Thinking about Leaving? The Ethics of Departing One Firm for Another

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Introduction

Lawyers today increasingly change jobs, suggesting to some that lawyer movement is becoming the norm. For example, one study reported that an average of 15 out of 100 associates annually depart a law firm. Today’s mobility is in stark contrast to a half-century ago when lawyers might reasonably expect to remain with the same firm for their entire careers.

Occupational movement in the legal profession is likely to continue for several reasons. First, many law students graduate with substantial educational debt. As a result, some graduates accept jobs that are not their “real” first choice but that pay well with the intent of moving soon to better jobs. They know that few, if any, adverse consequences will follow. Second, lateral job movement for some experienced lawyers is an effective way to improve income and other working conditions. Finally, lawyer movement or dislocation also occurs when law firms develop new specialties, clients, and economic efficiencies.

Although law firm departures are common, a lawyer’s decision to leave a firm is generally neither easy nor risk free. Departing lawyers may be sued by their clients and old firms and professionally disciplined if they injure persons or entities while making their career moves. This article discusses some of the ethical obligations that departing lawyers have under the Model Rules of Professional Conduct. It also offers some practical suggestions for how departing lawyers and their firms may avoid becoming the target of a legal malpractice or discipline action.

I. The Profession’s General Approach to Occupational Movement

The American Bar Association (ABA) has a long tradition of opposing restrictions on a lawyer’s right to practice law upon termination of employment with a law firm or other employer. Rule 5.6(a) of the ABA Model Rules of Professional Conduct (Model Rules) provides that a “lawyer shall not participate in offering or making 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.” Most courts refuse to enforce restrictive covenants that violate Model Rule 5.6(a), including provisions that penalize a lawyer financially for moving to another firm. Some commentators have criticized Model Rule 5.6 for its “lack of clarity” and its failure to sufficiently protect the economic interests of law firms by recognizing reasonable restrictions or non-compete agreements.

Model Rule 5.6(a) contains one exception to the general rule that prohibits restrictions on the lawyer’s right to practice law upon departing employment. Law firms may impose a restriction as a condition to receiving retirement benefits. The restriction must concern a retirement benefit that is available only to lawyers who in fact retire. The retirement restriction can not involve a forfeiture of income already earned by the lawyer because that would violate 5.6(a)’s proscription against restrictions – financial penalties – on the right to practice law.

Cohen v. Lord, Day & Lord is a leading case concerning the profession’s general ban on financial penalties for departing lawyers. In Cohen, the New York Court Appeals held that a partnership agreement that conditioned the payment of earned but uncollected revenue to a departing lawyer upon his not competing with his former firm was unenforceable as a matter of public policy – an unethical restriction on the lawyer’s right to practice law. Similarly and more recently, in Eisenstein v. Conlin, the Massachusetts Supreme Judicial Court found that a partnership agreement constituted an impermissible restriction on a lawyer’s right to practice law under Rule 5.6. Under the agreement, lawyers who voluntarily withdrew from the firm had to remit 15% of all fees received at their new firm for four years for work performed for clients or former clients of the lawyers’ former firm.

II. Ethical Rules and Advice – Lawyers Departing One Firm for another Firm

ABA Formal Opinion 99-414 (ABA Formal Opinion 414) examined some of the ethical rules and issues involved in a lawyer departing one firm for another. More recently, the Pennsylvania and Philadelphia Bar Associations issued Joint Opinion 2007-300 (Joint Opinion 300) advising lawyers about many of the same ethical issues involved in moving between firms. Both ABA Formal Opinion 414 and

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Joint Opinion 300 provide a good framework for identifying and discussing some of these ethical issues.20

A. Notification of Departure

Model Rule 1.4, titled “Communication”, requires that a lawyer “keep [a] client reasonably informed about the status of [a] matter,” and “promptly comply with reasonable requests for information.”21 Model Rule 1.4 further requires a “lawyer [to] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”22

ABA Formal Opinion 414 found that the impending departure of a lawyer “who is responsible for the client’s representation or who plays a principal role in the law firm’s delivery of legal services currently in a matter (i.e., the lawyer’s current client)” constitutes “information that may affect the status of a client’s matter as contemplated by Model Rule 1.4.”23 Joint Opinion 300 similarly notes that the departing lawyer and the old firm are required to notify “clients affected by the departure.”24 Under the opinion, neither the departing lawyer nor the firm has a duty to notify firm clients about a lawyer’s departure if the lawyer has not worked on a client matter or has played only a subordinate role in the matter “afford[ing] the lawyer little or no direct client contact.”25

ABA Formal Opinion 414 noted that both the departing lawyer and “responsible members of the law firm who remain” have a duty to notify the client about the departure.26 The notification can be done individually by the lawyer and the responsible members of the firm or jointly by the departing lawyer and the firm members.27 Both ABA Opinion 414 and Joint Opinion 300 recommend joint notice when possible.28 Joint Opinion 300 also noted that “in most cases” client notice should occur after the departing lawyer’s notice to his firm.29 The “firm first” principle of notification is not absolute. For example, the firm need not be notified first when the departing lawyer believes that the firm will take preemptive action that disables him or her from serving the client who desires or needs the lawyer’s services.30 Preemptive action includes locking the departing lawyer out of the firm’s offices or denying him access to client documents or the computer system, thus disabling him or her.31

Although when a departure becomes “impending” may not always be clear, when in doubt the departing lawyer should err on the side of disclosure to the client and the firm, thereby protecting the client’s interests and firm’s interests. The Model Rules do not specifically address the timing of the notice of departure.32 Joint Opinion 300 mandates that the timing of the notice “should be fair and reasonable under all of the circumstances.”33 Earlier rather than later disclosure of an impending departure may help insulate the departing lawyer from client or firm allegations of misconduct, including a violation of Model Rule 1.4 or a breach of fiduciary duty in delaying notice.

In addition to Model Rule 1.4, several other ethical rules support the dual obligation on the part of the departing lawyer and his or her firm to assure that clients receive fair and reasonable notice of the lawyer’s departure. First, Model Rule 1.1 requires a lawyer to provide competent representation.34 An impending departure is the type of development that may affect the status of a client matter and may necessitate changes in strategy or staffing.35 The client has a right to know how the departing lawyer and the firm — since both owe the client a duty of competency — will continue to protect his or her interests. Rule 1.1 requires both the departing lawyer and the firm to plan competently for and cooperate in servicing the client’s legal needs.

Second, Model Rule 1.3 requires lawyers to act with diligence and promptness in representing clients. The lawyer should act “with commitment and dedication to the interests of the client” and avoid unreasonable delay that “can cause a client needless anxiety and undermine confidence” in the lawyer or the firm.36 Prompt notification by the lawyer enables the client to act in his or her best interests, including retaining the firm, following the departing lawyer, or seeking entirely new counsel.37

Third, Model Rule 1.7 reflects the fundamental and overarching obligation of a lawyer to be loyal to a client. Model Rule 1.7 prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest — a conflict that precludes the lawyer from exercising independent judgment on behalf of the client and representing the client in a zealous manner.38 Loyalty requires that both the departing lawyer and the firm notify the client of any impending departure so that the client can make an informed decision about the selection of counsel in a timely manner.

The lawyer’s notice of departure should be in writing, although Joint Opinion 300 permits the departing lawyer and the firm to notify the client in person or by telephone.39 Good practice standards strongly favor written disclosure because of the risk that a lawyer’s departure may negatively affect a client and expose the lawyer and his firm to civil liability. Joint Opinion 300 makes clear that notice must be sent to all affected clients, including “difficult clients.”40

Joint Opinion 300 also cautions that lawyers and firms should not use the lawyer’s departure as a convenient tool for purging themselves of difficult clients.41 Model Rule 1.16 permits lawyers to withdraw from representing difficult clients. Withdrawal — and not departure — is the appropriate way to terminate a relationship with difficult clients.

