THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2013-4
(September 2013)

A law firm, of which the inquirer is managing partner, was hired by Client A under the terms of an engagement letter providing that Client A would fund a retainer of $50,000 to be applied to legal work performed at specified hourly rates, as well as expenses. The engagement letter further called for the firm to handle the matter on a 35% contingent fee basis once the retainer was exhausted with the firm advancing all further costs.

The matter which is the subject of the engagement was brought into the firm and handled by a firm partner, "B." The inquirer advises that without his knowledge and in violation of an unwritten firm policy, B contracted with another lawyer in another firm to serve as co-counsel in Client A's matter. As between B and the outside attorney, it was agreed the value of their respective services performed on an hourly basis was to be capped at $10,000 of retainer monies each, with the balance of the retainer - $30,000 – reserved to pay expert witness fees.

Subsequently, B left the Inquirer's firm to start his own practice, taking Client A and the matter in question with him. The inquirer then determined that the firm has $119,000 of unbilled time on the matter. (The inquirer advises that B instructed the firm's bookkeeper not to draw down on the balance of the retainer.) B has now asked that the $30,000 retainer balance be transferred to him, a request that the inquirer has refused. Amidst recriminations with B's counsel, the inquirer has determined that absent objections from Client A, the remaining retainer monies will be applied against the outstanding unbilled time.

Additional fallout from B's departure from the firm relates to B's email account at the firm which the inquirer advises has been set up to reply that B is no longer with the firm. It appears that under this arrangement, the emails are received and read by the firm and forwarded to B if they relate to a matter B took with him. This practice is based on the Inquirer's position "that any email that comes into the firm is presumptively firm email." For his part, B has asked that the firm program his former address so that emails simply "bounce back" (presumably unread) to the senders with a message that B's email account has been closed.

THE BALANCE OF THE RETAINER

The inquirer asks whether, in the event of an objection by Client A to application of the retainer to the outstanding unbilled time, his firm may hold the funds in escrow or, alternatively, whether the firm must honor B's request that the retainer monies be transferred to him.

It is the Committee's opinion that the Inquirer's firm must hold the retainer balance in escrow. While Pennsylvania Rule of Professional Conduct (the "Rules") 1.15 (e) states that "[E]xcept as stated in this Rule or otherwise permitted by law or agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property…that the client or third person is entitled to receive", it is not at all clear in this instance that either Client A or former partner B (as a putative "third person") is "entitled to receive" the "property"; i.e., the balance of the retainer. Under the terms of the engagement letter as described by the Inquirer, the entire retainer was to apply to hourly fees (and expenses) incurred and, thus, the firm, having rendered $119,000 of legal services to Client A, would seem to be otherwise entitled to draw down upon the retainer to its full extent. However, B's overt claim to the monies, together with the firm's awareness of the alternative fee arrangements made by B, precludes the firm from doing this.

While B's claimed entitlement to the monies may turn out to be meritorious, the arrangement giving rise to this claim is contrary to the terms of the firm's engagement letter.[1] Those terms, as the inquirer has described them, create an "interest" in the "property" on the part of the Inquirer's firm in the form of an entitlement to debit the balance of the retainer against the value of the unbilled time. Thus, the inquirer cannot, in the Committee's judgment, release the escrowed retainer monies to B even if it were otherwise free to do so.[2] Even if Client A – whose position on these matters is not identified in the inquiry – were to confirm that the involvement of and fee-splitting with the outside "co-counsel" had been explained and agreed to in advance, that would not necessarily cure the tension between the terms of the engagement letter and the alternative fee mechanism devised by B. Accordingly, this situation is clearly governed

[1] B's agreement to split the work and the fees on Client A's matter with another attorney is contrary to the prohibition in Rule of Professional Conduct 1.5(e) against dividing "a fee for legal services with another lawyer who is not in the same firm" unless the client is told of it and does not object and the combined fees of the lawyers is not "illegal or clearly excessive." The Committee cannot tell from the inquiry whether Client A ratified B's agreement with the outside lawyer in advance nor does it have enough information to ascertain whether that agreement might result in an "illegal or clearly excessive" fee.

[2] For purposes of this inquiry, the Committee assumes that B's request for transfer of the escrowed funds is solely so that B, in turn, may escrow the monies inasmuch as the clash between the terms of the firm's engagement letter with Client A and B's deviation from those terms likewise implicates RPC 1.15(f) (discussed *infra*.)

by Rule 1.15:

"(f) When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute."

