Law Firms Changes: The Ethical Obligations When Lawyers Switch Firms

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I. Duties of Firms *and* Lawyers When Someone Leaves

Yes, there are specific ethical requirements when a lawyer leaves a law firm – both for the lawyer *and* the firm. The following is a summary of the ethical considerations whenever a lawyer leaves (or a firm dissolves).

A. Ethical Obligation to Communicate to Certain Clients

Two primary directives must be remembered when lawyers leave law firms: 1) lawyers have a duty to tell "their" clients that they are leaving; and 2) clients are not chattels – the firm and departing lawyer cannot decide which clients can stay and which can go – the clients decide. Lawyers must keep clients informed so that clients may make informed decisions about what the clients want to do.[1]

As explained in ABA Formal Opinion 99-414, "The departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure that prompt notice is given to clients on whose active matters she currently is working." Remember, Ethical Rule 1.4 requires that lawyers keep clients reasonably informed – which would include the fact that a lawyer who has had "significant personal contact" with a client is leaving the firm.

1. Which clients to tell

Arizona Opinion 99-14 provides some guidance on when a departing lawyer may communicate directly with firm clients. A departing lawyer who has had "significant personal contacts" with the client, should inform the client that the lawyer is leaving the firm. Note: this does not mean that an associate who met a client once or twice and has prepared discovery requests has had "significant personal contacts" – the standard is that if the client were asked "which lawyer(s) at the firm represents you?" the lawyers mentioned would be those that have had "significant personal contacts."

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1. In addition to the ethical obligations departing lawyers have, they also must avoid interfering with the contracts the firm has with existing clients. *See, e.g.*, Raymond H. Wong Inc. v. Xue, No. 115269/04 (N.Y. Sup.Ct. N.Y. Cty. 1/21/05)(associate enjoined from attempting to lure away firm clients); Reeves v. Hanlon, 33 Cal.4th 1140, No. S114811 (Cal. 8/12/04)(departed lawyers liable for damages to firm for luring away clients and associates). Business tort litigation against departed lawyers is a growing practice area. However, the caution to avoid stealing clients must be balanced against the departing lawyer's *ethical* obligation to notify clients that an attorney is departing.

2. How to tell clients

The *preferred* method of advising firm clients about the impending departure of an attorney is a joint letter from the firm and departing lawyer to all clients with whom the lawyer had significant personal contacts.[2] Such a letter should advise the clients:

- When the lawyer is leaving
- The client has the option of going with the lawyer, staying with the firm, or getting a new firm
- How any advance fee deposit will be treated
- A place for the client to sign and return the letter, with instructions on where their file should go.

This letter should be sent prior to the lawyer's departure and should be calendared to assure that written responses are received from all clients. For those clients that want their files sent with the departing lawyer, the firm should review their malpractice policy for requirements on maintaining a copy of certain parts of the file for a period of time – that copying of course is at the firm's expense because the client file is client property that belongs to the client. ER 1.16(d).

Note that if a joint letter is not sent, separate letters may be sent by the lawyer (or the firm) to clients with whom the departing lawyer had substantial personal contact as long as: 1) the letters do not disparage the firm or the lawyer; and 2) the letters do not involve improper solicitation in violation of ER 7.3.

3. Other People Who Should Be Told About the Departure

Whenever a lawyer changes firms the following people/groups need to be notified about the new address (and other contact information), and the effective date of the change:

- State Bar Membership Records Department
- Courts: including clerk's office *and* the Judicial Assistants for each judge where the lawyer has a pending matter.
- Opposing counsels
- Other professional organizations in which the lawyer is a member (ABA, MCBA, etc.)
- The firm's malpractice carrier, accountant, and banker.

B. Trust Account Monies

Clients that have given the firm an advance fee or advance cost deposit take the money with them (less earned fees and costs), if they go with the departing lawyer. While simple in theory, application sometimes can be problematic. The "old" firm should write a check, consistent with the written instructions of the client, to either the client or to the trust account for the departed lawyer's new firm.