Joint Opinion 300 warns that after notifying a client about the lawyer’s impending departure, these same rules prohibit conduct by the departing lawyer and his firm that negatively affects the client’s case.42 For example, withholding documents or intentionally delaying work to influence the client’s choice of counsel is impermissible.43 Thus,
both the departing lawyer and his or her law firm should attempt to keep the client fully informed about his or her matter to preempt any client misconceptions about otherwise innocent conduct. Providing the client with copies of some emails or written communications regarding developments in his or her representation reassures the client that the lawyer has not forgotten the client and generally builds good will between the client and the lawyer.

B. Post-Notification & Subsequent Client Communications

After the lawyer or the firm notifies the client about the lawyer's impending departure, Joint Opinion 300 permits both the departing lawyer and the firm to communicate with the client. Subsequent communications are permitted for the purpose of assisting the client to make an informed decision about whether to continue representation with the law firm or with the departing lawyer. The subsequent communications should highlight the client's freedom of choice in selecting counsel.

A lawyer who is still an employee or partner of a firm and who attempts to take a client for himself or his new firm may be engaging in impermissible solicitation under applicable ethical standards. The conduct may also subject the lawyer to liability for breach of fiduciary duty or some other duty to the firm under the substantive law of partnership, agency, or torts. The written solicitation must not be false or misleading and must comport with the other exceptions in Rule 7.3. Unlike in-person, live telephone and electronic solicitation, the departed lawyer is not required to have had a "prior professional relationship" with the firm's client or former client before sending written solicitation to them.

C. Post-Departure & In-person Solicitation

Generally, a lawyer may solicit his or her former firm's clients or former clients once the lawyer has departed the firm. Solicitation that is in-person, by live telephone or real-time electronic contact, is permitted only if the lawyer "has a family, close personal, or prior professional relationship" with the client or former client.

Joint Opinion 300 describes a "prior professional relationship" as involving sufficient contact between the lawyer and the client so that the client can evaluate the lawyer's qualifications. What constitutes a "prior professional relationship" sufficient for assessing a lawyer's qualifications is not self-evident. Both the quantity and the nature of the contact play a role. The fact that the client belongs to the firm and therefore has a professional relationship with all of that firm's lawyers is not sufficient. This extremely broad view of a "prior professional relationship" arguably guts the overriding purpose of this exception to in-person solicitation which is to ensure that clients can make informed decisions about the selection of counsel.

The prior professional relationship exception to the ban on in-person solicitation requires that the lawyer had some direct, and arguably significant, professional contact with his or her old firm's clients. The standard invites a factual inquiry into the amount and nature of a lawyer's contact with a client. For example, the departing lawyer's preparation of written memoranda or motions or even minimally participating in client counseling sessions where the lawyer has some direct contact with the client arguably meets the standard. In contrast, a departing lawyer does not meet the standard when the lawyer has no direct contact with the client and the lawyer merely files a motion on behalf of a firm team representing the client. Here, there is no prior professional relationship with the client that justifies barring later in-person solicitation.

D. Post-Departure Written Solicitation

Joint Opinion 300 notes that once a lawyer has departed the firm, the lawyer may solicit in writing all current and former clients of the old firm. The written solicitation must not be false or misleading and must comport with the other exceptions in Rule 7.3. Unlike in-person, live telephone and electronic solicitation, the departed lawyer is not required to have a "prior professional relationship" with the firm's client or former client before sending written solicitation to them.

E. Rule 1.6 - Confidentiality

Another important ethical issue for departing lawyers arises from the need to protect client confidences. Rule 1.6 generally prohibits lawyers from disclosing client confidences related to the lawyer's representation of the client. To be sure, lawyers making lateral moves commonly communicate some client information to their new firms to help both the departing lawyer and his or her new firm to avoid actual or potential conflicts of interests. Joint Opinion 300 indicates that there is no express authorization in the professional conduct rules for such limited disclosure without client consent. Joint Opinion 300 warns departing lawyers to convey only as much information as is necessary to permit both the departing lawyer and the new firm to avoid conflicts of interest and to permit the new firm to assess the departing lawyer's competency and diligence.

