
A JUDICIOUS CHANGE

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The first steps in moving from working for a firm to taking on an Of Counsel relationship are to evaluate your personal interests and views and seek out a firm that matches these. It is also important to consider any binding agreements made with previous employers that would prevent you from taking on a role with the new firm, including any benefit agreements.

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by George H. Cain

Of Counsel positions are not for everyone. They may be most suitable for the lawyer who no longer finds firm work challenging and wants something new to do, or for the lawyer swiftly approaching that magic age when the firm's bylaws say all lawyers must step aside.

But until you find that “something else” to do, you cannot really outline or negotiate an Of Counsel agreement. So the first thing you've got to do is figure out what that “something” is. In some ways my suggestions are going to sound like reinventing the wheel, but in other respects, I think that you may find you have forgotten much of what you already know about change. I had a call just last week from a lawyer in Los Angeles who was interested in doing something different with his practice and was thinking of hiring one of these professional consulting firms to help—did I have one to recommend? What I told him was, “You are your own best counselor, and you will find out that you are also your own best client.”

Taking Stock

To start, simply make a list of everything you have learned and enjoyed during your however many years of practicing law. Then, on the other side of the ledger, enter the things you cannot do, do not like to do, or are not competent to do. It is that simple. Now you can start looking or asking around for the organizations or firms that might suitably employ your assets and minimize your liabilities.

The best sources are those gathered through networking. Consider who you have worked with during the last 20 or so years, then determine which of them know you and are familiar with your talents and which are still influential in those firms or businesses. Let them know you want to do something challenging, and they will often be some of the first people to give you a call and say, “I don't know anything right now, but I was talking to Joe Blow on the golf

course last week and he needs a new general counsel.” At the same time, maintain your contacts with other persons and organizations in your life, whether at church, in your political party, or in veterans' organizations, and talk with them about your desire for new experience. All these people can be of help to you.

Unfortunately there is one task you will have to handle yourself, which is to take out that resume that you haven't even looked at for many years, and update it. Make sure that your college and your law school still have your records so that they can certify to an employer that you actually went there, should verification be required.

Next, you must tailor your resume to the top two or three leads you have in hand and are interested in pursuing. Go to the library or the big search engines on the Internet and research each of your prospects: Find out what each one does; how big or small, local or global it is; how it is organized; and who are its principal executives. You can use this information to help choose what you emphasize or downplay in your resume. Additionally, when you go for an interview, whether for a formal position or an informal meeting, you can answer the interviewer's questions responsibly and intelligently. Although your contact understands that you are interested in a change, that is not the interviewer's concern. Her focus is what you can do for her and the organization, and you must be prepared to address that question. Fortunately, your research will have given you time to think in depth about the organization and formulate a few ideas about how your experience can help.

This brings us to some other problems that must be considered. Do you have any sort of ethical or philosophical problems with the organization's primary purpose? Over the years have you found occasion to say to yourself, “I'd never work for them”? Can you fully commit to the work this organization expects you to do? If you sense any holding back on your part, can you

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make peace with it so you can do the best possible job if an offer does come through?

There are also financial concerns. Suppose your change is that you want to open your own law office. If finances are of no concern because you are very well situated with a great portfolio, you can rent the finest office in town and not worry. On the other hand, if you have limited resources, you probably should decide on a budget ahead of time, figure how much an office will likely cost you, and see where the revenue may come from. Are your present clients going to stay with you when you open a one-man shop far from the big firm where they've worked with you for all these years?

Consider what other obligations you have. Suppose either you or your spouse has a chronic physical problem that is so far under control. If you suddenly want to become a litigator and do insurance defense work, you may be obligated to travel all over the country, trying cases wherever they happen to arise. If you are not free to travel, you cannot take that job.

The Agreement

Another matter to consider is the Of Counsel agreement. Your present law firm or partnership may have in its agreement with you a clause that restricts your right to compete with the firm if you leave. Remember ABA Model Rule of Professional Conduct 5.6, however, because it will affect what you may do when you leave your present firm and limit what you may agree to sign with your new organization. The rule provides:

A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Part (b) rarely occurs. But you may not agree to restrict your right to practice law, and the firm may not restrict your right to

practice law—unless it is part of an agreement to provide a retirement benefit.

The courts have struggled in finding the proper construction of the term “benefits upon retirement” as used in that rule. What may the individual do and what may the organization do to come within the exception to the restriction on practice that is permitted under the rule? The best analysis is found in the *Schoonmaker v. Cummings and Lockwood of Connecticut* decision the Connecticut Supreme Court handed down in 2000. 252 Conn. 416. The court established three conditions that should be present to constitute a retirement benefit. First, retirement benefits are generally those payable from future firm revenues, not from the former partner's share in net profits or his equity in the firm or his proportionate share of the capital of the firm. Second, retirement benefits are intended to compensate for the substantial reduction of income a worker experiences upon retirement. Therefore, benefits are characterized by an extended disbursement period. If you have an agreement with a firm that is limited in the duration of the payout to you, it probably will not pass muster. It must be paid out over an extended period, the idea being to take care of the loss of income that you suffer when you leave the firm. In 1998, the District of Columbia Court of Appeals addressed this issue in *Neuman v. Akman*, 715 A.2d 127. Commenting on the rationale for the rule, the court quoted Professors Hazard and Hodes. Professor Hazard wrote that Rule 5.6(a) is designed in part to protect lawyers, particularly young lawyers, from bargaining away their right to open their own offices after they have ended an employment.

The rule also protects future clients against having only a restricted pool of attorneys from which to choose. References to that reasoning are present in most of the decisions in this area. The courts are reluctant to deny a pool of clients the right to choose whichever lawyer they desire, and to have that right restricted. Courts in California, New Jersey, New York, Massachusetts, Illinois, Texas, the District of Columbia, and Connecticut have all ruled in this area. Litigation started with the *Haight* case in California in 1991, *Haight Brown & Bonesteel v. Superior Court of County of Los Angeles*,

1991 Cal. LEXIS 5862 (Cal. 1991), and ended most recently with *Schoonmaker*.

If you wish you had a list of points to review when responsible for drafting or negotiating an Of Counsel agreement you're inclined to sign or approve, I have a few. First, it is extremely difficult to conceive of a forfeiture-for-competition clause that will stand up in court. Second, if you are the departing partner seeking to escape judicial censure for becoming a party to an agreement containing such a clause, make sure that you had no hand in drafting it. Third, as a partner in a firm seeking to protect itself against losses following the departure of a rainmaker, note that the *Jacob* case in New Jersey, *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10 (1992), teaches that a downward adjustment in goodwill can be made in valuing the sale of the departing partner's interest.

A number of other decisions also question whether goodwill can be valued at all, so this point is especially significant when you realize that a departing lawyer may compete with the old firm if there is compensation for the reduced value of the departing partner's interest. Compensation

may be represented by the amount of goodwill lost by the firm as a result of the lawyer's departure.

If you are attempting to draft a forfeiture-for-competition provision, remember that the penalty for having the right to compete must be tied to the loss to the firm occasioned by the departure. The departing lawyer may not be deprived of a proper share of fees and profits earned prior to departure because those things are separate and apart from the goodwill value of the law firm.

Conclusion

In these days of desperate competition among law offices for clients, rainmakers are in short supply, and lawyers young and old want to be free to move and to attend to the same clients in the future as they do presently. Similarly, law firms are jealously guarding their clients against loss to the departing group. Be respectful of the needs of both your old firm and your new firm. Remember that your reputation is your most valuable asset, so do not overreach. ■

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