

## Legal Ethics Issues When an Attorney Leaves the Firm

Managing Client Communications and Files, Work Product, Conflicts of Interest

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THURSDAY, JUNE 24, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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**Ethical Issues When an Attorney Leaves the Firm  
Managing Client Communications, Client Files, Work  
Product and Conflicts of Interest**

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# INTRODUCTION: Priority One

## The Client's Best Interests

- Attorneys change firms on a regular basis, and whether it is agreeable or disagreeable, the primary focus must always be the client's best interests.
- Both the departing attorney and the firm have ethical responsibilities to the client to assure that their representation is not adversely affected by the attorney's departure.
- *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358 (Ill. 1998) – The fact that multiple clients were deposed as part of this lawsuit speaks volumes to the damage to client relations that can occur

# The Problems

- Tension between fiduciary duties to your clients vs. fiduciary duties to your partners and your firm
  - Clients win, but it is close
  - Your personal interests come last
- Real world departing attorney issues often do not fit easily within the guidance offered by cases and ethics opinions
- Guidance is conflicting from state to state

# **I. Notice and Communication**

# **I. Notice and Communication**

- A. Notice by the departing attorney to the firm;
- B. Notice by the departing attorney to the client;
- C. Notice by the law firm to the clients;
- D. Post-Notice communications with clients;
- E. Attorney solicitation of clients;
- F. Attorney solicitation of employees.

# A. Notice by the Departing Attorney to the Firm

*ABA Formal Opinion 489 (2020)*

Discussion of the ethical obligations of both a departing lawyer and their former firm in protecting client interests during the lawyer's transition.

“Such ethical obligations include providing the firm with sufficient notice of the intended departure for the firm and departing lawyer to notify clients, work together to ensure that the transition of files as directed by clients is orderly and timely, return firm property, update remaining firm staff/lawyers, and organize files that clients authorize to remain with the firm.”

# A. Notice Provisions

*ABA Formal Opinion 489 (2020)*

- Sources:
  - Some states have a specific rule
    - Ethical rules
    - Case law
  - Firm partnership/shareholder/member/employment agreements may have notice provisions

# A. Notice Provisions

## *ABA Formal Opinion 489 (2020)*

- Validity and Length of Notice Provisions:
  - Firms may require some period of advance notice of an intended departure but it
  - Cannot be fixed or rigidly applied
  - Cannot unreasonably delay the diligent representation of a client
  - Must be consistent with Rule 5.6
    - Cannot affect a client's choice of counsel
    - Cannot serve as a financial disincentive to a competitive departure or used to coerce or punish a lawyer for electing to leave
    - Cannot unnecessarily interfere with a lawyer's departure beyond the time necessary to address transition issues, particularly where the departing lawyer has agreed to cooperate post-departure in such matters.

# A. Notice Provisions

## *ABA Formal Opinion 489 (2020)*

- Proper Consideration:
  - To provide sufficient time to notify clients to select who will represent them
  - To assure that all electronic and paper records for client matters are organized and up to date so that the files may be transferred to the new firm or to new counsel at the existing firm, depending upon the clients' choices
  - To adjust staffing at the firm if matter is staying with firm
  - To secure firm property in the departing lawyer's possession
  - Upcoming client needs (deal about to close, TRO about to be filed, trial commencing)
  - Unique situations

# A. Notice Provisions

*ABA Formal Opinion 489 (2020)*

## General Rule

“A lawyer who wishes to depart may not be held to a pre-established notice period particularly where, for example, the files are updated, client elections have been received, and the departing lawyer has agreed to cooperate post-departure in final billing. In addition, a lawyer who does not seek to represent firm clients in the future should not be held to a pre-established notice period because client elections have not been received.”

# A. Notice Provisions

*ABA Formal Opinion 489 (2020)*

*Transition/Notice Period Obligations*

- Firm

Must provide departing attorney access to adequate firm resources needed to competently represent the client during any interim period, including: Support staff, Associate assistance, Research and drafting tools, Office access, Access to email, voicemail, files, and electronic court filing systems

- Departing lawyers

Must cooperate (pre- or post-departure) to assist in the organization and updating of client files, docket deadlines and update lawyers at the firm who will take over files remaining at the firm, submit time sheets and billing, return or account for firm property (devices, data and documents)

# A. Notice Provisions

## *Post Transition Obligations*

After departure:

*ABA Formal Opinion 489 (2020)*

- Firm should set automatic email responses and voicemail messages which advise of departure and offer an alternative contact at the firm.
- Firm should review the departed lawyer's firm emails, voicemails, and paper mail and promptly forward them to the departed lawyer as per client directions

*Ethical Considerations for Lawyers Departing Law Firms, Cincinnati Bar Assoc., Ethics and Prof. Resp. Comm., Op. 2006-2*

- Law firm may not withhold whereabouts of departing attorney.

- The next step in the process after notifying the firm of the attorney's impending departure, is to now notify the clients, with whom the attorney was actively working with, of his impending departure.
- Issues: When, which clients and how

# A. Notice Provisions

## *Obligation to Notify Clients*

- *ABA Formal Opinion 489 (2020)*

“Lawyers have an obligation to communicate relevant information to clients in a timely manner, according to Rule 1.4. This would include promptly notifying a client if a lawyer is changing law firm affiliations.”

- *ABA Model 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

## **A. Notice by the Departing Attorney to the Client -When**

- ABA Formal Opinion 489 (2020): “Firms may require that departing lawyers notify firm management contemporaneously with the departing lawyer communicating with clients, employees of the firm, or others about the anticipated departure so that the firm and departing lawyer may work together to assure a professional transition of the client matters.”
- State ethical rules: D.C. Bar Op. 273 (1997) sufficiently in advance of the departure”
- Case law: Preference in many jurisdictions is that the firm is to be noticed first.
- Possible exceptions?

# A. Notice by the Departing Attorney to the Client -When

- As a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice. Ideally, such approaches would take place only after notice to the firm of the partner's plans to leave. *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 120 (1995)
- “It would be improper for the departing attorney to announce to clients of the firm, his or her pending departure, before the law firm is told.” *Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Advisory. Opinion 98-5*

# A. Notice by the Departing Attorney to the Client -When

- *In The Matter of Gary M. Cupples*, 952 S.W.2d 226 (Mo. 1997) - Breach of fiduciary duty to the firm for the departing attorney to notify clients of his impending departure before the attorney notifies the firm of same.
- *Meehan v. Shaughnessy*, 404 Mass. 419, 437 (Mass. 1989) - Departing attorneys who send preemptive, one sided announcements will violate their duty of good faith and loyalty to the remaining attorneys in the firm.
- *Spangler, Jennings & Dougherty, P.C. v. Mysliwy*, 2006 U.S. Dist. LEXIS 39602 (N.D. Ind. Mar. 31, 2006) - Departing shareholder owed a fiduciary duty to both her fellow shareholders and to the firm. Pursuant to this duty she was to refrain from “pre-departure solicitation” of firm clients for her own personal gain.
- *Dowd & Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365 (Ill. App. Ct. 2004) - Pre-resignation surreptitious “solicitation” of firm clients for a partner’s personal gain is actionable.

## B. Notice to the Client – Which Clients

- *ABA Formal Opinion 489 (2020):*

“clients with whom the departing lawyer has had significant contact”

- *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 120 (1995)

“clients with whom they have a prior professional relationship”

## **B. Notice to the Client - How**

### *ABA Formal Opinion 99-414 (1999)*

- Joint Notification By the Lawyer and the Firm is Preferred

### *ABA Formal Opinion 489 (2020)*

- However, “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”

## **B. Notice to the Client - How The Content of the Communication to Client**

- The notification to the client should provide:
  - The attorney is leaving the firm;
  - The timing of the departure;
  - Where the departing attorney is going;
  - The departing lawyer's ability and willingness to continue representing the client;
  - The client's option to: stay with the old firm; go with the departing attorney; or choose another attorney/firm entirely
  - Nothing disparaging;
  - Where the client's file will be and who will be handling the client's matter until the client expresses a choice.

## B. Notice to the Client – Specific States

- *Ethics Opinion 116, Ethics Committee of the Colorado Bar Association (March 17, 2007)*
  - It is highly preferable that any affected client be notified by a joint communication from the departing lawyer and the firm and that the joint notice be transmitted sufficiently in advance of the lawyer's anticipated departure to allow the client to make decisions about who will represent it and communicate that decision before the lawyer departs.
  - If either the departing lawyer or the firm fails or refuses to participate in providing timely and appropriate joint notice, unilateral notice is necessary. If unilateral notice is given, it should impartially and fairly provide the same type of information as would have been included in the joint notice.

