be detrimental to the right of clients to choose counsel, and the rights of attorneys to generate

business. Comment [4A] to RPC 1.10 reminds us that: "[t]he principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests." RPC 1.10, Comment [4A]. Nevertheless, RPC 1.10(d) permits waiver of the potential conflict under certain circumstances. Specifically, RPC 1.10(d) provides: "[a] disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." For example, RPC 1.7(b)(4) requires that each affected client give informed consent to waive the conflict.

In the end, the decision to move firms is up to the client and you should work with your client if it wants to make the transition with you to your new firm. The rules that we have outlined will keep you on your proper course.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Maryann C. Stallone, Esq.
(stallone@thsh.com)
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Alyssa C. Goldrich, Esq.
(goldrich@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

UPDATE TO THE JAN./FEB. 2020 FORUM ON FEE SHARING IN RETIREMENT

We wanted to update you on a recent ethics opinion regarding our January/February 2020 *Forum* on fee sharing (Vincent J. Syracuse, Carl F. Regelmann & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., January/February 2020, Vol. 92, No. 1). In our January/February 2020 *Forum*, we discussed NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), which opined that an attorney can assume joint responsibility for a representation *only* where the lawyer opts for continued registration upon retirement. The Committee recently revisited this issue and has modified its 2019 opinion. In NYSBA Comm. on Prof'l Ethics, Op. 1201 (2020), the Committee opined that when analyzing the fee sharing rules with respect to OCA-retired lawyers, RPC Rule 5.4(a) (sharing fees with non-lawyers) is inapposite and, as long as the attorney remains licensed to practice, an OCA-retired lawyer may meet the "joint responsibility" requirements of RPC 1.5(g) (fee sharing with a lawyer who is not associated with the firm). Attorney fee sharing arrangements in retirement should be carefully considered and, based upon the lack of clear guidance in the Rules of Professional Conduct, is an area that may be ripe for future clarification. Stay tuned. . . .

QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM:

TO THE FORUM:

I have owned and operated my own practice for the last 25 years. Last year, I hired a partner to help service my clients and to generate additional business so that the practice can live on long after my retirement. The partner I hired has an impressive background in computer programming and suggested that we create an online platform to assist *pro se* litigants with the filing of legal documents through an automated system called U-Dox. U-Dox would be owned and operated by a new entity that is separate and apart from my legal practice, although it would be advertised on my firm's website. The service would offer two options for assistance in filing *pro se* papers. The first and cheapest option gives users access to generic templates to be filled in with the general assistance of an automated program and provides no direct access between the user and the lawyer specific to the user's needs. The second and more expensive option provides all of the features of option one, but the final product would be reviewed by an attorney to check for compliance, totality, etc. Of course, if users are happy with the automated system, they are always permitted to retain us for our full legal fee to obtain the entire gamut of our legal services.

Am I ethically permitted to offer such services to clients? If so, what are my ethical obligations with respect to advertising said services and retaining clients who have used these services?

Very Truly Yours,
Alott A. Business

Reprinted with permission from: *New York State Bar Association Journal*, November 2020, Vol. 92, No. 8, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.