The departing lawyer in the age of Covid-19 – Ethical, legal and practical guidance

by Claire Marchant and Sara Forte

THE ECONOMIC FALLOUT from the Covid-19 pandemic has led to widespread disruptions to employment relationships, including between law firms and lawyers. Employment lawyers and Law Society practice advisors are busy fielding questions from firms and associates about professional and legal obligations and rights in these extraordinary circumstances. In this article, we have brought employment law and ethical advice together to address some of the most frequently asked questions about departing lawyers in the age of Covid-19.

My firm can't keep me on. What are my and the firm's ethical and legal obligations?

Claire Marchant: Your first stop should be to read my colleague Barbara Buchanan, QC's valuable article "Ethical considerations when a lawyer leaves a firm," which sets out the obligations of the firm and the departing lawyer.

A fundamental duty of lawyers and firms when a lawyer leaves the firm is client notification. When the responsible lawyer on a matter is departing, the client must be notified and provided the opportunity to go with the departing lawyer, stay at the firm or find new counsel. Ideally, the firm and lawyer will send a joint letter to the client, but the letters can also be sent by the firm or the departing lawyer. Template client choice letters can be found on the Law Society website. Two letters need not be sent, if the firm and the departing lawyer are satisfied that the letter sent by one of them satisfies the obligation to notify the client. The party that does not send the letter should ask for copies of the letters that were sent (or be copied on the letters) or an example copy of the letter and a list of clients to whom it was sent, to ensure the duty has been observed.

To the greatest degree possible, this process is best handled in a coordinated manner through compromise and cooperation with a singular message to the client. It reflects poorly on the professionalism of the firm and the departing lawyer if the client has to parse through competing messages or be drawn into a dispute between the firm and departing lawyer. To me, the driving motivation behind this process is the preservation of client choice. The client is in charge, not the departing lawyer or the firm, and the goal is to provide continuity of service in as professional a manner as possible.

Sara Forte: Relationships between law firms and lawyers can be structured as either employment or independent contracting. The first step in understanding legal obligations on termination is to figure out which of these categories applies. In a true independent contractor situation, notice is determined solely by the contractual terms between the parties. Use of the qualifier "true" independent contractor is because some contractors are found to be employees or dependent contractors when the relationship is analyzed (see our blog for more information on this determination).

If the working relationship is set up as employee-employer (or if the lawyer is paid as a contractor but is actually an employee or dependent contractor), reasonable notice of termination is owed. Reasonable notice can be actual advance notice, pay in lieu of notice or a combination of advance notice and pay.

A properly drafted, enforceable employment agreement in which reasonable notice is addressed can be determinative. If the contract is silent or the termination clause is unenforceable (or if there is no written contract), common law notice is applicable based on the lawyer's age,

length of service, nature of the job and availability of alternate employment. The firm's financial situation is not generally relevant in determining reasonable notice requirements (frustration of contract being one possible exception in exceptional circumstances). Members of the Law Society and articled students enrolled under the *Legal Profession Act* are excluded from the *Employment Standards Act*, which is the legislative scheme that would apply to many other employment relationships.

Advance notice of termination can be mutually beneficial to lawyers and law firms and of great assistance in ensuring professional obligations to clients are met.

If the firm lets an associate go, can it just re-assign their files? What if there is a non-competition or non-solicitation clause in place?

Claire: This question turns on whether the associate is the responsible lawyer on a given file. Here's an excerpt from "Ethical considerations when a lawyer leaves a firm" on determining the responsible lawyer on a file:

> To assist in determining whether the departing lawyer is the "responsible lawyer" in a legal matter, consider objectively, from the client's perspective, who that is. Who is responsible for overseeing the work? Who is doing the work? The responsible lawyer is not merely a name on a file and may not always be the lawyer who brought the client to the firm. It is preferable for the law firm and the departing lawyer to review the client files, mutually agree on who is the responsible lawyer, make a list of the files and inform those clients of the change. If the lawyer and the law firm cannot agree on who is the responsible lawyer on a particular file, they may opt to ask for assistance from an impartial lawyer. Another option is to err on the client's side, in other words, inform the client of their right to choose.

If the associate is not the responsible lawyer on the file, then the file can be re-assigned internally. Although a client choice letter is not required in that circumstance, it is good practice to acknowledge the associate's departure to the client as a matter of customer service.

If the associate is the responsible lawyer, the general rule is that the client must be notified and provided with choices. There is a limited exception to this, when the lawyers affected by the change, acting reasonably, conclude that the circumstances make it obvious that the client will continue as a client of a particular lawyer or the law firm (*BC Code* rule 3.7-1, commentary [5]). The right of clients to be informed of changes to a law firm and to choose their lawyer cannot be curtailed by any contractual or other arrangement (including restrictive covenants such as a non-competition or non-solicitation clause). I should note that the Ethics Committee has opined that the *BC Code* does not prohibit restrictive covenants regarding prospective clients (including existing clients on new matters), but such a covenant may be unenforceable at law in any event.

To me, the driving motivation behind this process is the preservation of client choice. The client is in charge, not the departing lawyer or the firm, and the goal is to provide continuity of service in as professional a manner as possible.

