Primer on Acting Rationally

When Lawyers Relocate

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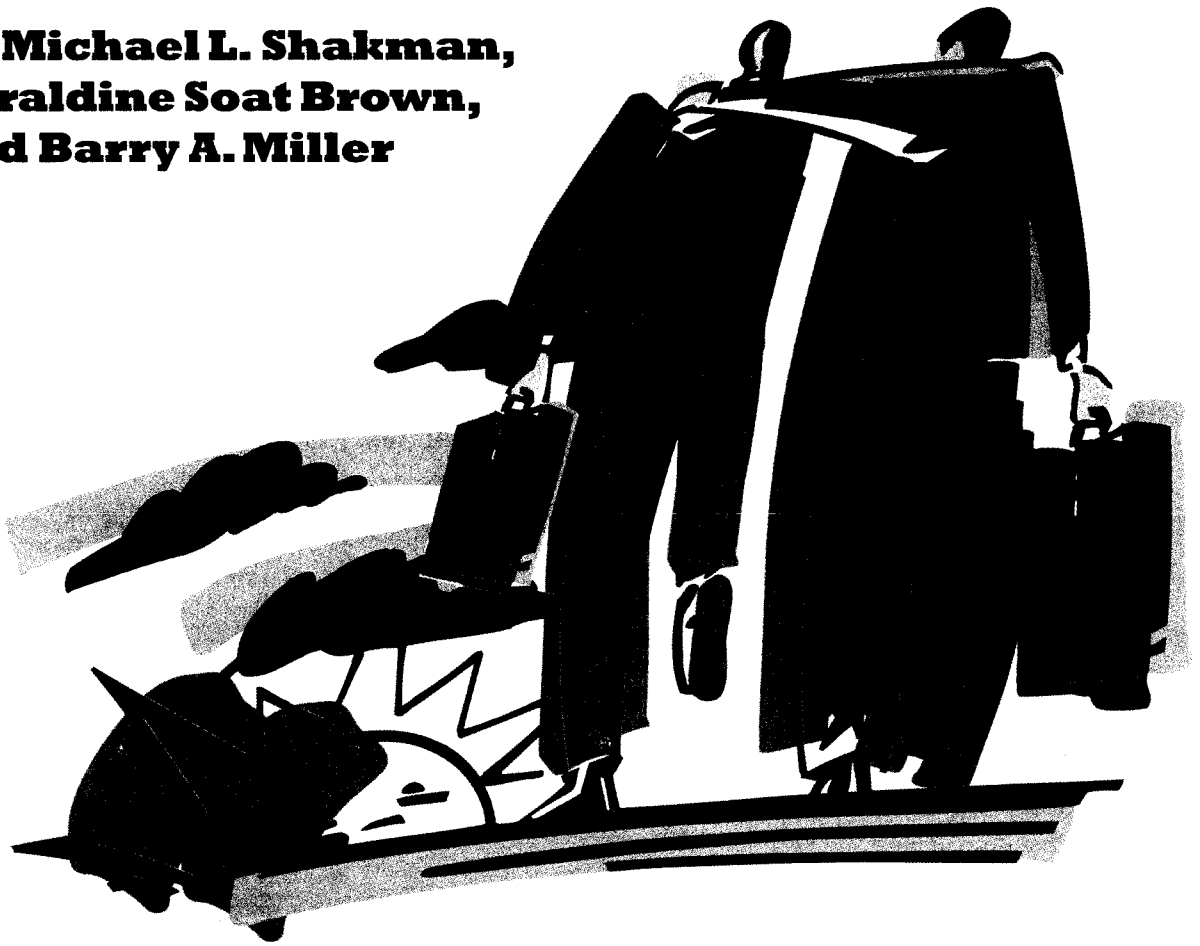

We live in an era of lawyer mobility. Because lawyer compensation is often tied to business production, lawyers strive to build and maintain relationships with clients who have confidence in the individual lawyer, as opposed to the lawyer's firm and colleagues. Many firms encourage this attitude, both by sometimes providing greater compensation to "rainmakers" who generate client relationships and by forcing out "unproductive" partners, despite years of loyal and effective service.

Whether the movement is voluntary or involuntary, the profession sees more of it today than ever. Case law and ethics opinions are responding to regulate the process. This article describes practical solutions to common problems encountered when lawyers relocate and relates them to the governing guidelines.

