

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988-89/14
Client/File Retention - Transfer to a New Firm
February 9, 1989

RULE REFERENCES:

- *Rule 4.2
- *Rule 7.3

ETHICS COMMITTEE RULES REFERENCES:

- *Rule 5

SUBJECTS:

- *Advertising and Solicitation
- *Attorney-Client Relationship
- *Client Communications
- *Files of Client
- *Law Firms
- *Termination/Withdrawal of Attorney-Client Relationship

ANNOTATIONS:

The Ethics Committee is prohibited from rendering opinions on past conduct. (Ethics Committee Rule 5)

A written announcement of an attorney's change of employment is permitted under Rule 7.3 for clients previously represented. Under *Shapero v. Kentucky Bar Association*, 108 S.Ct 1916 (1988), the written announcement may go to all potential clients, so long as the communication is truthful, nondeceptive, and sent to potential clients known to face particular legal problems. (Rule 7.3)

A lawyer without consent or authorization is prohibited from communicating, in the course of representing a client, about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter. (Rule 4.2)

If a lawyer can fairly be said to have personally represented a client before leaving a law firm, then any sort of communication from the lawyer, written or oral, informing them of his or her new practice and their right to choose to be represented by him or her is permissible. The lawyer's new law firm may communicate this information in writing only. (Rule 7.3)

QUESTIONS:

- A. Whether a firm from which an associate is departing has an obligation to inform clients on whose specific cases the associate was working of his departure and of their right to have the associate handle their cases in conjunction with his association with a new firm?
- B. Whether the associate and/or the new firm has the right to inform clients on whose files the associate was working of his transfer to the new firm and of their right to terminate the old firm's representation and retain the new firm and/or the associate to represent them in connection with the subject lawsuits?

FACTS:

Associate left firm X on January 31, 1989, and is currently employed by firm Y. In the course of his employment at firm X, he originated certain business and became primarily responsible for certain other clients. Firm X and the associate sent out a jointly signed letter concerning future handling of those clients' matters to them.

Associate also handled a limited number of insurance defense cases. Apparently these cases were handled in conjunction with a member of firm X. Firm X has refused to send any kind of notice concerning associate's transfer to the insurance defense clients.

RESPONSE:

Under Rule 5 of its Rules of Procedure, the Committee cannot answer inquiry A as firm X has already decided not to send out notices to the insurance defense clients. This action constitutes "past conduct" of firm X. The Committee is prohibited from rendering opinions on "past conduct".

Either the associate or firm Y may inform the insurance defense clients of the associate's new affiliation. Rule 7.3, Rules of Professional Conduct; *Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 (1988). *Shapero* concluded that a State may not under the First and Fourteenth Amendments categorically prohibit lawyers from soliciting business by sending truthful and non-deceptive letters to potential clients known to face particular legal problems. A written announcement of a change of employment is permitted under the existing Rule 7.3 for clients previously represented and under *Shapero* for all potential clients. Prior to *Shapero*, State Ethics Opinions had diverged concerning the propriety of such an announcement regardless of the prior relationship between the announcer and the targeted client. Michigan Ethics Opinion CI-1133 (4-2-86); Suffolk County Ethics Opinion 87-2.

However, firm Y desires more. Apparently firm Y and associate desire to communicate directly with the insurance defense clients to tell them of their right to change counsel to associate or Y.

There is no property interest in clients. A client can choose to be represented by whomever he or she wishes. Both X and Y concede this.

However, Rule 4.2 of the Rules of Professional Conduct prohibits communication in the course of representing a client "about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter". It has been suggested elsewhere that contact by associate or Y concerning the specific case they desire transferred comes within the language of this Rule. 81 Lawyer Manual on Professional Conduct 2005 (1984). Fairly read, Rule 4.2 does not apply to the facts of this inquiry.

Further, in extreme cases courts have found an associate's contact with clients on whose files he had worked following departure from the firm to be a tortious interference with the firm's contractual relationship with a client. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 P.A. 416, 393 A.2d 1175 (1978), cert. denied 422 U.S. 907 (1979). *Adler* rests on the proposition that the client solicited was really a firm client and not the migrating attorney's.

X and Y disagree in this case concerning the relationship of the four insurance defense clients to the associate. X believes that they were firm clients or at least the clients of a member of the firm and not the associate's clients. In the view of X, associate was simply to shepherd the case through discovery and then try the case, if at all, in tandem with a member of the firm. Y's supposition seems to be that the associate was solely responsible for the case and the insurance defense client was associate's client.

If associate can be fairly said to have personally represented the insurance defense clients before leaving firm X, then any sort of communication from the lawyer, oral or written, informing them of his or her new practice and their right to choose to be represented by him or her is permissible. Rule 7.3. Kentucky Bar Association Ethics Opinion E-317 (1/87). Firm Y may communicate this information in writing only. Rule 7.3; *Shapero, supra*.

However, if in fact associate simply assisted on the file and the clients were represented by firm X or a member of firm X, he and firm Y can only communicate with the insurance defense clients in writing. This communication can legitimately inform them of his new employment, his willingness to undertake representation of them in general, and their right to transfer the existing cases upon which he worked to him or firm Y. Rule 7.3; *Shapero, supra*. This opinion is limited to an interpretation of the Rules of Professional Conduct and in no way is to be read as a comment on the issue raised by *Adler, supra*.