## B. Notice to the Client – Specific States

- *Penn. Bar Assoc. Comm. on Legal Ethics and Professional Responsibility and Phila. Bar Assoc. Professional Guidance Committee - Joint Formal Opinion 2007-300*
  - Absent circumstances that would compromise the interests of the client, the prudent approach is that the departing lawyer should not notify clients of an impending departure until the firm has been informed of the lawyer's intention to leave the firm
  - Circumstances may exist allowing notification of clients prior to notification of the old firm (i.e., departing lawyer's reasonable fear that the old firm, upon receiving notice of the lawyer's intended departure, would take preemptive action)
  - Any suggestion that the departing lawyer should not be permitted to communicate the fact of departure until after that the departing lawyer has left the old firm must be rejected – this is the interplay with Model Rule 5.6

## B. Notice to the Client – Specific States

- *Penn. Bar Assoc. Comm. on Legal Ethics and Professional Responsibility and Phila. Bar Assoc. Professional Guidance Committee - Joint Formal Opinion 2007-300*
  - Because of the potential for breach of fiduciary or other duties to the old firm in any communication with clients about an intention to depart while still associated with the old firm, communications on this subject should be carefully worded and narrowly circumscribed.
  - Such communications by a departing lawyer, while still associated with the old firm, should go no further than necessary to protect the important value of client freedom of choice in legal representation, and should not go so far as to undermine the important value of loyalty owed by partners and associates to existing law firms. (citing *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*)

## B. Notice to the Client – Specific States

- *Florida Bar Rule 4-5.8(c) and (d) - Procedures For Lawyers Leaving Law Firms And Dissolution Of Law Firms*
  - Absent a specific agreement otherwise, a lawyer who is leaving a law firm shall not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful.
  - When a joint response has not been successfully negotiated, unilateral contact by individual members or the law firm shall give notice to clients that the lawyer is leaving the law firm and provide options to the clients to choose to remain a client of the law firm, to choose representation by the departing lawyer, or to choose representation by other lawyers or law firms.

## F. Attorney Solicitation of Employees

- Different states have different rules with respect to departing partners soliciting other employees of the firm.
  - New York provides that you can solicit your partners but not your employees. *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180 (N.Y. App. Div. 1st Dep't 2000)
  - Maryland provides that a departing attorney can solicit the people in your “circle of friends.” *Quality Systems, Inc. v. Warman*, 132 F.Supp.2d 349, 354 (Md. 2001)
  - Virginia provides that you can solicit employees and partners out of the office and after hours. *Appleton v. Bondurant & Appleton, P.C.*, 2005 WL 3579087, \*19 (Va. Cir. Ct. 2005)
  - Massachusetts provides that you may solicit the people with whom you are actively working. *Lampart, Hausler & Rodman, P.C. v. Gallant*, 2005 WL 1009522, \*2 (Mass. Super. 2005)

# F. Attorney Solicitation of Employees

- Another Tension
  - Associates and staff are usually at-will “free agents”
  - However, they are assets of the firm and the departing attorney is a fiduciary until departure
- But clients may be prejudiced if deprived of access to key associates working on their matters

## F. Attorney Solicitation of Employees

- Practical Reality: New firm wants to know who is coming with you
- Practical Reality: Associates and your secretary ask you:
  - “Are you leaving?”
  - “Can I come with you?”
- Safest course: Do not solicit them until you are at new firm

## **II. Property of Firm vs. Departing Attorney**

# Property of Firm vs. Departing Attorney Clients' Files

- The files are the property of the Client.
- Where a departing attorney wants to remove clients' files from the firm depends on various factors:
  - Are the documents considered the lawyers property; such as, were the documents created for herself for general use?
  - Are the documents in the public domain?
- Otherwise, the firm's consent is required. *ABA Formal Opinion 99-414 (1999)*.

# Property of Firm vs. Departing Attorney Clients' Files

- The departing attorney should look to the employment, operating, or shareholder agreement.
- If the agreement is silent as to the restrictions on what an attorney may remove from the firm upon leaving, then the attorney should inform the firm instead of removing files in a surreptitious manner.

# Property of Firm vs. Departing Attorney Clients' Files

- A departing attorney who is not continuing the representation of a client may still retain copies of the client documents relating to her representation of the former clients; but she must reasonably ensure that the confidential client information the files contain is protected in accordance with the Model Rules of Professional Ethics 1.9. *See ABA Formal Opinion 99-414 (1999); DC Bar Opinions 168 (1994)(2007).*

# Property of Firm vs. Departing Attorney Clients' Files

- *Illinois State Bar Opinion 95-02 (1995)*  
attorney who had departed from the firm could have access to his former clients' files, which were still at the former firm, so long as he paid for the retrieval fee and the copying charges.

# Property of Firm vs. Departing Attorney Attorney Work-Product

- *DC Bar Legal Ethics Opinion 273 (2007)* - a lawyer may require and enforce a lien to secure the lawyers fees or expenses but not on the client's file, except as to attorney-work product that has not yet been paid for. Except where the client has become unable to pay or if by withholding the work product would present a significant risk to the client of irreparable harm.

