

Risk Managers' Alert: Ethical Obligations for Firms and Departing Lawyers

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When a lawyer intends to move from one law firm to another, uncertainty and suspicion frequently beset the period of transition between Firm A and Firm B. To bring some clarity to that often fraught situation, the ABA's Committee on Ethics and Professional Responsibility has issued Formal Opinion 489, Obligations Related to Notice When Lawyers Change Firms (December 4, 2019).

Giving the highest priority to the obligations owed to the affected clients, the committee laid out a comprehensive set of ground rules each side must observe in meeting their respective responsibilities to clients during the transition, summarized as follows:

For the Departing Lawyer

One question that often, and contentiously, arises in lawyer departures: do ethical obligations restrict a departing lawyer from notifying clients of his or her impending departure? The committee reiterated its position from a prior formal opinion (Op. 99-414, 2009) that in light of every lawyer's obligation to act both with "reasonable diligence" and to communicate to the client in a timely manner, a departing lawyer "should communicate with all clients with whom [he or she] has had significant client contact that the lawyer intends to change firms."

"Significant client contact" means that the client would identify the lawyer as one of his or her attorneys; by contrast, a departing lawyer who had written a single research memo for a client would not be subject to the notice obligations.

It follows then that the law firm "may not restrict a lawyer's prompt notification of clients once the law firm has been notified or otherwise learns of the lawyer's intended departure."

In other words, the Rules of the Professional Conduct do not require that the departing lawyer wait until moving to the new firm to notify clients of the change of law firms, "provided that the firm is informed contemporaneously."

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The committee recommends that both the departing lawyer and the firm implement the following sensible notice procedure:

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

Such a jointly agreed upon "ballot" to clients tends to minimize (or possibly eliminate altogether) the rancor born of the suspicion that one side or the other is unfairly "grabbing" clients. See Atkins, "Law Firm Break Ups and Lawyer Departures: The Ethical Dos and Don'ts," 26 Connecticut Lawyer at 18 (July/August 2015).

In those instances where a client elects to stay with the firm, the departing lawyer has a duty to make sure the client files are up to date and that the firm lawyer who will take over responsibility for the client matter knows the status of the matter.

For the Law Firm

According to the committee, in connection with a lawyer departure, the firm's ethical obligations restrict it in the following ways:

The committee reminds the bar that "[c]lients are not property." The core principal is that when a lawyer leaves a firm, it is the client, and the client alone, who elects who should continue the representation. Thus, the departing lawyer and the firm may not, for example, "divide up clients when a law firm dissolves or a lawyer transitions to another firm." And, as described above, the opinion's authors warn that the firm may not bar or restrict the departing lawyer from meeting her duty to "promptly" notify clients of the planned departure.

The firm also may not adopt a provision in the partnership, shareholder or employment agreement that imposes a resignation notification period "that would unreasonably delay the diligent representation of the client or unnecessarily interfere with [the] lawyer's departure beyond the time necessary to address transition issues, particularly where the departing lawyers agree to cooperate post-departure in such matters."

The firm may not "penalize a client who wants to go with [the] departing lawyer by withholding firm resources the lawyer needs to continue to represent the client prior to departure."

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The firm “cannot prohibit or restrict” the departing lawyer’s “access to e-mail, voicemail, files, and electronic court filing systems where such systems are necessary for the departing lawyer to represent clients competently and diligently during the notice period.”

The committee directs that the firm “should set automatic e-mail responses and voicemail messages for the departed lawyer’s e-mail and telephones, to provide notice of the lawyer’s departure and offer an alternative contact at the firm for inquiries” once the lawyer has left the firm. It recommends that the firm designate a supervising lawyer at the firm in order to ensure that client directions are carried out and messages are “promptly forwarded” to the departed lawyer “for all clients continued to be represented by that lawyer at his or her new firm.”

During the notice period, the firm should not “assign new lawyers to a client’s matter...displacing the departing lawyer absent client direction or exigent circumstances,” such as imminent deadlines.”

The law firm may not, consistent with ethical obligations, interfere with the departing lawyer’s obligation “to retain names and contact information for clients from the departing lawyer worked while at the firm, in order to determine conflicts of interest at” the new firm.

Conclusion

Often when a lawyer notifies his or her firm of an impending move to another firm, the firm’s instinct is to accuse the withdrawing lawyer of a “betrayal” amounting to a breach of the lawyer’s obligations to the firm under the lawyer’s contractual obligations, or fiduciary duties, or both. But unlike in other businesses, a law firm’s paramount ethical obligation to its clients substantially restrain its rights as an employer or as a partnership. ABA opinion 489 reminds both departing lawyers and their soon-to-be-former firms of those obligations. But, as described above, it is to law firms that the opinion’s authors direct most of their warnings.

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Litigation

Professional Liability

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