The Committee concludes therefore that until competing claims to remaining retainer monies are resolved by agreement or otherwise, the Rules require that the Inquirer's firm retain the monies in its escrow account.

B's EMAIL ACCOUNT

The inquirer also asks whether his firm's current handling of B's email account as described above is "ethical." For purposes of this inquiry, the Committee takes this to be a twofold question: (1) whether the current procedure for handling B's emails is in compliance with the Rules and (2) whether, under those Rules, the inquirer must honor B's request for an automatic "bounceback" reply.

Because the inquiry provides no details as to the manner in which B's departure was handled, the Committee assumes that the Inquirer's firm and B both gave appropriate notices of departure to affected clients and that the then-current clients of the firm made and communicated their choices as to which entity is to continue with their representations That said, neither the Pennsylvania Rules nor their counterparts in other jurisdictions or in the Model Rules of Professional Conduct expressly address the issue of e-mail. However, in Formal Joint Opinion 2007-300 ("Ethical Obligations When A Lawyer Changes Firms") issued by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility in conjunction with this Committee, principles of the Rules implicated by the departure of a lawyer from a firm are discussed at some length. That Opinion noted that:

"Principal among them [duties under the Rules] is the duty to protect the interests of clients in their legal matters during the period of transition. See, RPC 1.16(d). Both the departing lawyer and the old firm owe an obligation to ensure that the interests of the clients in active matters are competently, diligently and loyally represented in accordance with Rules 1.1, 1.3 and 1.7 during that period. See e.g., ABA Formal Opinion 99-414 at 7, n.1."

In addition, Joint Formal Opinion 2007-300 cites with approval to ABA Formal Opinion 99-414 to the effect that members of the "old" firm with managerial authority were obliged:

"(1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure of a lawyer who is currently responsible for or plays a principal role in the current delivery of legal services for the client's active matters; (2) to make clear to those clients and others for whom departing lawyer has worked and who inquire that the client may choose to be represented by the departing lawyer [by the old firm or by another lawyer]. . .;

(3) to assure that active matters on which the departing lawyer has been working continue to be managed by the remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that upon firm's withdrawal from the representation of any client, the firm takes reasonable steps to protect the client's interest pursuant to Rule 1.16(d)."

From these general principles, it can be inferred that the Inquirer's practice of opening and reviewing emails addressed to B is permissible to the extent necessary to carry out the duties identified above.[3] Those same duties would seem to preclude the Inquirer's firm from honoring B's request for a simple "bounceback"; i.e., some degree of interaction with the substance of messages to B's old email address would, as a practical matter, be necessary in order for the inquirer's firm to sort out its responsibilities to current clients, former clients, those clients who have elected to follow B, as well as to third parties.[4]

The inquiry is silent as to whether the Outlook message that email correspondents receive from B's old address says anything beyond advising that B is no longer with the firm. The Committee believes that such reply messages should include, if they do not already, B's current contact information. As noted in our Opinion 94-30:

Moreover, Rule 1.4 obligates an attorney to keep clients up to date about the status of the matter, comply with client requests for information and explain a matter so that the client can make informed decisions. Therefore, the Committee believes there is an obligation on the part of the law firm to immediately provide to inquiring clients and former clients sufficient information that would allow the client to make prompt contact with the ex-partner prior to offering the firm's

[3] Case law suggests that generally speaking, an employee of a business has no reasonable expectation of privacy as respects email traffic at his or her work email address unless a partnership agreement, employment contract or firm employment practices provide otherwise. See, for example Scott v. Beth Israel Hospital, 17 Misc. 3d 984, 847 N.Y.S. 2d 436 (N.Y. Sup. 2007) but, *contra*, see also Stengart v. Loving Care Agency, 990 A.2d 650 (N.J. 2010)

[4] Optimally, if B's departure was accomplished in accord with the mechanics set out in Joint Opinion 2007-300, the handling of B's emails would be fairly straightforward in terms of processing, replying or forwarding, as appropriate.

services as an alternative.

In closing the Committee cautions against not forwarding e-mail received that is clearly meant for the departing attorney.

The inquirer is reminded that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Rule 4.4(b). This also applies to e-mail which the inquirer reads which is clearly meant for the departing lawyer.

Second, the inquirer is reminded that considerations of substantive law may influence this analysis. Although the Committee does not address those considerations here, relevant points to consider may include the firm's partnership agreement, any sidebar agreements with B concerning the latter's withdrawal, and/or the firm's written or customary employment practices.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.