Here are a few key principles:

• Lawyers are fiduciaries for their clients and must safeguard the clients' in-

terests.

- Agreements restricting the ability of lawyers to compete with their old firm after they leave are largely unenforceable.
- Clients do not belong to a lawyer or a firm; the client chooses whether to follow a departing lawyer or stay with a firm.
- Lawyers have fiduciary duties to their partners before they leave, and some duties continue after departure.
- Lawyers may plan for departure but may not secretly solicit clients or employees.

These general principles leave many open issues, the outcome of which will depend on a court's view of who is acting reasonably. These principles also are subject to exceptions under which specific client interests or equitable considerations outweigh the general policies. The predominant weight given to client interests underscores the highly fact-specific nature of the disputes that arise. The single most important practical recommendation, whatever one's role in the process or whomever a lawyer represents, is to be reasonable and fair in dealing with the issues.

These principles apply whether a firm is a partnership, professional service corporation, or limited liability company; the fiduciary duty principles that apply to lawyers and firms are substantially the same whatever the form of the firm. *See Fox v. Abrams*, 210 Cal. Rptr. 260, 265-66 (Cal. Ct. App. 1985); *Connelly v. Estate of Dooley*, 422 N.E.2d 143 (1st Dist. 1981).

Cannot Prevent Competing

Illinois Rule of Professional Conduct 5.6(a) permits agreements restricting the right of a lawyer to practice law only when the agreement concerns "benefits upon retirement." Agreements restricting a lawyer's practice after departure are otherwise unenforceable. *See Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 368-370 (Ill. 1998) .

Notifying Clients and the Old Firm

The departing lawyer voluntarily moving to another firm will usually have a group of clients who will likely move with him or her. This so-called "portable business" is the most important consideration for the lawyer who is relocating and for the new firm.

The departing lawyer will want to contact clients, tell them of the planned move, and obtain a clear understanding that the clients will follow. This area of the law is changing, but several rules are firming up.

Undisclosed Pre-departure Solicitation is Not Usually Permitted

In *Dowd & Dowd*, the Illinois Supreme Court made this clear: "[S]ecretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association . . . would not be consistent with a partner's fiduciary duties . . . ." 693 N.E.2d at 367 (quoting *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179, 1183-84 (N.Y. 1995)).

Unilateral pre-departure solicitation of clients violates the lawyer's fiduciary

duties to the old firm's partners—no matter who brought in the client. *See Saltzberg v. Fishman*, 462 N.E.2d 901, 907 (1st Dist. 1984). It is also unfair because it deprives the old firm of a chance to compete for the clients' loyalty. *See generally Pratt v. Blunt*, 488 N.E.2d 1062, 1070 (5th Dist. 1986) (injunction against former associates contacting clients of old firm who had not yet become their clients as part of order to preserve status quo); *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1265-67 (Mass. 1989) (departing partners required to pay old firm profits earned by new firm on old firm's cases, except when clients acted on own accord in transferring cases); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978) (enjoining solicitation).

Limited pre-withdrawal communication with clients may be permitted if necessary to protect client interests. "Departing partners have been permitted to inform clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice." *Dowd & Dowd*, 693 N.E.2d at 367. The client is entitled to know that the lawyer who is handling a lawsuit or transaction will be relocating because the client will be entitled to choose between the lawyer's old and new firms.

The best solution is usually for the departing lawyer to tell the old firm that he or she is leaving and to work out a joint letter from the departing lawyer and the old firm to the relevant clients giving them the choice of the old or new firm. *See ABA/BNA Law. Manual on Professional Conduct* 91:720. In *Dowd*, the Supreme Court emphasized that notification of clients should ideally occur after notice to the old firm. 693 N.E.2d at 367. *See also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980); Joint Ethics Opinion No. 99-100 of the Pennsylvania and Philadelphia Bar Associations, *ABA/BNA Law. Manual*, Vol. 15, No. 9, at 217 (departing lawyers should first inform old firm of intent to leave before discussing departure with clients).

An ABA opinion provides a full discussion of the joint versus individual notification to clients, concluding that joint notice is "far the better course" but in some circumstances, it may not be feasible. In those circumstances, "the departing lawyer must provide notice to those clients for whose active matters she currently is responsible or plays a principle role . . . in an appropriate manner." ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 99-414 (1999).

