

Duties When Leaving a Firm

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Ethical Considerations for a departing attorney and the firm:

- ABA Formal Opinion 489
- Diligence [1.3]
- Communication [1.4]
- Expediting Litigation [3.2]
- Restrictions on Right to Practice [5.6]
- Terminating Representation [1.16]

ABA Formal Opinion 489
(December 4, 2019)

Obligations Related to Notice
When Lawyers Change Firms

- Lawyers have the right to leave a firm and practice at another firm.
- Likewise, clients have the right to switch lawyers or law firms, subject to approval of a tribunal, when applicable (and conflicts of interest).

Lawyers must represent clients competently and diligently.

- Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.
- Rule 3.2: A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

- Lawyers also have an obligation to communicate relevant information to clients in a timely manner, according to Rule 1.4.
- This includes promptly notifying a client if a lawyer changes firms.

- The ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements except regarding retirement benefits or sale of the practice. *See* Rule 5.6.

- Lawyers AND law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm.
- Firms may require some period of advance notice of an intended departure.

- The timeframe should be the minimum necessary, under the circumstances, for clients to make decisions about who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession.

- Firm partnership / shareholder / member / employment agreements cannot impose a notification period that would unreasonably delay the diligent representation of the client or unnecessarily interfere with a lawyer's departure beyond the time necessary to address transition issues, particularly where the departing lawyer has agreed to cooperate post-departure in such matters.

- Firm may not penalize a client who wants to go with a departing lawyer by withholding firm resources the lawyer needs to continue to represent the client prior to departure.

- Departing lawyers also have a duty, pre- or post-departure, to cooperate with the firm to assist in the organization and updating of client files for clients remaining with the firm, including docketing of deadlines, updating lawyers at the firm who will take over the file and the like, and similarly to cooperate reasonably in billing.

- A departing attorney may be required to return or account for firm property, such as intellectual property, proprietary information, equipment/devices, and to allow firm data to be deleted from all devices retained by the departing attorney, unless the data is part of the client files transitioning with the departing lawyer.

- While the departing lawyer and the firm each may unilaterally inform clients of the lawyer's impending departure at or around the same time that the lawyer provides notice to the firm, the firm and departing lawyer should attempt to agree on a joint communication to firm clients with whom the departing lawyer has had significant contact, giving the clients the option of remaining with the firm, going with the departing attorney, or choosing another attorney.

- If a firm and departing lawyer cannot promptly agree on the terms of a joint letter, a law firm cannot prohibit the departing lawyer from soliciting firm clients.

- The preferred next step is for the departing lawyer and the firm to agree upon a joint communication sent to the clients requesting that the clients elect who will continue representing them.
- Departing lawyers should communicate with all clients with whom the departing lawyer has had significant client contact that the lawyer intends to change firms.
- “Significant client contact” would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client.

Please remember ...

- Clients are not property.
- Law firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm.
- Subject to conflicts of interest considerations, clients decide who will represent them going forward when a lawyer changes firm affiliation.

- Where the departing lawyer has principal or material responsibility in a matter, firms should not assign new lawyers to a client's matter, pre-departure, displacing the departing lawyer, absent client direction or exigent circumstances arising from a lawyer's immediate departure from the firm and imminent deadlines needing to be addressed for the client.
- Thus, clients must be notified promptly of a lawyer's decision to change firms so that the client may decide whether to go with the departing lawyer or stay with the existing firm and have new counsel at the firm assigned.

- Law firm management also has obligations to establish reasonable procedures and policies to assure the ethical transition of client matters when lawyers elect to change firms.
 - Rule 5.1(a): A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

- The firm and departing lawyer must coordinate to assure that all records for client matters are organized and up to date so that the files may be transferred to the new firm or to new counsel at the existing firm.
- A departing lawyer who does not continue to represent a client nevertheless has the obligation to take “steps to the extent reasonably practicable to protect a client’s interests.” I.R.P.C. 1.16(d).
 - Updating files and lawyers who take over the representation.

- Firm management should establish policies and procedures to protect the *confidentiality* of client information from inadvertent disclosure or misuse.
- The duty of confidentiality requires that *departing attorneys* return and/or delete all client confidential information in their possession, unless the client is transferring with the departing attorney.
 - The *exception* to this requirement is for a departing lawyer to retain names and contact information for clients for whom the departing lawyer worked while at the firm, in order to determine conflicts of interests at the departing lawyer's new firm and comply with other applicable ethical or legal requirements.

I.R.P.C. 5.6 prohibits restraints on a client's choice of counsel.

- 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 . . .
- Firms have an ethical obligation to assure that client matters transition smoothly and therefore, firm partnership/shareholder/member/employment agreements may request a reasonable notification period, necessary to assure that files are organized or updated, and staffing is adjusted to meet client needs.

- Firms cannot prohibit or restrict access to email, voicemail, files, and electronic court filing systems where such systems are necessary for the departing attorney to represent clients competently and diligently during the notice period.
- Once the lawyer has left the firm, the firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries.

- A supervising lawyer at the firm should review the departed lawyer's firm emails, voicemails, and paper mail in accordance with client directions and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer.