Breaking up is hard to do

By Peter H. Geraghty
Director, ETHICSearch

A four-partner law firm engaged in general practice is undergoing changes. One partner intends to retire in six months while a second partner is contemplating leaving to join another firm with a similar practice. The remaining two partners are considering whether to continue on as a partnership with the retiring lawyer as a named partner or to go their separate ways as sole practitioners. The situation raises several ethics questions:

- If the original firm dissolves, under what circumstances can the departing or retiring partners solicit clients of the former firm?
- If the remaining partners of the original firm do decide to continue on as a partnership, is it permissible for the departing partner to solicit clients to accompany him to his new firm?
- What are each partner’s responsibilities toward client files?

The ethics of breaking up

When lawyers leave law firms or when law firms dissolve, many thorny ethics issues arise. As Kentucky Bar Association Ethics Opinion E-424 (2005) points out, there also can be many legal issues, including: the allocation of fees, the notices the departing lawyer must give to the firm and entitlement to various firm assets. Lawyers who practice together have fiduciary responsibilities to one another and they have the duty to conduct themselves ethically, keeping in mind...
the mandates of **RPC 8.3** [Kentucky’s version of ABA Model Rule 8.4, Misconduct, prohibiting conduct involving dishonesty, fraud, deceit and misrepresentation] and **5.6** [prohibiting restrictions on the right to practice law].

When all the partners decide to end the partnership and either retire, establish new separate practices or join other firms, the firm enters dissolution. Under such circumstances, the “winding up” of the firm’s business and the distribution of the firm assets are typically governed by the applicable provisions of the Uniform Partnership Act (UPA), which is in effect in nearly every state. Note, however, that the UPA allows partners considerable latitude in crafting partnership agreements in such areas as the causes and consequences of dissolution, the compensation to be paid for work involved in winding up the partnership, partners’ rights to an accounting, and the valuation of partnership shares. (For further information on this topic, see the discussion in the chapter “Withdrawal and Termination” that appears at page 91:701 of the *ABA/BNA Lawyers’ Manual on Professional Conduct*. This chapter also provides a checklist of items that should be included in a partnership agreement.)

**Bar association ethics opinions**

There have been several ABA, state and local bar association ethics opinions addressing the ethical obligations of lawyers when changing firms. In general these opinions address the obligations of lawyers to inform clients of their impending departure (**Rule 1.4**, Communication), the types of pre- and post-departure notices they can send to their clients (**Rule 7.3**, Direct Contact with Prospective Client), the duty to protect client interests (**Rule 1.16(d)**, Declining or Terminating Representation), and the need to avoid conduct involving fraud, deceit, or misrepresentation (**Rules 8.4**, Misconduct, and **7.1**, Communications Concerning a Lawyer’s Services).

In 1999 the ABA Standing Committee on Ethics and Professional Responsibility issued **Formal Opinion 99-414**, Ethical Obligations When a Lawyer Changes Firms.

At page one of the opinion, the committee provides the following thumbnail sketch of the ethical issues it considers critical when a lawyer leaves her law firm for another:
- disclosing her pending departure in a timely fashion to clients for whose active members she is currently responsible or plays a principal role in the current delivery of legal services;
- ensuring that the matters to be transferred with the lawyer to her new firm do not create conflicts of interest in the new firm and can be competently managed there;
- protecting client files and property and ensuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal;
- avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; [and]
- maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the client’s former firm.

Recent state bar ethics opinions include Alaska Bar Opinion 2005-2 (2005), Kentucky Bar Association Opinion Kentucky Bar Association Opinion E-424 (2005), Oregon State Bar Opinion 2005-70 (2005), Joint Opinion 2007-300 (2007) of the Pennsylvania and Philadelphia Bar Associations, South Carolina Bar Opinion South Carolina Bar Opinion 02-17 (2002), and Virginia Legal Ethics Opinion 1822 (2006). The Florida State Bar has adopted an ethics rule that specifically addresses procedures for lawyers who depart from or engage in the dissolution of a law firm (see Rule 4-5.8 of the Florida Rules of Professional Conduct). With near unanimity, these opinions state that under Rule 1.4, Communication, a lawyer who has played a significant role in a client’s representation must notify that client of his pending departure. However, Connecticut Bar Association Opinion 00-25 (2000) states that a lawyer may but is not required to notify clients of her upcoming departure from the law firm. Most state and local ethics opinions also agree that although it is not always possible, a joint notice from both the firm and the departing lawyer is preferable. All opinions note that both the departing lawyer and the firm must make it clear that clients have the ultimate right to decide who will represent them in the future.

**Pre-departure notice**
The content and timing of departure notices and other communications to clients are frequent sources of contention when lawyers leave law firms, and such notices may implicate legal as well as ethical issues. As stated at page two of ABA Formal Opinion 99-414:

The departing lawyer also must consider legal obligations other than ethics rules that apply to her conduct when changing firms, as well as her fiduciary duties owed the former firm. The law of agency, partnership, property, contracts and unfair competition impose obligations that are not addressed directly by the Model Rules. These obligations may affect the permissible timing, recipients, and content of communications with clients, and which files, documents, and other property the departing lawyer lawfully may copy or take with her from the firm. Although the Committee does not advise upon issues of law beyond the Model Rules, we must take account of other law in construing the Rules; so must the departing lawyer before determining an appropriate course of action.

Subject to the “legal obligations other than ethics rules” as summarized above, most ethics opinions state that lawyers can send pre-departure notices only to those clients with whom they have a current professional or personal relationship, but that lawyers are free to contact any firm client subject to the restrictions of Rule 7.3 after they have left the firm. For example, according to ABA Formal Opinion 99-414 at page 4:

[t]he departing lawyer nevertheless may contact the client through written or oral recorded communication pursuant to Rule 7.2(a), subject to the limitations in Rules 7.1, 7.3(b) and 7.3(c), at least after the lawyer has departed the firm and joined the new firm.

Other state bar opinions hold that lawyers may send written pre-departure notices to clients at the firm but caution that a lawyer may violate Rule 7.3, Direct Contact with Prospective Client, if he were to make in-person or live telephone contact with a firm client with whom he has no existing lawyer-client or personal relationship. For example, Kentucky Bar Association Ethics Opinion E-424 (2005) states:

The departing lawyer may wish to advise former clients, as well as firm clients with whom the lawyer has had no association and others, of the change in affiliation. In such cases, the lawyer must consult Kentucky’s advertising rules, contained in SCR 3.130-7.01-7.50 and SCR 3.130-8.3 (misconduct). Of particular applicability is SCR 3.130-7.09 (direct contact with prospective clients); SCR 3.130-7.15 (communications concerning a lawyer’s services).

ABA Formal Opinion 99-414 lists the following principles that are applicable when the departing lawyer drafts pre-departure notices to her clients at the firm:

- the notice should be limited to clients [for] whose active matters the lawyer has direct professional responsibility at the time of the notice (e.g., the current clients);
- the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer’s willingness and ability to continue her responsibility for the matters upon which she currently is working;
- the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
- the departing lawyer must not disparage the lawyer’s former firm.

**Duty to protect client interests**

ABA and state bar opinions agree that both the departing lawyer and the firm must take reasonable steps to ensure that client interests are protected during a period of transition, and that the interests of the clients in active matters are handled in accordance with Rules 1.1,
Compliance; and 1.7, Conflict of Interest: Current Clients. Under circumstances where either the departing lawyer or the law firm withdraws from the representation, Rule 1.16(d), Declining or Terminating Representation, states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Fiduciary duties

The extent to which the departing lawyer can remove client files from the firm also poses tricky ethical and legal issues. At page eight of ABA Formal Opinion 99-414 (1999), the ABA Ethics Committee states:

To the extent that these documents were prepared by the lawyer and are considered the lawyer’s property or are in the public domain, she may take copies with her. Otherwise, the lawyer may have to obtain the firm’s consent to do so.

The Committee is of the opinion that, absent special circumstances, the lawyer does not violate any Model Rule by taking with her copies of documents that she herself has created for general use in her practice. However, as with the use of client lists, the question of whether a lawyer may take with her continuing legal education materials, practice forms or computer files she has created turns on principles of property law and trade secret law. For example, the outcome might depend on who prepared the material and the measures employed by the law firm to retain title or otherwise to protect it from external use or from taking by departing lawyers.
Client files and client property must be retained or transferred in accordance with the client's direction. A departing lawyer who is not continuing the representation may, nevertheless, retain copies of client documents relating to her representation of former clients, but must reasonably ensure that the confidential client information they contain is protected in accordance with Model Rules 1.6 and 1.9.

Some state bar opinions have addressed the joint obligations partners have with regard to client files when they retire from a partnership or when their partnership dissolves. For example, New York State Bar Opinion 623 (1991) states that a lawyer who leaves a law practice either because of retirement or dissolution of the firm has joint and several responsibility with other firm members for the proper disposition of the client files.

Nassau County Bar Association Opinion 93-23 (1993) discusses the joint ethical obligations of the lawyers who were formerly partners in a now-dissolved law firm. The lawyers who withdrew made arrangements to store their inactive files with the lawyers who remained to form a successor law firm. The successor firm then contacted the former partners and gave them a list of the files the firm had in storage. The former partners instructed the firm to send them approximately 30 percent of the files and to destroy the rest. The successor firm inquired as to its obligations with regard to the remaining files in its possession. The opinion states:

Neither the fact that the law firm has dissolved, nor the fact that inquiring counsel and his present partners have no knowledge of the files which remain in their custody changes their obligations with respect to the files.

Moreover, if there are any members of inquiring counsel’s current firm who are not members of the predecessor law firm in dissolution, they are nonetheless equally ethically bound since the present firm, of which they are members, has custody of the files. . . . [A]n attorney voluntarily assuming custody of the files of another lawyer’s client has the same ethical
obligations for the files as if they were his or her own files.

Thus, while the private contractual agreement may have the effect of allocating among the former partners the economic burden of dealing with particular files . . . it cannot shift the ethical burden which is joint and several as to (a) all the former partners, both “withdrawing partners” and those remaining at the successor firm and (b) any new partners of the successor firm.

A similar conclusion was reached in State Bar of Wisconsin Committee on Professional Ethics Opinion E-98-01 (1998).

The Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association Informal Opinion 98-2 (1998) provides the following guidance to a retiring lawyer who inquired as to the proper disposition of original client wills that he assumed responsibility for upon the death of two senior partners:

It is the Committee’s opinion that your ethical obligations with respect to these wills is to ascertain whether the makers are still living and, if so, to return the wills to them; and, if the maker is deceased, then your obligation is to locate and deliver the will to the maker’s personal representative. Your ethical obligation is to make a diligent effort to locate either the client or, if the client is deceased, his or her personal representative. If, after undertaking this effort, there remain clients whose whereabouts you cannot determine, then, the Committee is of the opinion that you must preserve and retain the wills. You should leave instructions that upon your death, if there is no responsible party willing to assume appropriate responsibility, then the wills should be delivered to the chair of the local certified grievance committee or Disciplinary Counsel.

A similar conclusion was reached in The Association of the Bar of the City of New York Opinion1999-5 (1999).
Illinois State Bar Opinion 95-02 (1995) addressed the circumstances under which a lawyer who has left a law firm can have access to the closed files of clients she had represented while at the firm. The opinion states that her former firm should grant her access but that she would have to bear the costs of retrieval and copying charges.

**Conclusion**

When lawyers leave law firms or when law firms dissolve, all lawyers involved have legal and ethical obligations toward their clients and the law firms they leave behind. For information specific to your jurisdiction, check your local rules of professional conduct, case law and ethics opinions.


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e-Discovery: what you need to know

Ralph C. Losey is a shareholder in the Orlando office of Akerman & Senterfitt, P. A., where he heads the firm’s national electronic discovery practice group. He has practiced commercial and employment litigation since 1980, and has more than 70 published opinions. In addition, he is author of e-Discovery: Current Trends and Cases.

YourABA recently asked Losey about those trends and, more broadly, what lawyers need to know about e-discovery.

First, so readers are all on the same page, can you explain what e-discovery is?

e-Discovery, short for “electronic-discovery,” pertains to the discovery of information in a litigation context that is stored in computers and other electronic devices. More and more, the smoking guns are not in the filing cabinets, they’re in the computers.

e-Discovery has to do with locating, preserving, collecting, analyzing and producing these computer files. Computer files are now critical in litigation because that’s how companies do business and how most people communicate these days, with e-mail and instant messages.

In order to prepare for a case, all of us as lawyers need to be computer literate and understand how to get at the evidence.

Is there a trend in what lawyers can expect to be asked of them
The trend is that courts are insisting upon a much higher degree of competence on the part of lawyers that appear before them, especially in federal court. Courts are becoming less tolerant about electronic evidence being “accidentally” destroyed.

Spoliation is now a common motion; it used to be rare but it is now quite common. Many lawsuits are now won or lost not on the merits, but on the charges and sanctions for not properly preserving computer files; for instance, not keeping e-mail and attachments to e-mail.

Are there recent examples?

One of the latest cases involves the mayor of Detroit, who may now be forced out of office because of romantic phone text messages he sent to one of his staffers. He and his staff member swore in deposition that they had no relationship, but later their text messages contradicted that. They obviously thought that the messages would never be found. That is a dangerous thing to do because electronic information like that has a way of lingering around for years, and can be found by smart investigators.

Today we need to realize that the “e” in e-mail stands for evidence. That’s what all the good lawyers are going for now, the opposing party’s e-mail. Even sophisticated executives in large corporations will still put things in e-mail that they would never put in a letter or other paper document under the naïve thought that, “oh, it’s just e-mail. It won't last, it'll go away.”

Another trend is that we’re not only seeing sanctions, but we’re also seeing adverse inference jury instructions, where the jury is told that they should assume that the e-mails would have been harmful to the person who destroyed them. I have never seen one side lose if it is able to get those instructions.

You’ve already mentioned the dangers of instant messages and e-mail, what other kinds of information can or should lawyers ask for from opposing counsel?
Contrary to the paper file in which there was no need to take a deposition about how things were filed, we're often seeing depositions being taken from the people who are in charge of filing the computer records. In some cases this also involves taking depositions of the opposing party’s computer techs. In addition, in every case you will want to talk to your client's IT department and have them explain where and how they keep the information that may be relevant to this lawsuit. The IT people become a key part of discovery in 21st century litigation.

One of the big changes in practice is driven by the new Federal Rules of Civil Procedures governing e-discovery that went into effect on Dec. 1, 2006.

These new rules require parties and lawyers to talk about all e-discovery issues at the beginning of a case. Issues to be discussed include the procedures in place to make sure that e-mails and other electronic information aren't lost, the form in which electronic documents will be produced, and what areas of a client's total IT system will, and will not, be searched for discoverable information—all of these IT-related discussions are supposed to happen at the beginning of a case so that everyone has a chance to prepare. And even though these are federal rules, it's good advice to also have these discussions early in state court cases too.

You've already talked about lawyers now deposing IT personnel. It would seem to be important for a lawyer to work with their own IT people in order to fully understand the technology element. Care to comment?

There really needs to be a better understanding between the two fields of IT and law. They're both very technical fields, with technical language used by both IT people and lawyers.

Lawyers need to take the time to ask the questions and make sure they understand exactly what their IT people are saying because the lawyer may be required to explain things to opposing counsel or to a judge. There have been countless examples where lawyers haven't fully understood what their IT people have said and, unknowingly, have made misrepresentations, or promises to complete a search and
production in unrealistically short time frames. These costly mistakes can be avoided by obtaining a better understanding of the technical processes involved.

But remember, for law and IT to work well together, the educational process should be a two-way street. Lawyers need to take the time to teach key legal basics to their IT people as well.

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Are there any new developments that people should be aware of in this area?

As I mentioned earlier, courts are demanding more and more from lawyers. For example, two of my recent blog essays deal with keyword searching. In one case (Diabetes Centers of America, Inc. v. Healthia America, Inc.), an attorney was criticized for doing a poor job of key-word searching. In that instance, the e-mail search was delegated to an untrained associate attorney with no instruction or supervision. The young associate totally missed it, and that caused key evidence to be lost. In that case sanctions were not imposed, but mainly because the other side made mistakes as well, and it was an offsetting balance.

Anything else that you’d like to add that we haven’t asked about, or other last tips or pointers?

The thing that I’m talking about most right now is the “e-Discovery team” concept, which is the name of my blog. The e-Discovery Team is a new kind of multi-disciplinary corporate task group. Everyone in this field has found that the biggest thing any large organization can do to keep their e-discovery expenses down—and these can otherwise be huge, expenses of a million dollars in a single month are not uncommon—is to create their own internal e-discovery teams.

Here the in-house lawyers work with their IT personnel, records management and other key management people to prepare and put into place systems to respond to e-discovery. They work on retention policies, document management, software systems and litigation hold and collection procedures. The goal is to become more self-reliant, and reduce the costs of e-discovery.
One final thought—today we call it e-discovery, but everyone seems to think that in five years—or certainly 10—the “e” will be dropped. That’s because by then all discovery will be electronic. We won’t even think much about paper discovery anymore. For our kids the paper chase will be a quaint reminder of bygone days in the 20th century.
Top ethics traps for lawyers

Ethical considerations relative to advertising, attorney-client privilege, subordinate lawyers and fee agreements were among the topics covered in a free CLE, “The Top Ethics Traps for Lawyers,” an ABA Connection program.

Trap: Lawyer advertising

Questions of acceptable lawyer advertising are more prevalent than ever because of the Internet. “Marketing issues are extremely tricky and rules applying to advertising generally lag 20 years behind,” said Diane Karpman, legal ethics expert, who has counseled lawyers and law firms for two decades. Advertising rules were designed for print media and each state has its own regulations. States have different retention policies, label requirements and even rules for type size, explained Karpman in a November 2007 ABA Journal article that complements the educational session. “Comply with your home state’s regulations,” she advised. “Include whatever disclaimers should
It's a good idea to state that the ad does not create an attorney-client relationship or protect any confidential information until a written agreement is signed.

**Trap: The lawyer-client relationship**

Michael Downey, partner at Hinshaw & Culbertson LLP, who led the program, stressed that very little is required to establish a lawyer-client relationship. “If a person asks a legal question, and a lawyer answers or says he or she will look into it, a lawyer-client relationship may result. There’s no need to sign an agreement, shake hands, discuss rates or send an engagement letter,” Downey wrote in the same *ABA Journal* article. Further, Downey pointed out, “ABA Model Rule 1.10, an inadvertent client relationship imputes to the lawyer’s firm, not just to the lawyer.”

**Trap: The subordinate lawyer**

Subordinate lawyers need to do more than just refuse to comply with unethical directives from a supervisor. *Model Rule 8.3* dictates that the subordinate report the supervisor to an appropriate disciplinary agency. Panelist Eileen Libby, associate ethics counsel for the ABA Center of Professional Responsibility, summarized how Model Rules 5.1 and 5.2, in addition to 8.3, relate to subordinate lawyers. Rule 5.2, said Libby, imposes affirmative responsibility on the subordinate. That lawyer can’t just say, “I was just following orders.”

Among other topics covered were ethical considerations in business transactions and when leaving one’s law firm.

The ABA Connection program was sponsored by the Center for Professional Responsibility, Young Lawyers Division, Section of Litigation, Tort Trial and Insurance Practice Section, Section of Business Law, ABA Journal and the Center for CLE.
Five tips for lawyer advertising: from billboards to blogs

Long gone are the days when advertising in the Yellow Pages was the sole means of growing a law practice. Lawyers are now using a variety of media to advertise, including Web sites, blogs, television, billboards and direct mail.

While advertising for most industries is virtually painless with few restrictions, advertising for lawyers is a more complex process that is bound by many laws, including federal and state regulations, as well as the ABA Model Rules, which offer guidance on lawyer conduct. A recent ABA teleconference, “Advertising for the Next Generation: From Billboards to Blogs,” provided an overview of some of these regulations.

**Avoid using a name that indicates a “firm” when there isn’t one**

It may be tempting for office-sharing solo practitioners to tack-on “firm” or “associates” to signs and other identifying materials, suggesting such an affiliation. However, panelists warned lawyers to be wary, as solos that unlawfully act as firms will be treated as such for both liability and disciplinary actions.
Avoid unintentional clients

When posting general legal information on your Web site or blog, be sure to post a disclaimer to ensure that visitors understand there is no attorney-client relationship being formed. Some argue that without such a disclaimer, the lawyer implicitly agrees to form an attorney-client relationship with those who unilaterally transmit, according to panelist Lynda C. Shely, ethics law expert. Besides disclaiming the formation of an attorney-client relationship, disclaimers should also state that information posted is “void where prohibited by law.”

Avoid speaking to strangers

Be wary of direct solicitation of clients. Lawyers should keep in mind that such solicitation is banned in some states to avoid potential badgering. This law is void, however, when the prospective is a former client, close friend/family member or another lawyer.

Avoid the use of trade names in some states

Although the ABA Model Rules permit the use of trade names, many states do not. To avoid unnecessary legal headaches, lawyers should check the rules in their jurisdiction before using trade names such as “The Bankruptcy Center” or “Personal Injury Law, LLC.”

Avoid giving “gifts” for referrals

Another tip regarding direct solicitation: lawyers should be cautious of gift giving. Although gift giving is acceptable during the holidays, doing so at other times of the year can be cause for concern, as it may appear that the gift was given for a client referral, which is prohibited.
Scissors, rock, paper—cutting the paper out of your office

Despite the wide use of e-mail, scanning and online research, the amount of paper that law firms use has not seemed to have decreased much in recent years. What tools are available to cull the stacks of paper? The ABA has several resources to use as starting points.

Even with the green movement picking up steam, lawyers can be creatures of habit and for many, change is hard. Also, as Nancy N. Grekin points out in her presentation, “The Paperless Office: The Electronic Transaction,” there are issues surrounding the storage of documents electronically. First is organization. Rather than a hard copy filing system, the computer can serve as an electronic filing cabinet. In order to keep some semblance of order, it's helpful to adopt a naming convention for files. This may also help identify documents when sharing them.
Click [here](#) to view Grekin's Powerpoint presentation for additional pointers that include considerations on how to bill when producing automated documents. In addition, Internet faxing and scanning capabilities are covered.

The use of scanners is also discussed in David L. Masters' article, “[Setting Up the Paperless Office](#)” Inexpensive flatbed scanners, Masters states, can be utilized for books but are cumbersome and slow when it comes to multiple pages. “The best model is a scanner that combines the benefits of flatbed and sheet-fed models.”

Turning to the issue of electronic storage, Masters stresses that daily back ups of electronic information are critical. Test the back-ups occasionally to make sure they can be accessed and that files are actually being recorded; keep one set of up-to-date back ups off-site, continues Masters.

Receiving faxes electronically versus via hard copy is another way to reduce paper. Catherine Sanders Reach in her article, “[Paperless Office: Hardware and Software](#)” offers a sampling of electronic fax options: eFax, MaxEmail, JConnect, FaxMicro and CallWave.

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If I don't see it, does it mean it's not there?
Metadata—ethics, technology and more

As much information and entertainment as the Internet may provide and as beneficial as we find e-mail and word processing, the world of technology is wrought with potential pitfalls.

Metadata—data about data—is one possible source of distress. Many electronic documents contain information beyond the printable page, such as the author’s identity, the number of revisions made and even comments and redlining revealed with a few quick strokes on the keyboard. Users may unintentionally share things that they didn’t expect to.

As Catherine Sanders Reach, director of the ABA Legal Technology Resource Center, outlines in her presentation, “Dangerous Curves Ahead: The Crossroads of Ethics and Technology,” metadata is coming to the forefront as technology proliferates. Because the Model Rules of Professional Conduct “do not contain any specific prohibition against a lawyer’s reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party,” metadata has become the basis of several ethics opinions by states and the ABA. View ABA ethics opinion 06-442, for example.
What can be viewed via metadata, according to Reach, include author name, the date document was created and modified, as well as comments and redlining that were made within the document. Software is available that can remove metadata; such programs include Payne’s Metadata Assistant, SoftWise: Out-of-Sight and Workshare: Workshare Protect, just to name three.

When working with electronic documents, ways to ensure protection include using passwords to open and edit, sharing a document either through the pdf format or via MS Office 2003 Information Rights Management, and through the use of encryption.

To view the presentation as presented to the Arkansas Bar Midyear Meeting in January 2008, click here.
Attract more clients, grow your business—advice for women lawyers

“You are your own best marketer,” contends Arnettia S. Wright in her article, “Ladies, Are You Capitalizing upon Your Competitive Advantage?” The article is among those featured as part of the Young Lawyers Division’s "101 Practice Series," which offers basic training in both substantive and practical aspects of law practice.

Many women have an often-overlooked competitive advantage when it comes to cultivating business relationships: the “gift of gab,” Wright states. However, it is sometimes hard for women to talk about themselves. Start with something personal. Set the stage to show others the “real” you. People want to hire lawyers with whom they’re comfortable. Develop a connection by talking about one’s children or pet, Wright advises.

The common roles women play can also help develop relationships. Serving as a “team mom” or as a volunteer creates opportunities for potential referrals.

To attract new clients, you may also want to consider:
• Publishing opportunities to enhance your visibility
• Offering your own “brand” by having an “elevator speech” down pat
• Volunteering through pro bono work, working on boards or participating in a local organization
• Honing your skill at public speaking, for example, through such programs as “Toastmasters International.”

Wright's article in its entirety may be read here.

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Social Security Administration to revise appeal rights regulations; ABA had urged changes

In late January, the Social Security Administration announced that it is rescinding a controversial proposed regulation that would limit Social Security and Supplemental Security Income benefits for some persons with severe disabilities.

The proposed changes would have applied to persons who were denied benefits not because of the severity of their disability, but rather because they were unable to follow the difficult procedural requirements mandated under the proposed rule or obtain critical medical evidence under the timelines imposed under the rules. The ABA is a strong supporter of improving the disability benefits process. While the proposed regulations have been rescinded, it is unknown what if any new regulations may be proposed.

As ABA members may know, the SSI and the SSA Disability Insurance programs have been sorely underfunded and have been plagued with administrative backlogs and other issues that have prevented claimants and their families from seeing their appeals move quickly through the process.

The SSA continues to review other provisions of the rule and has delayed the issuance of final rules on provisions that require
applicants to supply medical records in a time period that may not be realistic. While the recent change and delay in final ruling are important first steps, the ABA will continue its efforts to see that cases are handled as quickly as possible and with an accurate decision as early in the process as possible.

In December 2007, the association sent a letter to SSA Commissioner Michael J. Astrue outlining its concerns about the proposed regulations, as well as applauding the commissioner for efforts on the process. The ABA is pleased that the commissioner has taken the step of rescinding the proposed regulations and is working to rewrite them.

The Section of Administrative Law, Judicial Division, National Conference of Administrative Law of the Judicial Division and the Commission on Law and Aging have been working together on this issue.

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Model of Ethics in transactional matters

Several of the model rules guiding conduct around matters of conflict are of particular interest to transactional lawyers. Those rules include ones that address concurrent conflicts, former client conflicts, imputation of conflicts and conflicts surrounding waivers, explained Thomas B. Mason, Zuckerman Spaeder LLP, during “Ethics for the Transactional Lawyer: Practitioner, Disciplinary Counsel, and Defense Perspectives.”

Concurrent client conflicts are addressed by ABA Model Rule 1.7, which specifically states that a conflict exists if “the representation of one client will be directly adverse to another client” or if there is “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” As Mason stressed, a conflict will still exist even if the cases are unrelated to each other.

In citing ABA Model Rule 1.9 concerning duties to former clients, Mason stated that a conflict exists if representation of a current client against a former one involves a matter that is “substantially related” to the work done for the former client. That begs the question, Mason said, of “what does a substantial relationship mean?” The comments
section to the model rule include some examples to clarify.

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A conflict that precludes any lawyer in a firm from taking a matter applies to all other lawyers within the firm. There’s a common misperception that screening the one lawyer from the case is enough, said Mason, and that is not the case.

Mason detailed questions to ask oneself in order to identify conflicts: Who is the client? Are you representing multiple, adverse parties? How would you handle client confidential information?

Mason and fellow panelists, moderator Norman M. Powell, Young Conaway Stargatt & Taylor, LLP, and Michael S. McGinnis with the Office of Disciplinary Counsel, Delaware Supreme Court, engaged in a lively discussion of waiver conflicts. According to ABA Rules, waivers need to be made in writing. And while that is good practice, it is not mandatory everywhere, said Mason. Clients should be thoroughly instructed on what they’re giving up when they sign a waiver; “informed consent” is the best avenue.

A portion of the materials released in conjunction with the CLE may be found here.

The entire program may be purchased via the following link.

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How to navigate the ABA Web site to make the most of your membership

There’s a wealth of information on the ABA Web site – if you know where to look for it.

The Membership and Marketing Division has created a handy flyer to help you navigate the association Web site. Some of the Web site highlights include:

- From the main ABA home page, lawyers may want to click on “Lawyer Resources” and then “YourLaw client newsletter” to find a resource that will allow them to keep in closer communication with their clients and potential ones, as well.

- Another resource linked from “Lawyer Resources” is the “Career Counsel” page – not just designed for lawyers who are looking for a job or to switch jobs, this page provides links to materials on mentoring, leadership and much more.

- The Member Groups page provides information on the dozens of ABA entities that are active both in the U.S. and abroad.

- “ABA Centers/Other Departments” can lead a lawyer to the Government Affairs site where one can learn more about the issues on which the ABA is lobbying before Congress, such as attorney-client privilege and sentencing reform.

- From the Justice Center’s site, a reader has access to an array of information on fair and impartial courts, “resources for state trial judges” and appellate education opportunities.

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The ABA asks: “If there’s one issue facing our nation where the ABA should take a leadership role, what would that be?”

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If there’s one issue facing our nation where the ABA should take a leadership role, what would that be?
Ethical Obligations When a Lawyer Changes Firms

A lawyer’s ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients’ interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him. The departing lawyer and the responsible members of her firm who remain must take reasonable measures to assure that the withdrawal is accomplished without material adverse effect on the interests of clients with active matters upon which the lawyer currently is working. 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. The departing lawyer and responsible members of the law firm who remain also have ethical obligations to protect client information, files, and other client property. The departing lawyer is prohibited by ethical rules, and may be prohibited by other law, from making in-person contact prior to her departure with clients with whom she has no family or client-lawyer relationship. After she has left the firm, she may contact any firm client by letter.

When a lawyer ceases to practice at a law firm, both the departing lawyer and the responsible members of the firm who remain have ethical responsibilities to clients on whose active matters the lawyer currently is working to assure, to the extent reasonably practicable, that their representation is not adversely affected by the lawyer’s departure. In this Opinion, the Committee addresses obligations under the Model Rules of Professional Conduct that a lawyer has when she leaves one law firm for another, including the following: (1) disclosing her pending departure in a timely fashion to clients for whose active matters she currently is responsible or plays a principal role in the current delivery of legal services (sometimes referred to in this Opinion as “current clients”); (2) assuring that client matters to be transferred with the lawyer...
to her new law firm do not create conflicts of interest in the new firm and can be competently managed there; (3) protecting client files and property and assuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal; (4) avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; and (5) maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the lawyer’s former firm.1

The departing lawyer also must consider legal obligations other than ethics rules that apply to her conduct when changing firms, as well as her fiduciary duties owed the former firm. The law of agency, partnership, property, contracts, and unfair competition impose obligations that are not addressed directly by the Model Rules. These obligations may affect the permissible timing, recipients, and content of communications with clients, and which files, documents, and other property the departing lawyer lawfully may copy or take with her from the firm. Although the Committee does not advise upon issues of law beyond the Model Rules, we must take account of other law in construing the Rules; so must the departing lawyer before determining an appropriate course of action.

Notification to Current Clients Is Required

The impending departure of a lawyer who is responsible for the client’s representation or who plays a principal role in the law firm’s delivery of legal services presents a number of ethical concerns that must be addressed by the departing lawyer and the law firm.1 This Opinion addresses mainly the obligations of the departing lawyer. Nevertheless, the firm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, and may have obligations as well under other law, to assure to the extent reasonable practicable that the withdrawal from the firm is accomplished without material adverse effect on any clients’ interests, especially clients on whose active matters the departing lawyer currently is working. Cf. ABA Informal Opinion 1428 (1979), decided under the former Model Code of Professional Responsibility, and California Bar Ethics Op. No. 1985-86, 1985 WL 57193 *2 (Cal.St.Bar.Comm.Prof.Resp. 1985), both of which place the responsibility of notifying clients upon the departing lawyer and her firm. Among remaining firm members’ ethical obligations are to make reasonable efforts to ensure that there are in effect measures: (1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure of a lawyer having substantial responsibility for the clients’ active matters; (2) to make clear to those clients and others for whom the departing lawyer has worked and who inquire that the clients may choose to be represented by the departing lawyer, the firm or neither (see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. h (Proposed Official Draft 1998); (3) to assure that active matters on which the departing lawyer has been working continue to be managed by remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that, upon the firm’s withdrawal from representation of any client, the firm takes reasonable steps to protect the client’s interests pursuant to Rule 1.16(d). See infra, n.4 and accompanying text. This Opinion does not address the issue of a division of fees between the departing lawyer and her law firm.
services currently in a matter (i.e., the lawyer’s current clients), is information that may affect the status of a client’s matter as contemplated by Rule 1.4. A lawyer who is departing one law firm for another has an ethical obligation, along with responsible members of the law firm who remain, to assure that those clients are informed that she is leaving the firm. This can be accomplished by the lawyer herself, the responsible members of the firm, or the lawyer and those members jointly. Because a client has the ultimate right to select counsel of his choice, information that the lawyer is leaving and where she will be practicing will assist the client in determining whether his legal work should remain with the law firm, be transferred with the lawyer to her new firm, or be transferred elsewhere. Accordingly, informing the client of the lawyer’s departure in a timely manner is critical to allowing the client to decide who will represent him.

**Notification of Current Clients is Not Impermissible Solicitation**

Because she has a present professional relationship with her current clients, a departing lawyer does not violate Model Rule 7.3(a) by notifying those clients that she is leaving for a new affiliation. Under Rule 7.3(a), the depart-

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2. Rule 1.4 (Communication) states:
   - (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
   - (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment [1] to Rule 1.4 provides that “the client should have sufficient information to participate intelligently in decisions concerning . . . the means by which they [the objectives of the representation] are to be pursued . . . .”

3. Rule 1.16 (Declining Or Terminating Representation) in paragraph (a)(3) states in pertinent part that a lawyer “shall withdraw from the representation of a client if . . . the lawyer is discharged.” See also Comment [4]; Restatement § 26 cmt h, supra n.1.

4. State ethics opinions also have determined that, under the Model Rules, a departing lawyer has an ethical duty to inform current clients that she is leaving the firm. See, e.g., District of Columbia Bar Legal Ethics Committee Op. No. 273 (1997); State Bar of Michigan Std. Com. on Prof. and Jud. Ethics Op. No. RI-224, 1995 WL 68957 (Mich.Prof.Jud.Eth. 1995). See also Rule 1.16(d), infra n.8. The ABA Committee gave approval under the former Model Code of Professional Responsibility for a partner or associate who is leaving one firm for another to send an announcement soon after departure to those clients for whose active, open, and pending matters the lawyer had been directly responsible immediately before resignation. Informal Opinions 1457 (1980) and 1466 (1981). These opinions did not, however, address the question whether the departing lawyer might send notices to any clients before resigning.

5. Model Rule 7.3(a) states:
   A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.
ing lawyer is, however, prohibited from making in-person contact with firm clients with whom she does not have a prior professional or family relationship. A lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client. The departing lawyer nevertheless may contact the client through written or oral recorded communication pursuant to Rule 7.2(a), subject to the limitations in Rules 7.1, 7.3(b), and 7.3(c), at least after the lawyer has departed the firm and joined the new firm.

The Committee also is of the opinion that a departing lawyer must, under Rule 1.16(d), take steps to the extent practicable to protect her current clients’ interests. Moreover, the responsible members of the former firm must themselves comply with Rule 1.16(d) respecting all clients who select the departing lawyer to represent them, whether or not they are current clients of the departing lawyer.

6. The rationale for the prohibition is that “there is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to be in need of legal services.” Rule 7.3, Comment [1]. The rationale for the exception is that “[t]here is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal (sic) or professional relationship . . . .” Rule 7.3, Comment [4]. The Committee views the exception under Rule 7.3(a) to permit in-person solicitation only of those current clients of the firm with whom the lawyer personally has had sufficient professional conduct to afford the client an opportunity to judge the professional qualifications of the lawyer and as not extending beyond the text of the Rule to apply to firm clients with whom her relationship is solely personal and not professional. See, e.g., N.C. Bar Opinion 200, 1994 WL 899607 (N.C.St.Bar 1994) (lawyer after departure may contact clients of firm for whom he has been responsible); Arizona Comm. on Rules of Professional Conduct Op. No. 91-17 (June 10, 1991) (permissible before departure to notify clients with whom he had a personal, professional relationship); Kentucky Bar Opinion E-317 (1987) (permissible before departure to notify clients whom he personally represented of his impending departure).

7. Lawyers are permitted, subject to certain limitations, “to make known their services not only through reputation but also through organized information campaigns. Rule 7.2, Comment [1]. Rule 7.2 permits not only general advertising, but also targeted “written or recorded communication.”

8. Model Rule 1.16(d) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

9. If a current client chooses to remain with the firm or to move with the departing lawyer to her new firm, the lawyer(s) selected must continue the representation unless withdrawal is necessary under Rule 1.16(a) or permissible under Rule 1.16(b). In the
A lawyer’s duty to inform her current clients of her impending departure is similar to a lawyer’s obligation to inform clients if the lawyer will be unavailable to provide legal services to them for an extended period because of major surgery or an extended vacation. In all of these situations, the clients have a right to know of the impending absence so that they can make informed decisions about future representation, even though the lawyer who temporarily will be unavailable is likely to believe that other lawyers in the firm are fully capable of handling the clients’ matters during her absence.

The Initial Notice Must Fairly Describe the Client’s Alternatives

Any initial in-person or written notice informing clients of the departing lawyer’s new affiliation that is sent before the lawyer’s resigning from the firm generally should conform to the following:

1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (i.e., the current clients);

2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer’s willingness and ability to continue her responsibility for the matters upon which she currently is working;

3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and

4) the departing lawyer must not disparage the lawyer’s former firm.

Committee’s opinion, “other good cause for withdrawal” does not exist under Rule 1.16(b)(6) solely because the client’s matter is difficult or time consuming or has little chance of success, so long as no other enumerated predicate for withdrawal exists.


11. ABA Informal Opinion 1457 (1980) found consistent with the Model Code of Professional Responsibility the timing, content, and choice of recipients of a form letter announcement by a lawyer that he had resigned from a law firm to become a member of another firm sent “soon after making the change to clients (and only those clients) for whose active, open, and pending matters he was directly responsible as a member of the ABC law firm immediately before his resignation.” The form letter stated that the client had a right to decide how and by whom the pending matters would be handled and did not urge the client to choose the departing lawyer over the firm. In ABA Informal Opinion 1466 (1981), Opinion 1457 was extended to include associates, assuming the same fact pattern. The Committee there noted it “does not determine or advise upon issues of law,” but then distinguished the facts presented to the Committee from the facts shown in Adler v. Epstein, 393 A.2d 1175 (Pa. 1978), cert. denied, 442 U.S. 907 (1979) (departing group of associates enjoined from actively soliciting clients of old firm as part of pre-departure efforts to borrow money on the basis of the clients). Today we reject any implication of Informal Opinions 1457 or 1466 that the notices to current clients and discussions as a matter of ethics must await departure from the firm.
The Departing Lawyer Should Provide Additional Information

In order to provide each current client with the information needed to make a choice of counsel, the departing lawyer also may inform the client whether she will be able to continue the representation at her new law firm. If the client requests further information about the departing lawyer’s new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future representation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter. The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the firm, the departing lawyer and her new firm, or some other lawyer will continue the representation.

Joint Notification By the Lawyer and the Firm is Preferred

Far the better course to protect clients’ interests is for the departing lawyer and her law firm to give joint notice of the lawyer’s impending departure to all clients for whom the lawyer has performed significant professional services while at the firm, or at least notice to the current clients.

12. The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation. When discussing an association with another firm, the departing lawyer also must be mindful of potentially disqualifying conflicts of interest in her old firm if the new firm currently represents any client with interests adverse to a client of the old firm. Should such a client be identified, the departing lawyer may need to be screened within the old firm no later than the commencement of serious discussions with the new firm. See ABA Formal Opinion 96-400. Lastly, the departing lawyer also might find that her work in her former firm would, upon her arrival at the new firm, create a conflict of interest under Rule 1.9 with one of her new firm’s clients requiring the creation of a screen that, subject to the affected clients’ consents in most jurisdictions, would avoid imputation of her individual conflict of interest to her new firm under Model Rule 1.10(a).

13. In this respect, we agree with D.C. Bar Legal Ethics Opinion 273 (1997), “Ethical Considerations of Lawyers Moving From One Private Firm to Another.”

14. Cal. Bar Ethics Op. No. 1985-86, 1985 WL 57193 at *2, supra, n.1, interprets the California Rule to require both the departing lawyer and the law firm to provide fair and adequate notice of the withdrawal to the client sufficient to allow a client an opportunity to make an informed choice of counsel, and states that, where practical, the notice should be made jointly. ABA Informal Opinion 1428 (1979) suggested that, under the Model Code, both the departing lawyer and the law firm had an obligation to give the client “the choice as to whether or not the client wishes the firm to continue handling the matter or whether the client wishes to choose another lawyer or legal services firm.” See also Cleveland Bar Opinion 89-5 (under the Model Code, either the departing lawyer or the law firm must give due notice to those clients of the former firm for whose active, open, and pending matters the lawyer is directly responsible).
Unfortunately, this is not always feasible when the departure is not amicable. In some instances, the lawyer’s mere notice to the firm might prompt her immediate termination. When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services, in the manner described above, and preferably should confirm the conversations in writing so as to memorialize the details of the communication and her compliance with Model Rules 7.3 and 7.1.15

**Law Other Than the Model Rules Applies to the Departure**

In addition to satisfying her ethical obligations, the departing lawyer also must recognize the requirements of other principles of law as she prepares to leave, especially if she notifies her current clients before telling her firm she is leaving. For example, the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients’ matters.16

Charges of breach of fiduciary and other duties owed the former firm also might be avoided if the departing lawyer and her new firm go no further than the permissible conduct noted in *Graubard Mollen v. Moskovitz*17 and avoid

15. The responsible members of the law firm must not take actions that frustrate the departing lawyer’s current clients’ right to choose their counsel under Rule 1.16(a) and Comment [4] by denying access to the clients’ files or otherwise. To do so may violate the responsible members’ ethical obligations under Rules 1.16(d) and 5.1.

16. See, e.g., Siegel v. Arter & Hadden, 85 Ohio St. 3d 171, 707 N.E.2d 853 (Oho. Sup. Ct. 1999) (unresolved fact issues precluded summary judgment on unfair competition and trade secret counts because of departing lawyer’s use of client list with names, addresses, telephone numbers and matters and fee information, despite notice to firm before notice to clients). See also Shein v. Myers, 394 Pa. Super. 549, 552, 576 A.2d 985, 986 (Pa. 1990), appeal denied, 533 Pa. 600, 617 A.2d 1274 (Pa. 1991) (“breakaway” lawyers tortiously interfered with contract between their former firm and its clients by taking 400 client files, making scurrilous statements about the firm, and sending misleading letters to firm clients). In a joint opinion, the Pennsylvania and Philadelphia Bars warned that notice to clients before advising the firm of her intended departure “may be construed as an attempt to lure clients away in violation of the lawyer’s fiduciary duties to the firm, or as tortious interference with the firm’s relationships with its clients.” Pa. Bar Ass’n Comm. on Legal Ethics and Prof. Resp. Joint Op. No. 99-100, 1999 WL 239079 *2. (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.1999). The Committee also noted that the “prudent approach” is for the departing lawyer not to notify her clients before advising the firm of her intention to leave to join another firm. Id.

17. 86 N.Y.2d 112, 653 N.E.2d 1179 (1995). The Court stated that a departing lawyer’s efforts to locate alternative space and affiliations would not violate his fiduciary duties to his firm because those actions obviously require confidentiality. Also, informing firm clients with whom the departing lawyer has a prior professional rela-
the conduct the court found actionable, such as secretly attempting to lure firm clients to the new firm (even when the departing lawyer originated and had principal responsibility for the clients’ matters) and lying to clients about their right to remain with the old firm and to partners about the lawyer’s plans to leave. Although that case involved civil litigation, other courts have imposed discipline on lawyers for similar conduct because it involved dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).18

Entitlement to Files, Documents, and Other Property Depends on The Model Rules and Other Law

A lawyer moving to a new firm also may wish to take with her files and other documents such as research memoranda, pleadings, and forms. To the extent that these documents were prepared by the lawyer and are considered the lawyer’s property or are in the public domain, she may take copies with her. Otherwise, the lawyer may have to obtain the firm’s consent to do so.

The Committee is of the opinion that, absent special circumstances, the lawyer does not violate any Model Rule by taking with her copies of documents that she herself has created for general use in her practice. However, as with the use of client lists, the question of whether a lawyer may take with her continuing legal education materials, practice forms, or computer files she has created turns on principles of property law and trade secret law. For example, the outcome might depend on who prepared the material and the measures employed by the law firm to retain title or otherwise to protect it from external use or from taking by departing lawyers.

Client files and client property must be retained or transferred in accordance with the client’s direction.19 A departing lawyer who is not continuing...
the representation may, nevertheless, retain copies of client documents relating to her representation of former clients, but must reasonably ensure that the confidential client information they contain is protected in accordance with Model Rules 1.6 and 1.9.

**Conclusion**

Both the lawyer who is terminating her association with a law firm to join another and the responsible members of the firm who remain have ethical obligations to clients for whom the departing lawyer is providing legal services. These ethical obligations include promptly giving notice of the lawyer’s impending departure to those current clients on whose matters she actively is working.

The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client’s right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.

Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm’s information or other property.
A four-partner law firm engaged in general practice is undergoing changes. One partner intends to retire in six months while a second partner may be joining another firm. The remaining two partners are considering whether to continue on with the retiring lawyer as a named partner or to go their separate ways as sole practitioners.

The situation raises several ethics questions:

If the original firm dissolves, under what circumstances can the departing or retiring partners solicit clients of the former firm?

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What are each partner’s responsibilities toward client files?

**Eye on Ethics**

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