According to Opinion 99-414, unilateral informational notification should be limited to active clients, should not urge the client to sever its relationship with the firm, but "may indicate the lawyer's willingness and ability to continue" the matters currently being worked on. *Id.* It should make clear that the client has the right to decide who will complete the work, and it should not disparage the old firm. *Id.*

Contacting clients unilaterally and without prior notice to the old firm invites a charge that the departing lawyer has improperly solicited firm clients. For that reason, it is safer for the communication to be in writing. In either case, the client should be asked to respond in writing, indicating its choice of counsel.

Talking to Lawyers and Staff

The departing lawyer is obligated not to solicit employees of the old firm to leave until the firm has been notified that the lawyer is departing, and some caselaw suggests that the old firm must consent before solicitation occurs. *Cf. ABC Trans Nat'l Transp., Inc. v. ABC Air Freight*, 413 N.E.2d 1299, 1305-07 (1st Dist. 1980) (non-law firm commercial solicitation). If the person solicited is another partner, that partner may be obligated to tell the firm what the departing lawyer is proposing to do.

Surprisingly little law exists, however, enforcing these obligations. This may be due to the fact that when a rainmaker leaves, he or she will take the people who assist in serving the lawyer's clients. Without that business, the supporting lawyers may be extra freight, and their departure may be welcomed by the old firm. Further, unless the firm can establish that it has been damaged by the improper solicitation, it may not be entitled to recover damages. *See Meehan*, 535 N.E.2d at 1264 n.14. The only completely safe course for the departing lawyer is to keep plans to leave strictly confidential until the lawyer informs the old firm as a whole, or to obtain permission from the old firm to discuss a joint departure with specific individuals.

A third approach often arises in practice: sometimes several partners are collectively dissatisfied with the old firm; individual associates may also express the intention to relocate unless a specific problem in their relationship with the old firm is addressed. These lawyers may treat such circumstances as justifying a joint departure. If the partners' or associates' dissatisfaction has been presented to the old firm and not satisfactorily addressed, an argument can be made that no harm to the firm comes from the joint departure of the group because they were going to leave individually in any case.

This fact pattern occurs frequently and may justify pre-departure discussions among lawyers who may ultimately leave together, but no case addresses this argument, so its merits remain to be tested. Whether there has been a breach of duties to the old firm in this situation will likely be a fact-specific inquiry turning on several factors, including what the old firm knew about the dissatisfaction, what the departing lawyers did and said pre-departure, and whether they were going to leave individually in any case.

Pre-departure Preparation

Although secret solicitation of clients and firm employees is usually forbidden, courts have also recognized that departing lawyers are permitted to undertake some confidential pre-departure preparation. "[T]aking steps to locate alternative space and affiliations would not violate a partner's fiduciary duties. That this may be a delicate venture, requiring confidentiality, is simply common sense . . . ." *Graubard*, 653 N.E.2d at 1183, *cited in Dowd & Dowd*, 693 N.E.2d at 367.

Timing the Departure—Formal Notice Requirements

Tension often arises between the departing lawyer's wish to obtain a clear commitment from clients and colleagues and her wish not to tell the old firm of the planned move so that it cannot compete for the clients. In addition to the general considerations discussed above, the partnership or shareholder agreement often has something to say on this subject.

Some agreements require substantial advance notification—60, 90, or even 180 days. Firms seek to justify advance notice by emphasizing the need for time to arrange the transition of pending matters to other lawyers at the firm for clients who elect to remain. A short advance notice requirement is consistent with Rule 5.6, if not pressed too far. *See Dowd & Dowd*, 672 N.E.2d at 866 (upholding 90-day notice provision), *rev'd on other grounds*, 693 N.E.2d at 368.

Long periods could be used to disadvantage clients who wish to have the lawyer of their choice work on their matters. Accordingly, courts are likely to look with skepticism on advance notification if the old firm insists that the departing lawyer stay in place for the entire period—particularly if the old firm uses the period to seek to cement its relationship with the clients who are viewed as likely to leave. While the *Dowd* decision did not resolve this question, its emphasis on client interests suggests a basis for doubt if the client wishes the departing lawyer to handle its matters and does not wish to wait 90 or 180 days for the lawyer to do so. *See* 693 N.E.2d at 364-65.

A reasonable solution, and one that is often negotiated, permits the departing lawyer to leave before the end of a long notice period, provided that he or she has first fulfilled all obligations to bill unbilled time and arranged for payment to the old firm, has not attempted to jump the gun in pre-soliciting clients, and has otherwise complied with reasonable termination-related requests.

Financial Considerations

Issues frequently arise concerning the departing partner's share in the old firm's profits. Many partnership agreements provide that if a partner leaves before the end of the year, his or her share of profits is computed as of the date of departure. Because many firms receive a disproportionate part of their total annual fees in the last few months of the year, this can result in no profit (or even a loss) for the departing attorney who leaves before year end. Many firms adopt the reasonable solution of prorating the profit for the year, once it is known, over the period that the departing lawyer was present. Thus, someone who leaves after working the first six months receives half of his her share of profits when they are known at year-end.

Similarly, extended periods for the repayment of the departing lawyer's capital in the firm are sometimes provided. Negotiations often shorten the period, usually in return for a recognition of the time value of money when paid early.

Taking Client Files

The departing lawyer will want to take the files of clients who have elected to be represented by the new firm. The old firm is usually willing to release the files, provided that it has a letter of authorization from the client, and provided other related matters are addressed. Departing lawyers also usually agree to maintain the files for a specific number of years and to provide the old firm future access to the files on proper notice. The most common issues are payment of unpaid fees by the clients and future access to the files by the old firm.

Liens

Because Illinois recognizes an attorney's lien on the client's files and papers to secure payment of fees, the old firm can justifiably ask for some assurance that its fees will be paid in the normal course by the client. *See* 770 Ill. Comp. Stat. 5/1 (West 1999) (charging lien in favor of attorneys attaching to "any verdict, judgment or order entered and to any money or property which may be recovered"); *Upgrade Corp. v. Michigan Carton Co.*, 410 N.E.2d 159, 161 (1st Dist. 1980).

Courts have released the retaining lien when the client pays the attorney the amount claimed or furnishes adequate security. Substituting the charging lien for the retaining lien is inadequate security when there was no assurance that the client would be successful in the pending litigation to which the charging lien attaches. *Upgrade Corp*, 410 N.E.2d at 162.

When the client seeks the materials on which the retaining lien is asserted because they are needed for pending litigation, the attorney is "entitled to a summary determination fixing the value of his services so that such amount can be paid or otherwise adequately secured before the production order may be enforced." *Id.; see also In re Liquidation of Mile Square Health Plan of Illinois*, 578 N.E.2d 1075, 1080 (1st Dist. 1991) (asserting lien in certain circumstances may violate ethical considerations); *Intaglio Service Corp. v. J.L. Williams & Co.*, 445 N.E.2d 1200 (1st Dist. 1983).

Access

Access is most important if a malpractice claim is asserted or if the firm is otherwise involved in litigation to which the files are relevant. Illinois Supreme Court Rule 769 requires that all financial records related to an attorney's practice be maintained for not less than seven years.

Dealing with Fees, Billed and Unbilled

One area of the law is not consistent with what most lawyers assume it to be. Most lawyers incorrectly assume that payment for work performed after departure on matters that arose pre-departure belongs to the new firm, unless the partnership agreement is to the contrary. The rule established by the Uniform Partnership Act ("UPA") is that an open matter at the old firm is "unfinished business" that belongs to that firm. *See Ellerby v. Spiezer*, 485 N.E.2d 413 (2d Dist. 1985); *see also* Epstein and Wisoff, "Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice," 73 *Cal. L. Rev.* 1597 (1985) (*Ellerby*-type rule prevails in most

jurisdictions).

A lawyer is "not entitled to take any action with respect to the unfinished business leading to purely personal gain, such as having the client discharge the partnership and hire him individually." *Ellerby*, 485 N.E.2d at 416-17. This stems from the UPA principle that a partnership dissolves when any member withdraws, but its existence does not end. Instead, its unfinished business is completed for the benefit of the partnership. *Id.* at 417.

