This article originally appeared in Law Journal Newsletters' Law Firm Partnership & Benefits Report, September 2004. For more information, visit www.ljnonline.com.

CLIENTS: To Whom Do They Belong?

By Wayne N. Outten
Douglas C. James

The answer is, nobody.

When a partner leaves a law firm, the parties have to allocate various partnership rights, assets, and other interests. They may allocate most of these interests in any way that they choose. They may not, however, allocate clients, perhaps the most valuable of partnership "assets." The client alone decides whether to remain a client of the firm, to leave with the departing partner, or to choose another attorney. Law firms and departing partners have an ethical obligation to handle these situations in a way that is consistent with the principle of client choice.

I. The Client's Right to Choose

Clients have an absolute right to choose their attorneys, including the right to end attorney-client relationships without cause. "[T]he right to change attorneys, with or without cause, has been characterized as universal"; it finds its origins in the English common law. *Echlin v. Superior Court of San Mateo County*, 90 P.2d 63, 65 (Cal. 1939) (internal citations omitted). This unfettered right necessarily includes the right to select a departing partner over the remaining partnership or, in the event of partnership dissolution, one partner over another. *See Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (1989).

Under common law, the client's right to choose her attorney has been regarded as necessary to ensure zealous representation. "It is unquestioned that a client has the right to terminate the relationship of attorney and client at any time, with or without cause. That right is afforded him by the law because of the peculiar nature and character of the relationship, which in its very essence is one of trust and confidence. It is a right for the benefit of the client, and is intended to save him from representation by an attorney whose services he no longer desires.... " *Gordon v. Mankoff*, 261 N.Y.S. 888, 89-90 (1931). See also *Sohn v. Brockington*, 371 So.2d 1089, 1093 (Fla.App. 1 Dist., Jun 13, 1979); *Herman v. Prudence Mut. Cas. Co.*, 235 N.E.2d 346 (Ill.App. 1 Dist., Feb 19, 1968); *MacLeod v. Vest Transp. Co.*, 235 F.Supp. 369 (N.D.Miss., Sep 25, 1964); *State ex rel. Seifert, Johnson & Hand v. Smith*, 110 N.W.2d 159 (Minn., Jul 07, 1961); *De Korwin v. First Nat. Bank of Chicago*, 155 F.Supp. 302 (N.D.Ill., Aug 23, 1957); *In re Lachmund's Estate*, 170 P.2d 748 (Or., Jul 02, 1946).

This absolute right to choose is not without conditions. It is limited by, for example, conflicts of interest, the client's ability to pay for services, and the attorney's right to decline engagement. *Howard v. Babcock*, 863 P.2d 150, 159 (Cal. 1994). Moreover, while a client may terminate the attorney-client relationship for any reason, that right is conditioned on, among other things, the right of the terminated attorney to recover the value of services already rendered. *Marshall v. Romano*, 10 N.J. Misc. 113,114 (C.P. 1932). That topic is discussed below.

II. Restrictive Covenants as Unreasonable Restraints

Rule 5.6 of The Model Rules of Professional Conduct states as follows:

> A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;[1] or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

As interpreted by many courts, "[t]he history behind the RPC and its precursors reveals that the RPC's underlying purpose is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice." *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992). *See ABA Formal Op. 61-300* ("Clients are not merchandise[,] [l]awyers are not tradesmen," and restrictive covenants inappropriately "barter in clients."); *see also ABA Informal Op. 68-1072.*

Accordingly, clauses in partnership agreements that prohibit departing attorneys from representing clients of their former firms have been held to be unenforceable as against public policy. *See Meehan v. Shaughnessy* 535 N.E.2d 1255 (Mass. 1989)(interpreting agreement as permitting representation of firm's clients by departing partners in order to avoid violating rule against anticompetitive agreements); *Dwyer v.* Jung, 336 A.2d 498 (N.J. 1975) (covenant not to do business with firm's clients void); *Hagen v. O'Connell, Goyak & Ball*, 683 P.2d 563 (Or. 1984) (non-competition agreement void); *Cohen v. Graham*, 722 P.2d 1388 (Wash. 1986)(agreement not to represent former firm's clients unenforceable).