Conclusion

A departing lawyer and the firm he or she is leaving have much to gain by being mutually civil and cooperative in resolving the details of the departure. At the very least, this approach reduces the likelihood that the departing lawyer or his old firm will be the target of a lawsuit or disciplinary
action. Cooperation and civility during and following a lawyer’s departure also promise to enhance the profession’s reputation as lawyers avoid being perceived as unduly litigious, greedy, or vindictive.50

Joint Opinion 300 offers several client-centered suggestions for lawyers departing firms. First, the lawyer should inform the client about the impending departure and its timing as soon as reasonably possible so that the client is in a position to protect his or her interests including the possibility of selecting new counsel.61 Second, the lawyer should mention his new professional association and “his willingness and ability to continue the client’s current representation.”62 Third, the departing lawyer should not urge the client to “sever or continue its relationship with the old firm” or to move to the new firm. 63 Fourth, the client should be advised in a clear and fair manner that he or she has the sole right to decide who continues to represent his or her interests.64 Finally, neither the departing lawyer nor his or her firm should disparage the other.65

Endnotes

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1. **Anthony Kronman, The Lost Lawyer** 277-80 (1993) (discussing the phenomenon of increased lawyer movement between firms and concluding that “it is rapidly becoming the norm” id. at 277) (hereinafter Kronman). See Lynley Browning, For Lawyers, Perks to Fit A Lifestyle, N.Y. TIMES, Nov.22, 2007, at C1 (reporting that “associates routinely jump[]” to go elsewhere, [and] that law firms are trying to create a workplace that satisfies their young recruits’ wants and needs, while freeing them to bill 60 hours or more a week.”); see also Erwin Chemerinsky, The Wall Street Lawyer 86-90 (discussing a managing partner’s experience approximately 50 years ago and suggesting that lawyers often moved to firms clients-corporations and some government agencies). See generally Robert W. Hillman, Hillman on Lawyer Mobility, at 1:6 (2d ed. 1998) (2007 Supp.) (reporting that lockstep compensation schemes were common when ‘inter-firm movement by partners were difficult’); and stating that “lawyers rarely changed firms” id. at 1:12 (2003 Supp.) (hereinafter Hillman).

2. **Hillman, supra note 1, at 1:27 (2 ed. Supp. 2002) (citing National Association of Law Placement, “Beyond the Bidding Wars: A Survey of Associate Attrition, Departure Destinations and Workplace Incentives” 27 (2000) (reporting also that by the third year 43.1% of associates in a class have departed id. at 27). See Kronman, supra note 1, at 277 (noting a 1988 survey of the 500 largest firms that found that over a quarter of the firms were common when ‘inter-firm movement by partners were difficult’); and stating that “lawyers rarely changed firms” id. at 1:12 (2003 Supp.) (hereinafter Hillman).

3. Kronman, supra note 1, at 277 (stating that “the movement of lawyers from one firm to another was “a relative rarity” id.). See Hillman, supra note 1, at 1:7 (2 ed. Supp. 2006) (recognizing that the “era of the mobile lawyer began in the 1980s . . .”).


5. Karen Dybis and Michelle Weyenberg, The Hidden Debt Crisis, 17, No. 3 Nat’l Jurist 22-27 (Nov. 2007) (reporting the median debt among new lawyers at about $70,000 with about two-thirds of the debt ranging between $35,000 and $106,000 and the highest reported figure at $213,000 id. at 23-24; also noting that today’s “average graduate from a private law school is paying $1,000 a month just to cover their law school debt” or “more than 20 percent of their monthly paycheck - a figure double what financial planners recommend” id. at 24). The ever spiraling costs of training professionals transcends the law field. See Cheryl Powell, Studies predict shortage of physicians nationwide, AKRON BACON J., A1 (Nov. 28, 2007) (noting that because new doctors “[i]t is increasingly higher medical school debt,” they are less likely to remain in areas where “reimbursement tends to be lower than in other regions.”).