While the old partnership may, in fact, continue in business under the same name with all other partners, it is treated as a new legal entity. Each partner of the dissolved firm has the right to wind up the partnership's business by handling open matters as requested by clients. The partner is entitled only to compensation for overhead, not for any profit (beyond his or her share of income under the old firm's sharing agreement). *See* Robert W. Hillman, "The Impact of Partnership Law on the Legal Profession," 67 *Fordham L. Rev.* 393, 402-03 (1998); Michael L. Shakman & Barry A. Miller, "*Flynn v. Cohn*: Payment of Overhead in Winding Up a Partnership," 81 *Ill. B.J.* 530 (1993). On the flip side, the partner would be entitled to share in the profit from unfinished business from the old firm.

Absent an agreement, a departing lawyer should negotiate a resolution of the *Ellerby* issue. Typically, the departing lawyer and the firm agree that fees earned by each side after the date of departure are kept by that side.

More complex issues arise when contingent fee litigation is moved from the old firm to the new before there has been any recovery or when the departing lawyer has sought to move the case on the eve of trial, settlement, or other fee-generating event. While the client clearly retains the right to choose its lawyer, courts have held the departing lawyer liable to the old firm when the circumstances suggested that the case was moved to deprive the old firm of its share of a substantial recovery or when the case represented unfinished business of the old firm after it dissolved.

In one case, the client was even held subject to liability for conspiring with the withdrawing attorneys to interfere with the client's contract with the old firm, even though the client had the unilateral right to terminate the contract. *See Rosenfeld, Meyer & Susman v. Cohen*, 194 Cal. Rptr. 180, 195-96 (1983), *cited in Ellerby*, 485 N.E.2d at 416. In most contingent fee cases, the parties agree to allocate any recovery *pro rata* between the old and new firm based on the value of the hours worked on the case at each firm, applying normal hourly billing rates.

The old firm is entitled (absent extraordinary circumstances) to have the departing lawyer record, bill, and assist it in collecting fees attributable to services rendered for the old firm. Usually, there is no dispute over this.

Dealing with Continuing Liabilities of the Old Firm

This is one area in which it makes a difference whether the law firm is organized as a partnership, corporation, or limited liability company. When partners withdraw from a partnership, under the UPA, the partnership is dissolved, but it stays in existence as a firm in dissolution to wind up its affairs. These affairs include unpaid obligations to third parties, such as a landlord or bank. Typically, partnership agreements adopt the rule that the firm continues to exist, and the departing partner is to be paid what he or she is owed as a creditor. As a corollary, the departing partner is usually released by agreement from liability for future installments of existing and known obligations that the firm owes to its creditors on the lease or bank debt.

Complex issues of liability to third parties can arise in these circumstances, however, because the continuing partners who assume ongoing partnership obligations are usually viewed as primarily liable for pre-departure obligations of the firm, and the departed partners are liable only as sureties. *See* II Alan R. Bromberg & Larry E. Ribstein, *Bromberg and Ribstein on Partnership*, §7.14(d) (1999).

As a practical matter, if the firm continues, either under a provision of the partnership agreement that so provides or as a reconstituted new partnership with a reduced roster of partners, it must deal with the old firm's creditors. They retain the right to look to all of the old firm's partners with respect to pre-departure obligations of the old firm. 805 Ill. Comp. Stat. 205/36 (West 1999).

A member of an LLC, on the other hand, is liable for the company's debts to third parties (except professional malpractice) only to the extent that a shareholder in a corporation would be liable in analogous circumstances. *Id.* at 180/10-10. A well-drafted operating agreement for an LLC (or shareholders' agreement for a law firm that is incorporated) should spell out the members' responsibilities to the company upon departure.

Even if the partnership or LLC agreement is clear, it may be appropriate to negotiate for a different result. There is a big difference, for example, in how to deal fairly with the old firm's long-term lease obligations if the departing partner was a newcomer who had nothing to do with the negotiation of the firm's long-term lease, rather than a senior partner who had insisted on a long-term lease and pressed the firm to assume significant debt for leasehold improvements.

Professional Malpractice Issues

Under Supreme Court Rule 721(d), responsibility for professional malpractice is the same no matter how the firm is structured: all members of the firm are jointly and severally liable for malpractice by members or employees of the firm. No simple formula prescribes in advance the responsibility for liabilities from existing or potential future malpractice claims that could involve the departed lawyer and the old firm.

If known circumstances might give rise to a claim, the departing lawyer and the old firm should jointly discuss advising their professional liability carrier at or before the time the lawyer relocates. Under most policies, this discussion will trigger coverage under the ex-

isting policy and avoid a question as to whether the claim had been made by the plaintiff but not reported to the insurer within the policy period.

