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# Well THAT Was a Surprise!

## *The Arbitration E-mail Battles*

by Hilary P. Gerzhoy, Esq.

As part of my legal ethics practice, I routinely represent lawyers and firms when a lateral partner move goes south. In years' past, the most typical fights were over clients, associates, and attempts by firms to claw back bonuses or withhold a departing partner's capital contribution. Recently, firms have begun to pursue claims that a departing lawyer stole firm intellectual property. In particular, firms have initiated arbitration against departing lawyers for revealing the billable hours and rates of their former colleagues. Some may be surprised to learn that the firm, in fact, "owns" that information and that lawyers have been sanctioned for revealing it. *See Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180 (1st Dep't 2000) (holding that departing partners breached their fiduciary duty to their former law firm when they gave their new firm associate billing rates and billable hour data); *see also* D.C. Ethics Op. 273 (deeming it a Rule of Professional Conduct 8.4 (c) violation to take and share proprietary business information that belongs to the firm). At least one firm has gone one step further and sued its non-lawyer, C-level Executives for taking and revealing this information: Proskauer sued its former COO for, among other things, taking this information to Paul Hastings in an ongoing case in New York. *See Proskauer Rose LLP v. Jonathan O'Brien*, Civil Action No. 1:22 -cv-10918 (SDNY 2023).

The battle over departures is usually fairly routine: a partner leaves a firm and is accused of notifying clients before he's left, or of taking proprietary firm information, or of soliciting associates. The firm sues the departing partner, triggering a mandatory arbitration provision found in nearly every partnership agreement. Arbitration begins, and discovery quickly follows. Both sides issue discovery requests seeking e -mail correspondence. Arbitrators construe discovery broadly, typically ruling that most requests are within the scope of permissible discovery. Thousands of highly personal, often embarrassing, e-mails are produced.

> *"Lawyers rarely expect their professional and personal emails to be subject to scrutiny by their partners when they write them, but when it comes to disputes over lateral moves, that is frequently the case."*

In two such recent cases I have seen, however, the e-mail battles took an unexpected turn. In the first case, the firm forgot to shut off the departing partner's e-mail after his departure date. Prior to starting at his new firm, the departing partner continued using his old firm e-mail as though everything was business as usual. The firm realized several weeks into arbitration that the departing partner had done this and, as was within their legal rights, started reviewing the departing partner's e-mail *in real time*. Of particular note, the departing partner was discussing the *current arbitration* using his firm e-mail. Needless to say, the firm was in possession of a treasure trove of information helpful to their case and harmful to that of its former partner.

In the second, the lawyer's personal emails were subject to discovery and expanded the scope of the firm's lawsuit. In this case, the departing lawyer was accused of soliciting clients before he left the firm and of violating the firm's 60-day notice provision. The *initial* fight was over whether that notice period was enforceable in light of ABA Opinion 489. That Opinion states that the actual time a firm can hold a lawyer and prevent her from starting at a new firm is dictated solely by both parties' compliance with their obligations to transition client matters. Where those obligations are satisfied prior to the expiration of a fixed notice period, any remaining notice period is unenforceable. To support moves prior to the end of their partnership notice period, lateral movers usually cite ABA Opinion 489 and ABA Model Rule 5.6(a) (which prohibits partnership agreements that restrict "the right of a lawyer to practice after termination of the relationship"). Firms tend to contest these claims, and arbitrators differ in their conclusions.

In this particular case, the firm issued broad discovery requests that the arbitrator sanctioned (as mentioned above, arbitrators tend to be lenient with discovery). The departing partner was forced to turn over all *personal* e-mails that in any way related to firm business. Unbeknownst to the firm at the time they requested the e-mails, the departing partner had solicited a paralegal to join him prior to his departure date. The e-mail production revealed as much and the firm added a new claim. The can of worms had been opened.

The lesson from both these cases is that while we hope lateral moves are smooth and uneventful, it is best to plan for the opposite. Lawyers rarely expect their professional and personal emails to be subject to scrutiny by their partners when they write them, but when it comes to disputes over lateral moves, that is frequently the case.

It is best to advise clients about e-mail best practices well in advance of a move. These include advising your clients (1) to keep all communications about a potential move verbal, (2) to the extent anything needs to be done in writing, to use your personal, not firm e-mail; and (3) assume that as soon as you provide notice of your departure, your firm e-mail will be inaccessible. Finally, putting your candidates on notice that very little is off limits when it comes to e-mail discovery will mitigate potential damage down the road.

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