6. See generally Ursula Furi-Perry, Best Law Firms to Work For, What Makes a Great Firm, 17 NAT’L JURIST 24, 25-30, (Oct. 2007) (discussing law student expectations of work in law firms and noting, in part, that “the[se] are the kind of students coming out saying they want more work life balance” id. at 25). But they prioritize work differently. Yes they have conflicting desires and goals. On the one hand, they want work life balance. On the other, we absolutely see them pursuing higher salaries” (quoting James Leipold, executive director of the National Association of Law Placement); and noting research that showed that large law firms have an attrition rate over 20 percent and that appropriation is the “biggest issue” for law students (quoting Andrew Carter, co-chair of new student group, “Law Students Building a Better Legal Profession”)—an organization devoted to part in “changing the” law firm billing system, and “implementing balanced hour policies” at law firms in return for students accepting “less money” id. pt. 3 An attack on the Law firm status quo at 31). Of course, the legal profession is not alone in experiencing mobility and other challenges in its workforce. Cheryl Powell, Studies predict shortage of physicians nationwide, AKRON BACON J., A1 (Nov. 26, 2007) (noting that younger physicians “want more opportunities to have balance between their private and professional lives”, that “it is getting worse”, and discussing the recruitment and retention efforts by hospitals, including helping physicians manage their practices and providing grants for medical records, to prevent “medical stuff[g]aps in patient care” that may be caused, in part, by lawyers relocating; also stating that there is an expected physician shortage by 2020).

7. A common economic reason for firm mergers is the need to establish a physical presence in a new location to service clients directly. See Hillman, supra note 1, at 1:8 (2006 Supp.); Robert L. Nelson, Partners with Power: Social Transformation of the Large Law Firm 37 (1998) (hereinafter Nelson). Clients often prefer convenient “face time” with their counsel. Of course, some firms may avoid merging with a local firm and instead open a satellite office. The firm may need local lawyers to help staff the satellite office. This may cause occupational movement as some lawyers depart existing jobs for the new satellite office. See Hillman, supra note 1, at 1:7-8 (2006 Supp.) (discussing some reasons for lawyer movement and its destabilizing effect on law firms).

8. In addition to the ethical standards governing lawyer move-
ment between firms, state substantive law may be applicable. For example, partners in a law firm must be careful not to breach any fiduciary duties owed by departing lawyers to their former colleagues. Hillman supra note 1, at 4:84-115 (2 ed. Supp. 2003) (discussing the fiduciary obligations of lawyers in different contexts, for example, departing lawyers soliciting firm clients prior to withdrawal, id. at 4:100). Similarly, lawyers may expose themselves to liability for tortuous interference with contractual relations when they solicit clients while still working for the old firm. See Id. at 3:1-27. Departing lawyers should know state statutes and case law potentially governing lawyer movement between employers. See Ethical Obligations When a Lawyer Changes Firms, ABA FORM Op. 99-414 at 2 (1999) [hereinafter ABA FORM Op. 414] (stating that “the law of agency, partnership, property, contracts, and unfair competition impose obligations” not covered by the Model Rules). A recent joint ethical opinion by the Pennsylvania Bar Association and the Philadelphia Bar Association stated “there is an overlap, and sometimes a tension, between the Rules of Professional Conduct and applicable substantive law.” Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility and Philadelphia Bar Ass'n Professional Guidance Commnn., Joint Op. 2007-300 at 2 [hereinafter Joint Op. 300]. Contractual agreements between lawyers and their firms may also affect the conduct of departing lawyers. This private ordering of occupational movement is also subject to both state legal ethics codes and state substantive law.


10. Rotunda, supra note 9, at 977. Denburg v. Parker Chapin Flattau & Klimp, 82 N.Y.2d 375, 381-82, 600 N.Y.S.2d 900, 904-05, 624 N.E.2d 995, 999-1000 (1993) (finding financial disincentive in firm agreement violated DR 2-108’s ban on restrictions by requiring lawyers who entered private practice during a five-year period to pay or to remit a percentage of the departing partner’s net profits or a percentage of billings of the firm’s former clients who moved to the departing lawyer’s new firm).

11. Stephen Gillers, Some Problems with Model Rule 5.6(a), COURSEBOOK, 33RD NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY 1 (2007) [hereinafter Some Problems]; Rotunda, supra note 9, at 976. See generally Nelson, supra note 7, at 207 (noting that “[b]ecause managerial authority in the firm is subject to the control of client-responsible lawyers, it is constrained by the balance of power between partners with client responsibility” and that this raises the question of how the firm will “foster the autonomy of practitioners from clients?”)

12. Rule 5.6(a) ABA Model Rules of Professional Conduct (MR). MR 5.6(a) forbids any agreement “that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . .” See Rotunda supra note 9, at 980.

13. Rotunda, supra note 9, at 980. See Some Problems 1-4 (providing an interesting discussion about “[w]hat counts as a ‘restriction’ on the right to practice” law and what constitutes “retirement” — the two essential concepts of MR 5.6(a) and noting that meanings of both terms are not “self-evident”).

14. Rotunda, supra note 9, at 980.

15. 75 N.Y.2d 95, 551 N.Y.S.2d 157, 550 N.E.2d 410 (1989). See Ronald C. Munkoff, Compilation of Cases Involving Restrictive Covenants Among Law Partners (MR 5.6(DR 2-108) COURSEBOOK, 33RD NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY 1 (2007) (containing a helpful review of cases dealing with restrictive covenants not to compete; and stating that for “the past two decades, state courts have roughly divided into two groups: the majority, which follow Cohen and flatly prohibit ‘forfeiture for competition’ clauses, and the minority, which follow cases like Howard v. Babcock, 6 Cal. 4th 409, 563 P.2d 150 (1993) and recognize that reasonable restrictions on competition for departing partners may be sensible and necessary”).


18. Id. at 265, 827 N.E.2d at 689.


22. MR 1.4(b).


25. Id. at 8.

26. ABA FORM Op. 414, supra note 8, at 3. See Joint Op. 300, supra note 8, at 7 (discussing the notification duty of both the departing lawyer and the old firm and stating that: “this is not to say that each must notify the client of an impending departure . . . . [H]owever, if one fails or refuses to do so, the other one must.”)

27. ABA FORM Op. 414, supra note 8, at 3.

28. Id. at 6 (recognizing that non-amicable departures may make joint notice not feasible); Joint Op. 300, supra note 8, at 12.


31. Id. at 8-9.

32. Id. at 8.

33. ABA/BNA MAN., supra note 20, at 384.

34. MR Rule 1.1 Competence.

35. ABA FORM Op. 414, supra note 8, at 2; Joint Op. 300, supra note 8, at 7 (cautioning that the client’s informed consent is required concerning who shall continue to represent the client when the lawyer’s departure).

36. MR 1.3 Com’t [1], [3]. See Joint Op. 300, supra note 8, at 16 (warning that the departing lawyer may not defer work on a client matter to further the lawyer’s personal financial interests, for example, generating fees at new firm).

37. MR 1.3 Diligence (noting that a lawyer must “act with commitment and dedication to the interest of the client” see id. Com’t [1]; and recommending that sole practitioners prepare a plan to protect a client from possible neglect of client matters in case of the lawyer’s disability or death see id. Com’t [5]). Similar to a sole practitioner’s death or disability, a lawyer’s departure creates some risk that client matters may
be neglected. Thus, lawyers should carefully plan their departure and that plan should include diligently notifying the client about the departure to reduce possible client anxiety. Comment [3] to Rule 1.3 provides: “Even when the client’s interests are not affected in substance, however, unreasonable delay (i.e., procrastination in representing a client) can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.”

38. MR Rule 1.7 Conflicts of Interest: Current Clients (requiring lawyers to avoid concurrent conflicts). “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” MR 1.7 Com’t [1]. See also MR 1.7 (b) (permitting a lawyer in limited circumstances to represent a client notwithstanding a concurrent conflict of interest in limited circumstances—essentially when the lawyer obtains a valid conflict of interest waiver).

40. Id. at 17; ABA/ BNA MAN., supra note 20, at 385.
42. Id. at 9 (both the departing lawyer and the old firm owe the client ethical duties during the period when the lawyer is negotiating departure and a transitioning to the new firm).
43. Id. at 17; ABA/ BNA MAN., supra note 20, at 385.
45. ABA/ BNA MAN., supra note 20, at 384.
46. Id. at 384.
47. ABA FORM Op. 414, supra note 8, at 3-4 (stating that departing lawyer is ethically prohibited from soliciting in person a firm client with whom he has neither a family relationship nor a prior professional relationship).
48. ABA/ BNA MAN., supra note 20, at 385 (noting that Joint Opinion 300 cites cases involving these causes of action from Pennsylvania, Alabama, New York, and Massachusetts).
50. See e.g., Graubard, Mollen, Dannett & Horwitz v. Moskovitz, 86 N.Y.2d 112, 119-20, 624 N.Y.S.2d 1009, 1113, 653 N.E.2d 1175, 1184 (N.Y. 1995) (finding actionable a partner’s surreptitious solicitation of firm client before departure); Meehan v. Shaughnessy, 535 N.E.2d. 1255, 1264-65 (Mass. 1989) (holding that there was a breach of fiduciary duty when two partners, a junior partner and an associate, who had access to clients and access to information concerning clients, secretly lured clients away from their old firm to their new firm).
51. MR 7.3(b) (permitting solicitation with some limitations, see infra note 55). See ABA FORM Op. 414, supra note 8, at 3. Joint Op. 300, supra note 8, at 3-4; See generally ROTUNDA, supra note 9, at 1119-24 (discussing departing lawyers who solicit their former law firm’s clients and stating that after lawyers have departed they can use written or recorded communications to solicit their former firm’s clients id. at 1124).
52. MR Rule 7.3(a) (1)(c)(2); Direct Contact with Prospective Clients; ABA FORM Op. 414, supra note 8, at 4.
55. Id. at 14. See ABA/ BNA MAN., supra note 20, at 384-85; see also Slappo v. Kentucky, 486 U.S. 466, 473 (1988) (holding that the First Amendment protects direct written mail solicitation that is neither false nor misleading). Model Rule 7.3(b)(1) is one exception to the general rule that permits direct written solicitation. It prohibits written, recorded or electronic communications if the prospective client has made known to the lawyer his desire not to be solicited by the lawyer. Rule 7.3(b)(2) is a second exception that prohibits similar communications that involve coercion, duress or harassment. The exceptions or prohibitions to communications contained in Model Rule 7.3(b), also apply to Model Rule 7.3(n)”s permissable communications, for example, in-person solicitation of former clients or family members. See MR 7.3(b).
56. For a discussion of in-person solicitation limitations see Part II C supra.
57. ABA FORM Op. 414, supra note 8, at 5 n.12; JOINT Op. 300, supra note 8, at 23-24 n.9; ABA/ BNA MAN., supra note 20, at 385.
59. Joint Op. 300, supra note 8, at 24 n.9. See ABA/ BNA MAN., supra note 20, at 385. Cf. MR 1.17, Com’t [7] (dealing with client confidences and the sale of a law practice and requiring client consent before a seller “provide[s] the purchaser access to client-specific information relating to the representation and to the file . . .”). It is interesting to note that Comment 7 specifically compares the type of negotiations that occur between the seller and prospective purchaser of a law practice with the preliminary discussions of a lawyer who is associating with a new firm. In both contexts, the client confidentiality provisions of Rule 1.6’s are not violated unless the lawyer discloses “client-specific information relating to the representation and to the file — in which case, client consent is required. Id.
64. Joint Op. 300, supra note 8, at 12. See ABA FORM Op. 414, supra note 8, at 5 (noting that the departing lawyer “must make clear that the client has the ultimate right to decide who represents him”); ABA/ BNA MAN., supra note 20, at 384.
65. Joint Op. 300, supra note 8, at 12. See ABA FORM Op. 414, supra note 8, at 5 (noting that “[a]ny initial in-person or written notice informing clients of the departing lawyer’s new affiliation that is sent before the lawyer’s resigning from the firm” must not disparage the departing lawyer’s former firm); ABA/ BNA MAN., supra note 20, at 384.