Because most policies provide coverage on a "claims-made" basis, notice is important to avoid an argument by the insurer during a later policy period that the claim was not "made" within the policy period, but earlier, and is not covered by the current policy (because the claim was "made" in the earlier period but not reported) or by the earlier policy (because no notice of the claim was given to the insurer in the earlier period).

It serves all interests to agree to cooperate should a future malpractice claim be made that involves both the firm and the departing partner. The departing partner will normally ask the firm to continue coverage for the lawyer's actions, even after the lawyer has left the firm. This sort of coverage is available in professional liability policies, sometimes with payment of an additional premium. The coverage should probably last as long as the repose period for attorney malpractice--six years from the time the act or omission occurred. 735 Ill. Comp. Stat. 5/13-214.3 (West 1999).

The parties may also attempt to negotiate a formula for sharing uninsured expenses associated with future malpractice claims, such as the deductible amount (which can be very large) and any uninsured loss. In view of the lack of knowledge about what claim will be made or who will bear responsibility, it is often enough to agree that uninsured amounts will be allocated in accordance with the applicable rules of law.

Nuts and Bolts of Relocation

The departure of one or more partners from a firm can be much like a divorce in terms of its personal impact. Emotional issues can overwhelm the otherwise good judgment that each participant would bring to the matter if he were not personally involved but were advising a client. The firm and departing lawyers are often much better off if each is represented by counsel, who may be expected to bring a rational and balanced approach to the issues and to facilitate communications when relationships have been strained to the breaking point. When both sides are represented by experienced counsel, it is usually possible to work out the issues with a minimum of disruption.

If possible, the practical arrangements should be documented in a separation agreement. The parties often adopt arbitration or another ADR process to resolve future disputes because few lawyers or law firms benefit from the relatively slow judicial process or the publicity that is likely to accompany a lawsuit.

In addition to the issues discussed above, issues include:

- What personal property can the departing lawyers take with them? Inevitably, they have personal items to remove from their offices and often have form documents used in their practices. Whether these documents belong to the old firm, thus preventing the departing lawyer from taking copies, is a question that arises occasionally. As a practical matter, most form documents find their way into court filings or are otherwise publicly available so that it is not essential to obtain a copy from the firm in order to have access to the form. This issue is usually not worth the fight.
- Will secretaries and other support personnel be encouraged to stay or relocate? Unless the old firm is preparing to go to war with the departing partner over other issues and is, therefore, trying to identify all possible claims, it normally does not care if the departing lawyer seeks to hire a secretary or a paralegal who works on the lawyer's matters.
- How will phone calls and mail to the old firm be handled after the departure? Lawyers usually arrange to have a messenger pick up mail addressed to the departing lawyer at the old firm on a daily basis for the first few weeks after departure and on a less frequent basis thereafter. The old firm is usually willing to advise persons who call of the new location of the departing lawyer. Not to do so could expose the old firm to liability should the departing lawyer not be contacted regarding a client matter and may expose the firm to ethical sanctions. *See* Arthur Garwin, "What to Say When a Lawyer Leaves," *ABA Journal*, Feb. 1998, at 69.
- What sort of public statement will be made concerning the change in the firm's makeup? Parties frequently agree on a neutral statement in the event that a reporter asks questions about the relocation of the departing lawyer. It rarely helps either the departing lawyer or the old firm to discuss in the press the shortcomings of the other (despite the understandable temptation to do so).
- When and how will client files be transferred? The mechanics of transferring files requires coordination of letters of direction with clerical personnel and making certain that court dates or closing deadlines are not missed. The old firm may also wish to retain copies of work product (legal research, typical forms, and other materials) that may be useful in connection with other work.
- How will the firm and the withdrawing lawyer report to the IRS the amounts paid by the firm and received by the departing lawyer? Both parties have an interest in consistent reporting. They may wish, therefore, to agree to follow the determinations made by the firm's regularly employed accountants if both parties have confidence in them.

Conclusion

The relocation of a lawyer disrupts existing bonds and relationships, but that does not mean that the parties need go to war. Often, they have common interests in terms of fees to be collected and even future business to be handled or referred to one another. Those interests are best advanced by reaching a reasonable resolution to the issues that arise in separating. ■

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