# Property of Firm vs. Departing Attorney Clients' Files

- Chronology files may be removed and taken with the departing attorney, if the partnership agreement is silent on this.
- Removal is common practice for departing attorneys. *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180 (N.Y. App. Div. 1st Dep't 2000).

# Property of Firm vs. Departing Attorney Client Lists

- The removal of client lists, CLE materials, practice forms or computer files turns on property law and trade secret law.
- The removal of these items will depend on:
  - Who prepared the materials, and
  - The measures employed by the firm to retain title or otherwise to the documents to protect it from external use or from removal by departing attorneys. *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180 (N.Y. App. Div. 1st Dep't 2000).

# Property of Firm vs. Departing Attorney

## Firm Materials

- The Massachusetts Supreme Judicial Court recently held in *Governo Law Firm LLC v. Bergeron*, 487 Mass. 188 (2021), that the inapplicability of G. L. c. 93A, § 11, to disputes arising from an employment relationship does not mean that an employee never can be liable to its employer under G. L. c. 93A, § 11.

# Property of Firm vs. Departing Attorney

## Firm Materials

- Rather, where an employee misappropriates her employer's proprietary materials during the course of employment and then later uses the materials in the marketplace, that conduct is not purely internal and it comprises a marketplace transaction that may give rise to a claim under G. L. c. 93A.

# Property of Firm vs. Departing Attorney

## Firm Materials

- In this case, Governo Law Firm (GLF) sued to protect materials stolen by a group of its nonequity partners as they left GLF and prepared to start a new law firm, CMBG3 Law LLC. Governo had created a research library containing over 20 years of materials it had collected on asbestos litigation, along with an electronic database used to search the library.

# Property of Firm vs. Departing Attorney

## Firm Materials

- The jury in the Superior Court action found some or all of the attorney defendants liable for conversion, breach of the duty of loyalty, and conspiracy, but found none of them liable for unfair or deceptive trade practices in violation of G.L c. 93A, § 11.
- The SJC on appeal agreed with GLF and held the judge erroneously instructed the jury that the defendants' conduct prior to their separation of employment, namely the stealing of the materials while still employed at GLF, was not relevant to GLF's claim under G.L. c. 93A § 11. The SJC held that in order for the jury to resolve the G. L. c. 93A, § 11 claim the jury should have considered whether the attorney defendants' theft and subsequent use of GLF's materials amounted to unfair or deceptive conduct.

# Property of Firm vs. Departing Attorney

## Some Practical Advice

- Err on side of caution
- Do not get greedy
- When in doubt, leave it behind
- Do not get careless or lazy
  - Rolodex/Blackberry example
- Your credibility will be key if a fight with your former firm results

## Rule 1.9(c) Duties To Former Clients

- A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

# **III. Obligations of Departing Attorney and New Firm Concerning Conflict Checks**

# Conflicts Check Obligations of the New Firm

- New firm needs to do full conflict check
- Arriving lawyer's clients likely to come with the relocating lawyer
- Arriving lawyer's clients not likely to come with the relocating lawyer
- Parties adverse to arriving lawyer's clients
- Check for reasonable period of time backwards (three years?)

# Disclosure Of Client Information To New Firm

- Information necessary to do conflict check ordinarily may be disclosed to new firm
- Rare exceptions based on client's confidentiality concerns

# ABA Formal Opinion 09-455

- Permits disclosure of client information necessary to avoid conflicts when lawyer switches firms
- Failure to do full, detailed check can result in disaster
- New RPC 1.6(b)(7) & cmt. [13]-[14]

# Checklist for Leaving a Firm

- Make any arrangements so that you may function in your new firm immediately if you are evicted from the firm once you provide notice
- Notify firm of your impending departure
- Provide firm with a joint letter to be sent to all active clients for whom you have provided material representation, notifying clients of:
  - Your departure
  - The date of your departure
  - Your new contact information
  - The Clients’ options:
    - Stay with the firm
    - Go with you to new firm
    - Choose a completely different attorney
  - Where the clients’ file will be until they communicate their choice
  - Any critical matters that require the client’s immediate attention
  - What will happen with any balance due by the clients to the former firm.
- Send the notice, as soon as practicable after notice to the firm
- If firm does not cooperate, send out notice independently
- After departure, begin solicitation of firm’s clients, subject to the ethical rules governing solicitation of clients.

# Words of Wisdom

- Do not lie, ever, in the departure process. You have fiduciary duties to your partners.
- Act as conservatively as possible.
- Do not “bad mouth” your current firm
- Get a lawyer to counsel you in the process
- You want to avoid litigation at all costs

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