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2. *See* ABA Formal Ethics Op. 99-414.

C. Fee Divisions In General

There is some disagreement regarding how fees earned *after* a law firm split may be apportioned between the firm and the departed lawyer, when the case initiated with the old firm. For example, in contingent fee cases where some or much of the work was performed at the existing firm, but the case is going with the departing lawyer, the firm and lawyer must agree how the contingent fee will be apportioned among them, based upon their respective contributions to the case (i.e., *quantum meruit)* or based upon terms in the partnership agreement.

But can a departing lawyer keep *all* of a contingent fee case that came into the old firm but ultimately settled when the lawyer was at a new firm? Probably not, according to several cases. [3] A lawyer may be entitled to only his partnership portion of the fees earned on a case, even if he performed most of the work after the dissolution of the firm.[4]

Nevertheless, some courts will find that when a lawyer leaves a firm and takes a case with him, he may be entitled to the *quantum meruit* value of the work he performed.

Additionally, the majority view of "no extra compensation" upon dissolution of a firm does not apply to either the situation where the firm is completing work for a deceased partner or if the partnership agreement provides for a different compensation plan upon dissolution or departure. Such terms in partnership agreements will be upheld as long as they are not grossly inequitable.[5]

Note also that Comment [8] to ABA Model Rule 1.5 explains that "Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm." This means that the decision on how fees will be split between the former firm and the departed lawyer does not need to comply with the writing and joint responsibility requirements of paragraph (e) of Rule 1.5.

Regardless of whether the fees go to the firm, are divided on a *quantum meruit* basis, or divided by agreement, the fees must be reasonable for the services performed. In other words, the clients cannot be charged more than a reasonable fee.

D. Files

Do not hold client files hostage, even if the client that is leaving with the

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3. *See, e.g.*, Meyer & Susman v. Cohen, 194 Cal.Rptr. 180 (Calif. Ct.App. 1983)("The partner may take for his own account new business even when emanating from clients of the dissolved partnership and the partner is entitled to the reasonable value of the services in completing the partnership business, but he may not seize for his own account the business which was in existence during the term of the partnership").

4. *See* Jewel v. Boxer, 203 Cal. Rptr. 13, 1 LAW. MAN. PROF. CONDUCT 106 (Cal. Ct. App. 1984); Frates v. Nichols, 167 So.2d 77 (Fl. Dist. Ct. App. 1964); Ellerby v. Spiezer, 485 N.E.2d 413 (Ill App. Ct. 1985); Resnick v. Kaplan, 434 A.2d 582 (Md. Ct. App. 1981); Smith v. Daub, 365 N.W.2d 816 (Neb. 1985); Platt v. Henderson, 361 P.2d 73 (Or. 1961).

5. *See* Smith v. Daub, 365 NW2d 816 (Neb. 1985).

lawyer owes the current firm money. Model Rule 1.16(d) requires that the client's interests not be prejudiced when the attorney/client relationship is terminated. Have the client or a runner from the departed lawyer's new firm sign for the file, if it is going to the new firm. Also, it is appropriate to request in a litigation matter that the departed lawyer file a substitution of counsel or at least notification of address change with the court, to assure that the old firm is still not listed as counsel of record.

Note that a recent New Hampshire Ethics Opinion[6] advises lawyers that when a client asks for their file, you must give them *both* the paper and the electronic documents – including emails. And remember that the client file is client property, so you cannot charge the client for the cost of downloading everything to disks….

E. Phones

It is ethically inappropriate to have the receptionist tell callers who are looking for a lawyer who recently left the firm "we don't know where he is." That game is not professional and not acceptable. Assure that all staff are instructed to provide the departed lawyer's phone number and mailing address. Also, assign a partner to answer any client inquiries. Moreover, mail should be forwarded to the departed lawyer.