Further, most jurisdictions have found that clauses that impose financial penalties on former partners who represent firm clients also violate public policy. *See Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598 (Iowa 1990)(forfeiture of partnership interest for causing "detriment" to firm by withdrawing and competing held void); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992)(agreement barring compensation, including percentage of annual draw, to withdrawing partners who represent clients of firm

[1] Covenants that condition or limit **legitimate** retirement benefits based on an attorney's withdrawal from practice or non-competition are explicitly permitted. *See generally Borteck v. Riker, Danzig, Scherer, Hyland & Perretti*, 844 A.2d 521 (N.J. 2004); *Donnelly, v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum, and Walker, P.L.C.*, 599 N.W.2d 677 (Iowa 1999)(retirement benefits conditioned on not practicing law in the state of Iowa). *But see Apfel v. Budd, Larner, Gross, Rosenbaum, Greenberg & Sade*, 734 A.2d 808 (N.J.App.Div. 1999)("[T]he benefits to be paid or withheld under this agreement do not turn on any bonafide retirement ... but rather turn on competition or non-competition with [the former firm]"); *Cohen*, 550 N.E.2d 410, 411 (N.Y. 1989)(forfeiture of earned partnership revenues fall outside of the retirement benefit exception and is therefore prohibited).

within a year of departure void); *Cohen v. Lord, Day, & Lord*, 550 N.E.2d 410 (N.Y. 1989)(agreement conditioning payment of withdrawing partner's share of net profits, including unpaid fees and work in progress, on non-competition void); *Gray v. Martin*, 663 P.2d 1285 (Or. 1983)(voids agreement that withdrawal payments are forfeited if withdrawing partner practices law in certain geographical area); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528 (Tenn. 1991)(voids agreement providing for forfeiture of equity and deferred compensation for withdrawing partner who continues to practice law). *But see Howard, 863 P.2d at 160* (rejecting majority rule, finding an "agreement . . . to forego benefits otherwise due under the contract [ ] in an amount that at the time of the agreement is reasonably calculated to compensate the firm for losses that may be caused by the withdrawing partner's competition with the firm, would be permitted."); [2] *Capozzi v. Latsha & Capozzi, P.C.*, 797 A.2d 314, 318 (Pa. 2002)(adopting the minority view as expressed in *Howard*).

III. Tortious Interference with Contractual Relationship

Notwithstanding the majority view prohibiting non-compete clauses, a departing attorney may still expose herself to liability for breach of fiduciary duty and/or tortious interference with contractual relationships by improperly inducing clients to breach their contracts with the law firm prior to departing. *See Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30, 47 (Ind.App. 2002)(Partner's "fiduciary duty also includes the duty to abstain from pre-departure "surreptitious solicitation" of firm clients for personal gain."); *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179, 1183 (N.Y. 1995) ("[P]reresignation surreptitious "solicitation" of firm clients for a partner's personal gain--the issue posed to us--is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation."). See also Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary and Disciplinary Liability*, 50 U.PittL.Rev, at 99-106).

IV. Notice to Clients

When a partner leaves a firm, both the firm and the departing partner have an obligation to give appropriate notice to clients, so as to give effect to the principle of client choice. ABA Formal Opinion 99-414 provides specific guidelines for such notices.

Among other things, ABA Formal Opinion 99-414 proposes specific methods, times and content for communicating to clients the departure of a partner. These guidelines emphasize client choice. Although the Ethics Opinion does not specifically address Model Rule 5.6 or the prohibition against non-competition clauses, it presumes that all departing partners have the right to engage clients of their former firms and expressly directs departing attorneys and law firms to inform clients of their right to choose the departing partner as their counsel.

Many state bars have adopted similar guidelines. See, e.g., District of Columbia Bar Legal Ethics Committee Op. No. 273 (1997); State Bar of Michigan Std. Com. on Prof. and Jud. Ethics

[2] Notably, the majority view is in tension with the "anticompetitive [sic] penalty" imposed by the "no-compensation rule" which prohibits partners from receiving any pay for services rendered in completing outstanding partnership business upon dissolution. *Howard*, 863 P.2d at 159. The "no-compensation rule" creates a disincentive for partners to represent clients of the dissolved partnership. *See generally Beckman v. Farmer*, 579 A.2d 618, 636 (D.C. 1990).

Op. No. RI-224 (Mich.Prof.Jud.Eth. 1995); N.C. Bar Opinion 200, 1994 WL 899607 (N.C.St.Bar 1994) (lawyer after departure may contact clients of firm for whom he has been responsible); Arizona Comm. on Rules of Professional Conduct Op. No. 91-17 (June 10, 1991) (permissible before departure to notify clients with whom he had a personal, professional relationship); Kentucky Bar Opinion E-317 (1987) (permissible before departure to notify clients whom he personally represented of his impending departure); Cal. Bar Ethics Op. No. 1985-86, n.1 (requiring both the departing lawyer and the law firm to provide notice of withdrawal to clients

sufficient to allow them an opportunity to make an informed choice of counsel made jointly where practical); Cleveland Bar Opinion 89-5 (either the departing lawyer or the law firm must give due notice to those clients of the former firm for whose active, open, and pending matters the lawyer is directly responsible).

