

PERSPECTIVES

An attorney's guide to insurance and risk management

MSP L 03/02 "Law Firm Management"

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Law Firm Management

By Marcia L. Proctor

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Risk Management Control Spots

The "Risk Management at Large Law Firms, 1997" Report of Louis Harris and Associates, Inc., notes that over the last decade the number of law firms larger than 35 lawyers using in-house risk management partners or committees has increased from 41% to 90%; the use of computerized conflict check software has increased from 16% to 85%; firms that have in-house risk management mechanisms tend to pay out less in claims over \$50,000 than firms without mechanisms.

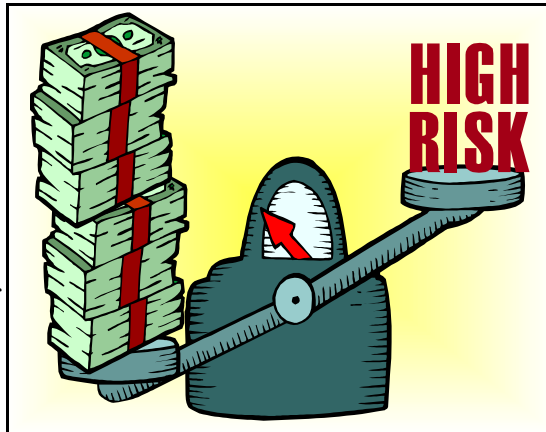
Twelve Michigan law firms were included in the survey. Nine out of ten law firms 35-75 members have a partner or committee in charge of risk management/malpractice/ethics; 97% of the firms larger than 75 lawyers have such positions. The report notes that 56% of legal malpractice claims are resolved within the policy deductible.

Noncompete Covenants

Law firm agreement requiring departing members not to solicit clients, and establishing fee structure applicable if client of firm sought representation by departing member. Held unenforceable, not limited by geography or time, fee schedule was inextricably linked with noncompete agreement, and was therefore an unreasonable restraint of trade.

William Robbins PC v Burns, 488 S.E.2d 760 (Ga App 1997).

Law firm agreement requiring departing lawyers to remit 75 percent of fees earned from clients who leave with departing lawyers is valid. Court holds that ethics rules may not be used to invalidate fee splitting agreements addressing post-termination allocation of client fees. *Miller v*



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1230 Columbia Street, Suite 850, San Diego, CA 92101-3547

Phone: 619-234-6848

Facsimile: 619-234-8601

Website: www.cavnac.com

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Jacobs & Goodman PA, 699 So.2d 729 (Fla Dist Ct App 1997).

Law firm may not penalize lawyer who departs and competes by requiring forfeiture of the firm's cash profits attributable to the partners in the year of withdrawal and partner's share of the change in the firm's net worth. *Pettingell v Morrison Mahoney & Miller*, 687 NE2d 1237 (Mass 1997).

Termination of Employment

"Once a whistle-blowing partner accuses another partner of overbilling, partners may find it impossible to continue to work together to their mutual benefit and the benefit of clients." *Bohatch v Butler & Binion*, 41 Tex Sup Ct J 308, 1998 WL 19482 (1998), rejecting a claim of breach of fiduciary duty brought by lawyer who had raised question that another law firm partner may be overbilling, and was subsequently ousted from partnership.

A concurring opinion would hold that if the ethics complaint was valid, partnership expulsion may be a breach, but if the ethics complaint proved incorrect, *"a mistake so serious indicates a lack of judgment warranting expulsion."* The dissent argued that the holding sent a message that rules of ethics are subordinate to a law firm's other interests.

An associate alleging he was forced out of the law firm after raising questions about a partner's billing practices, sought discovery pertaining to the firm's investigation of his complaint, which included client records relating to Citibank, Chase Manhattan Bank and Philip Morris Cos. The court held it was not error for the trial court to refuse to permit the clients to intervene to protect their confidential information where confidentiality has been adequately addressed through a protective order. *Geary v Hunton & Williams*, 1997 WL 790047 (NY sup Ct 3d Div 1997).