Sara: Irrespective of contractual limitations, professional obligations are really the driving principle in terms of what happens with clients. No lawyer or law firm owns a client. There has been judicial consideration of law firms seeking to enforce post-employment restrictions on departing lawyers, and the public interest has weighed heavily against enforcement, for example in *MacMillan Tucker MacKay v. Pyper* (2009) BCSC 694:

> The public interest is not served by restrictions on the right of qualified professional persons to practice their profession at the location of their choice …
>
> To the extent that the restrictive covenant would prevent Mr. Pyper from practising law at all for a period of three years within a five-mile radius of Cloverdale Town Centre and thereby inhibit some existing or potential clients in that area from having ready access to his services, granting the injunction would weigh against the public interest in facilitating access by clients to the lawyer of their choice.

My firm has let me go and I don't have a new position lined up yet. What should we put in the client notification letter?

Claire: If the departing lawyer does not have a new firm yet, the firm and departing lawyer could, depending on the circumstances, agree to "placeholder" language while the departing lawyer is figuring out next steps.

For example, instead of the client choice letter saying:

> On [date], [departing lawyer] is leaving [or left] our firm to join the law firm of XYZ [or to commence practice as a sole practitioner].

It could be changed to:

> On [date], [departing lawyer] is leaving [or left] our firm. [Departing lawyer] plans to continue in private legal practice and will advise as soon as possible on their new place of practice.

The firm and departing lawyer would need to agree in advance that one or the other will notify the clients of the departing lawyer's new place of practice when determined. Clients could then communicate their decision.

This course of action would only be appropriate if: (a) the departing lawyer was going to set up their own practice or join a new firm in relatively short order; and (b) the client did not have any imminent hearings or other deadlines, to avoid client prejudice or a gap in client service.

Of course, every situation has its own different twists and turns, and both firms and departing lawyers should contact the practice advisors for advice on their specific circumstances.

Our departing associate is going to stop practising for a while. Do we still need to send the client notification letter, and what should it say?

Claire: If the departing lawyer is the responsible lawyer on the file, the clients still need to be provided with a letter notifying

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Barbara Buchanan, QC
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Claire Marchant
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- practice management
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All communications with Law Society practice advisors are strictly confidential, except in cases of trust fund shortages.

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Contact Equity Ombudsperson **Claire Marchant** at 604.605.5303 or equity@lsbc.org.

them of the associate's departure and the option to be re-assigned to a different lawyer at the firm or to find new counsel.

The obligation to notify in this scenario does not arise if the departing lawyer and firm, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of the law firm (pursuant to *BC Code* rule 3.7-1, commentary [5]). Whether this commentary applies is contextual and fact driven, so it very much depends on the circumstances at hand. If you have questions, feel free to contact a practice advisor.

I've been let go by my firm. If I do legal work from my home, on contract, or for other firms, what do I need to tell the Law Society?

Claire: You need to notify our Member Services department (memberinfo@lsbc.org) about your change of practice circumstances. They will help and advise you of the requirements.

If you are considering setting up your own practice, check out our Opening Your Law Office practice resource for tips and tricks for setting up your own law office.

How would temporary layoffs apply to lawyers in a law firm setting?

Sara: In a law firm setting, temporary layoffs of lawyers are a termination of employment unless the written employment contract expressly allows for temporary layoffs or the employee agrees to them. When associates are given a notice of temporary layoff, they can either accept or reject the layoff. Given our current economic climate, many workers are accepting temporary layoffs in the hope that they will have a job to return to when things improve. If an associate rejects a temporary layoff and insists on severance pay, the employment relationship ends. This rejection has significant consequences, and it is advisable to obtain legal advice before making this move.

Can a firm lower an associate's salary or otherwise negatively change terms of employment due to a business downturn?

Sara: Fundamental, unilateral changes to employment contract terms can be a constructive dismissal. These could include significantly changed core duties or responsibilities or a reduction in compensation. While there is no set amount required to be a "fundamental" change of compensation, relatively small reductions are unlikely to be constructive dismissal. Generally, reductions in excess of 20 per cent will be found to be "fundamental." Similar to a temporary layoff, if a fundamental compensation reduction is imposed, the employee can choose to either accept the change (which can be to express acceptance or acquiescence by continuing to work under the new terms without objection) or reject the change and assert constructive dismissal. Lawyers should be careful before rejecting changed terms, though, because dismissed employees have a duty to mitigate to seek and accept new work, and being offered work on changed terms can complicate the assessment of liability for pay in lieu of notice. It is strongly recommended that lawyers seek employment law advice before rejecting changed terms.

I have questions! Who should I call?

Claire: Practice advisors continue to be available to answer questions about ethics and practice management and can be reached at practiceadvice@lsbc.org or 604.443.5797.

Sara: Lawyers and law firms can also avoid costly disputes by calling an employment lawyer for advice. All inquiries are confidential, per solicitor-client privilege. All of our lawyers at Forte Law have experience advising clients in the legal industry, and we can be reached at info@fortelaw.ca or 604.535.7063.❖

Claire Marchant, Manager, Practice Support and Equity Ombudsperson, oversees the Law Society's practice advice team and spearheads the production of resources to help lawyers be honourable and competent.

Sara Forte is an employment lawyer and founder of Forte Law – Employment Law Solutions, a boutique firm focused exclusively on workplace legal issues based in Surrey, BC. Sara and her team advise workers and businesses, including law firms and lawyers.