The guidelines in ABA Formal Opinion 99-414 are intended not only to preserve client choice, but also to prevent violation of other ethical guidelines and laws regarding lawyer conduct. These include the following: preventing conflicts of interest; protecting client files and property; preventing clients from being adversely affected by an attorney's withdrawal; avoiding dishonesty, fraud, deceit, or misrepresentation in connection with the planned withdrawal; and maintaining confidentiality.

A joint communication in the form of a letter from the firm and the departing partner is strongly preferred. See inset for a model joint letter.

V. An Attorney's (and Firm's) Right to Fees

Courts generally will enforce the contract and quasi-contract rights of attorneys to be paid for their services, provided those rights do not substantially interfere with a client's right to choose. Accordingly, attorneys have a right to recover their earned fees when they are terminated without cause.

When a contingent fee agreement governs the relationship, the majority rule allows the discharged attorney to recover the fair value of the services rendered, rather than allowing the attorney to enforce the contingency fee agreement. "*See Trend Coin Co. v. Fuller, Feingold & Mallah, P.A.*, 538 So.2d 919, 921 (Fla.App. 3 Dist. 1989)("The client is neither penalized for exercising his right to change counsel, nor unjustly enriched at the attorney's expense; he is required to pay the reasonable value of the attorney's services at the time of discharge. *Even when the contingency has almost occurred at the time of the attorney's discharge*, the fee awarded the attorney is limited to the capped quantum meruit amount...."") (emphasis added). *See also Fracasse v. Brent*, 494 P.2d 9, 13 (Cal. 1972)(rejecting prior rule providing that attorneys terminated without cause could obtain specific performance of contingent fee agreements and awarding instead quantum meruit damages).

Under the minority rule, courts will award specific performance of contingent fee agreements against clients who terminate their attorneys without cause. That rule has been rejected by most states as against public policy. "It would be anomalous and unjust to hold the client liable in damages for exercising that basic implied right [of freedom to choose one's attorney]." *Fracasse*, 494 P.2d at 13.

Just as courts will enforce the rights of terminated attorneys to be paid for their services, they also will enforce contractual obligations between departing partners and their former firms regarding fee allocations and profit distributions, so long as they do not interfere with a client's right to choose. Accordingly, courts will enforce such provisions in partnership agreements or retainer agreements with respect to fees earned during the period of the partnership but collected after the separation or dissolution. *See Haymond v. Lundy,* 177 F.Supp.2d 371 (E.D.Penn. 2001).

By

Wayne N. Outten
and Douglas C. James

Outten & Golden LLP
3 Park Ave.
29th Floor
New York, New York 10016
(212) 245-1000
Fax (212) 977-4005
wno@outtengolden.com
www.outtengolden .com

Wayne N. Outten is managing partner of Outten & Golden LLP in New York City, which concentrates its practice on representing employees, executives, and partners. Douglas C. James is an associate of the firm.

Inset: Model Joint Letter.

Dear Client:

This is a joint letter from [Name of Firm] ("the Firm") and [Name of Departing Attorney] ("the Attorney") about your matter.

Effective [Date], the Attorney, who has worked on your matter, will be leaving the Firm and setting up his own law practice. The Attorney's new contact information, effective [Date], will be as follows: [New Address] telephone number, XXX-XXX-XXXX; facsimile number, XXX-XXX-XXXX; email, XXXXXXXXXXX. Between now and then, he can be reached at the Firm.

You may choose to continue having the Firm represent you, or you may choose to have the Attorney continue to represent you through his new firm; the choice is entirely yours. If you choose the former, the Firm will designate a successor attorney to work on your matter; any other attorney of the Firm who has worked on your matter in the past will continue to do so, assuming that this is your preference, of course. If you choose the latter, the Attorney will continue to represent you on your matter.

If you choose to stay with the Firm, your retainer arrangements will remain as they are. If you choose to go with the Attorney, you will need to make retainer arrangements with his new firm. In that event, you would be expected to fulfill your obligations to the Firm through the transition date; after that, you would have no further obligations to the Firm.

Both the Firm and the Attorney are committed to making this transition as smooth as possible and will cooperate with each other to facilitate a transition that has the least possible impact on you.

We would be grateful if you would contact [Managing Partner] of the Firm and/or the Attorney as soon as possible to discuss this matter further, to raise any questions you might have, and to facilitate and coordinate the handling of your matter during this transition period.

Thank you for your cooperation and understanding.

Sincerely,

The Firm **The Attorney**

By: _____
The Managing Partner