Discrimination

Former associate sued law firm alleging Title VII sex-based discrimination in decision not to grant her partnership status. The Court held that associate was an "employee" under the federal civil

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rights laws, that if partnership consideration was a term, condition or privilege of the associate's employment, partnership consideration could not be based on factors prohibited by Title VII, and that application of Title VII to the law firm would not infringe constitutional rights of expression or association. *Hishon v King & Spaulding*, 467 US 69 (1984).

But partners aggrieved under partnership agreements are not "employees" for purposes of Title VII. *Serapion v Martinez, Odell & Calabria*, 119 F3d 982 (CA1 1997). But see, *Ernst & Young v Simpson*, 100 F3d 436 (CA6 1997), cert den 117 S Ct 1862. Circuits 2, 3, 6 say there is suit; 1, 7 11 say no. US Sup has not taken a case.

Both the ABA Litigation Section and the ABA Ethics Committee presented recommendations to amend the ABA Model Rules of Professional Conduct to prohibit discrimination by lawyers. Action was deferred so the proponents could combine their efforts. A model law firm policy on sexual harassment is available from the State Bar of Michigan.

Firm Name

Lawyers shared offices and held themselves out as "X and Y." Lawyer X provided services to bankruptcy creditors, while Lawyer Y had a relationship to the debtors. On application for attorney fees, X argued that he was in actuality a sole proprietor, that Y's relationship should not be imputed to him, and that denial of all fees because of an interest in the estate was too severe.

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In denying fees, the bankruptcy court observed that “*When dealing with attorneys who obviously follow Machiavelli’s principle that the ‘end justifies the means’, or to paraphrase: ‘the fee justifies the conduct’, a draconian response is justified.*” If the lawyers were in fact sole practitioners, then the order authorizing employment of “Krogstad and Wood” would be approving a nonexistent entity. In re Petro-Serve Limited and Magnolia Development Corporation, H.S. Stanley, Jr., Trustee v. Krogstad, 97 BR 856 (SD Miss 1989).

Dissolution

In the absence of an agreement, upon the dissolution of a law firm that has incorporated as a limited liability company the fees earned from contingency cases are divided 50-50. Hurwitz v Padden, (Minn App 1998). In accord, Kirsch v Leventhal, 586 NYS2d 330 (App Div 1992); Sullivan Bodney & Hammond PC v Bodney, 820 P2d 1248 (Kan 1991); Resnick v Kaplan, 434 A2d 582 (Md App 1981).

Transferring Lawyers

Screening - Conflict Walls

Lawyer, who had worked 300 hours on plaintiff’s case and had extensive direct contact with plaintiff, took a position with defendant’s law firm. Although defendant’s firm knew at least one month before the lawyer arrived for work that the lawyer had worked on the case, the firm did not institute a conflict wall to screen the lawyer from the case until nine days after the lawyer began working there, and did not notify the court of the attorney’s hire until five days after implementation of the conflict wall.

The court characterized the notice eventually sent to the court as “*misleading at best*” as to what steps had been taken to deal with the conflict as required under MRPC 1.10(b), and when these actions occurred. The court noted that the defendant’s firm had known of the conflict for at least a month prior to the lawyer joining the firm. Defendant’s firm was disqualified. Cobb Publishing Inc v



Hearst Corp, 891 F Supp 388 (ED Mich 1995).

Firm A previously represented client in patent matter. Client retained Firm B as trial counsel for litigation against alleged patent infringer, who was represented by inside lawyer C.

Lawyer C subsequently transferred Firm A, bringing the patent defense with him to the firm. Client discharged Firm B and hired Firm D, who filed a motion to disqualify Firm A.

The court held that Firm B’s failure to seek disqualification of Lawyer C does not constitute client’s “consent” to the adverse representation, that Firm D’s motion to disqualify Firm A and Lawyer C is not “untimely” while the parties are negotiating the conflict issue, and that Lawyer’s C’s filing an appearance without reference to Firm A does not vitiate the conflict issue. The court requested an opinion from the State Bar of Michigan Standing Committee on Professional Ethics. Kearns v Chrysler Corporation, 771 F Supp 190 (ED Mich 1991).

Imputed disqualification for conflict with a former client may be avoided by timely screening of transferring lawyer from the hiring firm’s matters, or by timely screening of firm from the matter the transferring lawyer brings to the firm. Mich Op RI-97.

Restrictive Covenants

Cases upholding restrictive shareholder agreements have required a reasonable connection between the calculation and the work done on the file before it left the corporation. McCroskey, Feldman, Cochrane & Brock PC v Waters, 494 NW2d 826 (Mich App 1992); Barna Guzy & Steffen v Beens, 541 NW2d 354 (Mn 1996).

If there is no nexus between the calculation and the actual contribution of the law firm, it is more likely

the primary rationale for the calculation is to penalize the departing lawyer, and the agreement would not be upheld. See, e.g., Leonard & Butler v Harris, 279 NJ Super 659, 653 A2d 1193 (App Div 1995), an employment agreement that requires a departing lawyer to turn over entire contingent fee in exchange for previous hourly rate is invalid.

New York law firm decided to close its Florida office, offering to relocate the local lawyer to New

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York. The Florida partner declined, and sued for wrongful expulsion. Court awarded punitive damages and held that if the partnership agreement does not provide for expulsion of partners, a partner may be removed only through dissolution of the law firm. *Cadwalader, Wickersham, & Taft v Beasley*, 1998 WL 405919 (Fla App 7/22/98).

The law firm may not penalize a lawyer who departs and competes by requiring forfeiture of the firm's cash profits attributable to the partners in the year of withdrawal and partner's share of the change in the firm's net worth. *Pettingell v Morrison Mahoney & Miller*, 687 NE2d 1237 (Mass 1997).

Soliciting Clients

Lawyers may not solicit firm clients before departure from firm without the firm's consent; non-competition agreements among lawyers are invalid. *Dowd & Dowd Ltd v Gleason*, 693 NE2d 358 (Ill 1998).

Partners may be liable to the firm for breach of fiduciary duty for soliciting clients prior to announcing departure. *Graubard Mollen Dannett & Horowitz v Moskowitz*, 629 NYS2d 1009 (NY 1995).

Misappropriating Client Files

In preparing to transfer jobs and leave his law firm, attorney hid insurance defense client files, failed to advise insurer of change in representation, and misled the law firm about possession of files, although the files were ultimately returned to the firm.

In considering disciplinary charges, the court noted that law partners have fiduciary duties of loyalty, to be candid about business opportunities, not

to put self-interest before firm interest, and not to compete with the firm in the business of the firm. Attorney received a public reprimand for deceit and misrepresentation.

In the Matter of Cupples, 952 SW2d 226 (MO 1997). See also, *In re Smith*, 843 P2d 449 (Or 1992), lawyer suspended for four months for secretly taking 31 client files from former firm, sending letters to clients that only reflected a change of firm address, and not change of firm.

It is not per se improper, however, for a law firm agreement to establish how shared fees are to be calculated after departure, *McCroskey Feldman Cochran & Brock PC v Waters*, 197 Mich App 282 (1992); or to refrain from awarding payments clearly intended for lawyer who retires from the practice of law. *Neuman v Akman*, 715 A2d 127 (DC 1998).

Law Firm Affiliations

Law firms that include affiliate firms on their letterhead or that use variations of a common name can be treated collectively as a single law firm. *Complaint of Maritime Aragua, SA*, 847 F Supp 1177 (SDNY 1994).

Disqualification ordered when letterhead of plaintiff counsel of record listed affiliation with patent firm that previously performed work for defendant. *Mustang Enters v Plug-In Storage Sys.*, 874 F Supp 881 (ND Ill 1995).*

Marcia L. Proctor is General Counsel at Butzel Long, a multi-state law practice based in Detroit, Michigan, and concentrates her practice in professional responsibility and risk management. Butzel Long serves as panel counsel and loss prevention counsel for DPIC. This article presents the personal views of Ms Proctor and should not be attributed to Butzel Long or DPIC.

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