F. Partners and Associates Leaving Must Abide By Fiduciary Duties to Firm

It is worth noting *again* that lawyers who are leaving a firm have certain fiduciary duties to the firm to not interfere with the contracts that the firm has with existing clients, to not use firm resources to set up their new firm, and to not attempt to steal away associates and staff while the lawyers are still working for the firm. As explained in the *ABA/BNA Lawyers' Manual on Professional Conduct*[7]*:*

> In *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 5 Law. Man. Prof. Conduct 119 (Mass. Sup. Jud. Ct. 1989), a distinction was drawn between the "logistical arrangements" made by partners planning their departure, and concerted efforts they made in secret, while still at the firm, to lure away some of the firm's clients immediately after the lawyers' withdrawal. The former, the court said, did not constitute a breach of the partners' fiduciary duties. They were free to make pre-withdrawal arrangements for their new firm, such as leasing office space and obtaining financing by preparing for the bank a list of clients they expected to take with them and the fees they anticipated these clients' cases would generate. But the secret plans to contact and persuade clients to remove their cases to the new firm were a violation of the departing lawyers' fiduciary duties, the court said. As partners, they were required to act in utmost good faith and

6. No. 2005-06/3, issued January, 2006.
7. § 91:707 (2005).

loyalty toward their fellow partners, and to "render on demand true and full information of all things affecting the partnership to any partner." These duties were contravened when, in secret, the withdrawing partners prepared authorization forms and letters, on the firm's stationery, informing clients with whom they worked of their departure and failing to make clear to the clients that they could choose to keep their business with the firm rather than removing their cases to the lawyers' new firm.

Even after the partners made known to the partnership their impending withdrawal, they continued to violate their fiduciary duties, the court said, by sending the letters to firm clients and to referring attorneys, and delaying giving a list to the partnership of clients they intended to solicit until after a majority of these clients had already authorized removal of their cases to the new firm. The court held the former partners would be required to pay to their former colleagues the profits the new firm earned on all cases taken from the partnership, except on those cases for which the former partners could prove that the clients had acted of their own accord in deciding to remove their cases to the new firm.

A partnership/shareholder agreement should include at least the following provisions to assure that measures are in place to address what happens when a partner leaves the firm:

- the expulsion of a partner
- the death of a partner
- what notice is to be given to the partnership by a withdrawing partner and timing of the notice
- the firm's right to accelerate the departure of a withdrawing partner
- the timing and method of notification of clients
- which clients will be contacted
- the content of the notice
- the retention and/or transfer of client files
- the compensation of partners upon withdrawal or dissolution, including repurchase of shares
- the formula for the distribution of profits and losses
- the payment of the capital account
- whether a withdrawing partner shall be paid any share of work in process and accounts receivable
- the method by which the practice and assets shall be valued
- the allocation of responsibility and compensation for closed files and ongoing financial obligations of firm

• **Don't place restrictions in partnership agreements that restrict the lawyer's ability to practice.**

Most lawyers form partnerships with other lawyers with the anticipation that

you'll stay together for a while. Thus, *no one* wants to think that the severance provisions in the partnership agreement will ever be needed. The reality is that lawyers are becoming more mobile; they change locations, they change practice areas, and they change firms. A partnership agreement cannot restrict a lawyer's ability to practice law after the lawyer leaves the firm. ABA Model Rule 5.6 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. . . .

That appears to be pretty clear but apparently not – at least when it comes to firms merging with each other. In a twist on the usual departing partner scenario, the D.C. Bar Legal Ethics Committee explained that Rule 5.6 also precludes a firm from making an agreement among partners that they won't get paid for work done *before* the merger unless they agree to stay with the merged firm. Opinion 325 (Oct. 2004) explained that it is a violation of the Ethical Rules for a partnership agreement to say that a partner forfeited his or her right to pre-merger receivables if the partner leaves the new firm within two years of the merger (unless he dies, retires, or is sick).

II. Duties When Switching Firms

A. Duties of Lawyers Interviewing With Other Firms

Hypothetical: You are interviewing with Aye, Bigge & Cable for a lateral position in their corporate litigation section. While interviewing with partner Aye, she asks you what cases you're currently working on. What can you say?

Ethical Rule 1.6 prohibits disclosing "information relating to the representation of a client" unless the client consents to the disclosure or one of the exceptions to the confidentiality rule applies. This ethical duty is far broader than the evidentiary rule on attorney/client privilege. A lawyer's duty of confidentiality will even include the client's identity and whereabouts.[8]

This suggests that, technically, under the confidentiality Rule, you may not disclose the names of your clients to anyone outside of your current firm unless the clients impliedly authorize you to do so.

If you cannot disclose the names of your clients, how can Aye, Bigge & Cable check to see if they have any conflicts of interest, if they hire you? The firm has a duty to assure that they are not going to hire someone who will disqualify the firm from current representations.

A District of Columbia Bar Ethics Opinion[9] has several suggestions for how

8. *See In re* Goebel, 703 N.E. 2d 1045 (Ind. 1998).
9. No. 312 (April 2002).

to survive – ethically – the interviewing dilemma. First, however, note that the D.C. Confidentiality Rule 1.6 prohibits the disclosure of "confidences and secrets," as opposed to Arizona's Rule language of "all information related to the representation."

Nevertheless, the D.C. Opinion is instructive in suggesting that one option for the interviewing lawyer is to disclose the *opposing parties* in matters for which he is personally involved. That list will at least notify the interviewing firm if they currently represent any of those clients who might have a conflict with you joining the firm. Another suggestion from the Opinion is to discuss the general nature of the matters that you are handling – although in some circumstances, that might disclose confidential information. For instance, if you stated that you're working on a merger between two large amusement parks, that probably would divulge the identity of your client. Such confidential merger deals should not be disclosed without client consent.

Realistically, if you're working on a litigation matter that has been filed, it probably is acceptable to disclose the name of your client. Another suggestion from the D.C. Opinion is to provide a list of all clients and opposing parties on matters for which you have worked and then let the new firm determine whether anyone on the list was a problem – then you would need to follow-up with them on which ones are clients – after you have client consent.

Conclusion: Be very careful when interviewing to not disclose any client identifying information unless either the matter is public record and could be easily confirmed or the client(s) have consented to the disclosure. Otherwise, the interviewing firm should first confirm whether it is adverse to the lawyer's current law firm and then discuss with the lawyer whether there are specific matters that the interviewing lawyer *knows* are adverse and on which the lawyer has worked.

B. Screening an "Infected" Lateral Hire

Some jurisdictions versions of Ethical Rules 1.10 and 1.18 permit screening of lawyers with certain types of conflicts. For instance, Arizona Rule 1.10(d) permits screening a lawyer who has a former client conflict *as long as,* among other things, it was not a litigation matter in which the conflicted lawyer played "a substantial role." The U.S. District Court for the District of Arizona helped define what constitutes "a substantial role" in *Eberle Design, Inc. v. Reno A & E.*[10] The court determined that a lawyer's drafting of *voir dire* questions and billing only 9 hours of time to the former client did not constitute a "substantial role." Caution: whenever a firm is considering hiring a lateral who may have a conflict the firm should assure that it checks for conflicts *before* extending an offer….

Assuming that the conflict is one that can be screened, the screening procedures according to ABA Model Rule 1.0 Comment [9] must include the following:

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10. 2005 U.S. Dist. LEXIS 2323 (D. Ariz. Feb. 8, 2005).

1. *Prompt* notice to the affected client that the conflicted lawyer has been screened.
2. Notice to all staff regarding the lawyer or staff person who is screened.
3. Physical notice in the paper file of the conflicted matter as follows:

This assumes that the conflict is one that is screenable and that the other lawyers in the office will not have their independent professional judgment materially limited by the screened lawyer's conflict. In order to be effective, screening must occur as soon as the conflict is known and must be thorough.

A thorough screen should assure that:

- *all* firm staff have been notified of the screen,
- measures are implemented to lock out the infected lawyer or employee from the document database,
- measures must be implemented to assure that the infected lawyer not receive emails or voicemails that discuss the matter (e.g., an email sent to all partners discussing a matter must not be sent to the infected lawyer),
- the screening notice is resent periodically to all staff, and
- the paper file must have a written warning and should be in a secure location (not stored in the general file room).

Note that the "prompt" notice to the affected client must identify what screening precautions have been implemented.

III. Law Firm Mergers

When two firms "marry" the first thing they must do before walking down the aisle and signing the marriage/partnership agreement, is to check for conflicts.

- **When considering merging with opposing counsel, you will need to tell *your* client – eventually.**

Hypothetical: You are interested in moving to opposing counsel's firm. When must you tell your current client?

ABA Formal Opinion. 96-400 (1996) helps clarify when you must tell your client that you want to join the opposition. The ABA Opinion concluded that lawyers must disclose the possibility of joining the opposing firm when the lawyers' interest in combining becomes "concrete, communicated and mutual."

- **When two firms are considering merging, you *will need to clear conflicts.***

In a recent decision in Iowa, *Kinzenbaw v. Case LLC*,[11] a court refused to disqualify a firm that only learned two years after a merger that it had a conflict of interest caused by merging with an opposing firm–but this should *not* be relied upon to ignore checking for conflicts prior to merging. In 2002 Cahill, Christian & Kunkle was acquired by Perkins Coie. At the time Perkins Coie had numerous

11. No. C 01-133 LRR (N.D. Iowa 5/20/04).

offices. Lawyers in Perkins Coie's Seattle office were representing Case Corp. on a variety of matters. Cahill's Chicago office was representing a company named Kinze. When the merger occurred the conflict check between Cahill and Perkins noted that there might be a conflict with Case but for some unknown reason the red flag was not investigated further. After the merger Seattle lawyers of Perkins continued to represent Case, while Chicago lawyers of former Cahill–now Perkins, represented Kinze–against Case.

When Perkins ultimately learned of the conflict in 2004 all work for *both clients* was frozen until Perkins could investigate the matter. Several months later the firm terminated its relationship with Case and the Chicago Cahill/Perkins lawyers continued to represent Kinze.

Ruling upon Case's motion to disqualify Perkins, the court declined to disqualify the firm even though it did find that the firm violated DR 5-105 (Iowa's conflict of interest rule at the time) because the court concluded that disqualification is only one of several different sanctions that can be imposed for a conflict and the hardship that would be imposed upon Kinze for losing its counsel of choice would be too great. The court explained that a conflict of interest does not mean per se disqualification. In this matter Perkins lawyers did not represent Case on any matters that were related to the litigation and did not have confidential information that could be used against Case.

This case presents a practical reminder: when two firms are considering merging, you will need to provide both your current and former client lists to check for conflicts. Either one lawyer from each firm or a committee of lawyers in each firm must be assigned responsibility for investigating and resolving all potential conflicts that appear when the client lists are cross-referenced. Only the information necessary to check for conflicts should be disclosed to the committee. The due diligence checklist for pre-merger should include a memo from that committee/lawyer, confirming that all potential conflicts have been resolved and providing copies of letters to affected clients obtaining their "informed consent" to waive the conflicts or memos to the file explaining the committee's conclusion on why the firm does not need to obtain such waivers.

- **Selling a Law Firm**

ABA Model Rule 1.17 permits the sale of law firms….with very specific requirements. The new Rule provides:

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

> (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area(s) in which the practice has been conducted;
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> (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
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> (c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

These criteria are similar to when a lawyer leaves a firm: the clients are not chattels – they get to decide who will be their lawyer *and* their fees cannot be increased because of the change.

IV. Death of a Lawyer

Law firms with more than one lawyer always should have provisions for what happens to handle client matters if a lawyer passes away or becomes incapacitated for an extended period of time. Law firms with more than one lawyer usually do not have significant ethical issues regarding deaths within the firm. Solos must have back-up counsel who can come into the firm and notify clients of the lawyer's incapacity, file for extensions of time and/or obtain new counsel for clients. Remember that partnership/shareholder interests may be paid to the estate of the deceased lawyer pursuant to ER 5.4(a) even if this means the money will be paid to a non-lawyer surviving beneficiary.