

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 489**

**December 4, 2019**

## **Obligations Related to Notice When Lawyers Change Firms**

*Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to approval of a tribunal, when applicable (and conflicts of interest). The ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements. Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm. Firms may require some period of advance notice of an intended departure. The period of time should be the minimum necessary, under the circumstances, for clients to make decisions about who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be so rigid that they restrict or interfere with a client's choice of counsel or the client's choice of when to transition a matter. Firms also cannot restrict a lawyer's ability to represent a client competently during such notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. The departing lawyer may be required, pre- or post-departure, to assist the firm in assembling files, transitioning matters that remain with the firm, or in the billings of pre-departure matters.<sup>1</sup>*

### **I. Introduction**

As succinctly noted in ABA Op. 09-455, "Many lawyers change law firm associations during their careers." That opinion addressed the need to disclose to new firms information about clients of a departing lawyer in order to perform a conflict of interest analysis before the departing lawyer joins the new firm. This opinion discusses 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.<sup>2</sup> A departing lawyer's and law firm's agreement to cooperate in these matters post-departure is relevant in determining whether notice provided by such lawyer to the firm is consistent with these obligations and with Rule 5.6(a) as further discussed below. Ideally the firm will have written policies to provide guidance to lawyers about the procedures the firm anticipates following when a lawyer leaves the firm. This affords everyone some uniform expectations about working together to facilitate transitioning clients.

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414 (1999) at n. 1 (clients should be given the option to stay with a firm, go with a departing attorney, or choose another firm altogether).

Firm partnership/shareholder/member/employment agreements cannot impose a notification period that would unreasonably delay the diligent representation of the client or unnecessarily interfere with a lawyer's departure beyond the time necessary to address transition issues, particularly where the departing lawyer has agreed to cooperate post-departure in such matters. Nor may a firm penalize a client who wants to go with a departing lawyer by withholding firm resources the lawyer needs to continue to represent the client prior to departure. Departing lawyers also have a duty, pre- or post-departure to cooperate with the firm they are leaving to assist in the organization and updating of client files for clients remaining with the firm, including docketing of deadlines, updating lawyers at the firm who will take over the file and the like, and similarly to cooperate reasonably in billing. A departing partner may be required to return or account for firm property, such as intellectual property, proprietary information, and hardware/phones/computers, and to allow firm data to be deleted from all devices retained by the departing attorney, unless the data is part of the client files transitioning with the departing lawyer.<sup>3</sup>

## II. Analysis

### A. The Lawyer's Obligation to Represent Clients Diligently

Lawyers must represent clients competently and diligently. Rule 1.3 provides:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 3.2 similarly requires:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

In addition to the duty to represent clients diligently, 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.<sup>4</sup> Law firms 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. As noted in ABA Op. 99-414, "informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him."<sup>5</sup> While the departing lawyer and the firm each may unilaterally inform clients of the lawyer's impending departure at or around the same time that the lawyer provides notice to the firm, the firm and departing lawyer should attempt to agree on a joint communication to firm clients with whom the departing lawyer has had significant contact, giving the clients the option of remaining with the firm, going with the departing attorney, or choosing another attorney.<sup>6</sup> In

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<sup>3</sup> See State Bar of Ariz., Formal Op. 10-02 (2010) ("When a lawyer's employment with a firm is terminated, both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued representation and avoid conflicts. These ethical obligations can best be satisfied through cooperation and planning for any departure.").

<sup>4</sup> See D.C. Bar Op. 273 (1997) (A lawyer has an obligation under Rule 1.4 to notify a client "sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue representation by the departing lawyer and, if not, to make other representation arrangements.").

<sup>5</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414, *supra* note 2, at 2.

<sup>6</sup> *Id.* at n. 2 & 5; State Bar of Ariz., Formal Op. 99-14 (1999).

the event that a firm and departing lawyer cannot promptly agree on the terms of a joint letter, a law firm cannot prohibit the departing lawyer from soliciting firm clients.<sup>7</sup>

Some states, such as Florida and Virginia, have a specific Rule of Professional Conduct regarding such situations. For instance, Florida Rule of Professional Conduct 4-5.8(c)(1) provides:

*Lawyers Leaving Law Firms.* Absent a specific agreement otherwise, a lawyer who is leaving a law firm may 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.

Under the Model Rules, departing lawyers need not wait to inform clients of the fact of their impending departure, provided that the firm is informed contemporaneously. Law firm management and lawyers remaining at the firm may also contact clients to inform them of the lawyer's impending departure. The preferred next step is for the departing lawyer and the firm to agree upon a joint communication sent to the clients requesting that the clients elect who will continue representing them.

Departing lawyers should communicate with all clients with whom the departing lawyer has had significant client contact that the lawyer intends to change firms. "Significant client contact" would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client.<sup>8</sup> A departing attorney would not have "significant client contact," for instance, if the lawyer prepared one research memo on a client matter for another attorney in the firm but never spoke with the client or discussed legal issues with the client. Similarly, remaining members of the firm may communicate with these clients, offering for the client to be represented by the firm, another firm, or the departing lawyer. Neither the departing lawyer nor the firm may engage in false or misleading statements to clients.<sup>9</sup>

## **B. Clients Determine Who Will Represent Them**

Clients are not property. Law firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm. Subject to conflicts of interest considerations, clients decide who will represent them going forward when a lawyer changes firm affiliation.<sup>10</sup> Where the departing lawyer has principal or material responsibility in a matter, firms should not assign new lawyers to a client's matter, pre-departure, displacing the departing lawyer, absent client direction or exigent circumstances arising from a lawyer's immediate departure from the

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<sup>7</sup> See Ill. State Bar Ass'n, Advisory Op. 91-12 (1991); Iowa Bd. of Prof'l Ethics Op. 89-48 (1990); State Bar of Mich., Inf. Op. RI-86 (1991); Tex. Comm. on Prof'l Ethics Op. 422 (1985); Va. State Bar, Legal Ethics Op. 1403 (1991); Wash. State Bar Ass'n, Advisory Op. 2118 (2006); RESTATEMENT OF THE LAW THIRD, THE LAW GOVERNING LAWYERS § 9(3)(a) (2000).

<sup>8</sup> See State Bar of Ariz., Formal Op. 99-14 (1999), see also RESTATEMENT, *supra* note 7, at § 9(3)(a)(i) (limiting solicitation by departing lawyer to "firm clients on whose matters the lawyer is actively and substantially working").

<sup>9</sup> See, e.g., Va. Rules of Prof'l Conduct R. 5.8; MODEL RULES OF PROF'L CONDUCT R. 7.1.

<sup>10</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414, *supra* note 2; see also Heller Ehrman LLP v. Davis Wright Tremaine LLP, 411 P.3d 548, 555 (Cal. 2018) (noting "the client's right to terminate counsel at any time, with or without cause" and that "[t]he client always owns the matter") (citations omitted).

firm and imminent deadlines needing to be addressed for the client. Thus, clients must be notified promptly of a lawyer's decision to change firms so that the client may decide whether to go with the departing lawyer or stay with the existing firm and have new counsel at the firm assigned.

### C. Firm and Departing Lawyer Obligations for Orderly Transitions

Law firm management also has obligations to establish reasonable procedures and policies to assure the ethical transition of client matters when lawyers elect to change firms.

Rule 5.1 provides:

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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. The orderly transition of a client matter may require the firm to assess if it has the capacity and expertise to offer to continue to represent the clients. If a departing lawyer is the only lawyer at the firm with the expertise to represent a client on a specific matter, the firm should not offer to continue to represent the client unless the firm has the ability to retain other lawyers with similar expertise.<sup>11</sup>

The firm and departing lawyer must coordinate 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. A departing lawyer who does not continue to represent a client nevertheless has the obligation to take "steps to the extent reasonably practicable to protect a client's interests."<sup>12</sup> This duty includes the departing lawyer updating files and lawyers at the firm who take over the representation, when possible. If exigent circumstances cause a lawyer's immediate departure from the firm, either voluntarily or involuntarily, relevant clients of that lawyer still must be notified of the departure and the firm should provide the lawyer with a list of their current and former clients for conflict-checking purposes. The departed lawyer and firm should endeavor to coordinate after the departure, if necessary, to protect client interests.

Firm management should establish policies and procedures to protect the confidentiality of client information from inadvertent disclosure or misuse.<sup>13</sup> The duty of confidentiality requires that departing attorneys return and/or delete all client confidential information in their possession, unless the client is transferring with the departing attorney. The exception to this requirement is for a departing lawyer to retain names and contact information for clients for whom the departing lawyer worked while at the firm, in order to determine conflicts of interests at the departing lawyer's new firm and comply with other applicable ethical or legal requirements. Rule 1.6(b)(7)

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<sup>11</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1.

<sup>12</sup> *Id.* at R. 1.16(d).

<sup>13</sup> *Id.* at R. 1.6(c).

provides that a lawyer may disclose confidential information “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.” Firms should have policies that require the deletion or return of all electronic and paper client data in a departing lawyer’s possession, including on a departing lawyer’s personal electronic devices, if the clients are remaining with the firm. Personal electronic devices may include, for instance, cell phones, laptop computers, tablets, home computers, jump drives, discs, cloud storage, and hard drives.

#### **D. Reasonable Notice Periods Cannot Restrict Client’s Choice of Counsel or the Right of Lawyers to Change Firms**

Model Rule 5.6 prohibits restraints on a client’s choice of counsel. The Rule provides:

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . .

Firms have an ethical obligation to assure that client matters transition smoothly and therefore, firm partnership/shareholder/member/employment agreements may request a reasonable notification period, necessary to assure that files are organized or updated, and staffing is adjusted to meet client needs. In practice, these notification periods cannot be fixed or rigidly applied without regard to client direction, or used to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client. If they would affect a client’s choice of counsel or serve as a financial disincentive to a competitive departure, the notification period may violate Rule 5.6. 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.

Case law interpreting Rule 5.6 supports the conclusion that lawyers cannot be held to a fixed notice period and required to work at a firm through the termination of that period. Financial disincentives to a competitive departure have routinely been struck down by the courts and criticized in ethics opinions. In *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989), the Court of Appeals of New York held that any provision that imposes a “significant monetary penalty” on an attorney who remains in private practice is the functional equivalent of a restriction on the practice of law, even though there is no express prohibition on competitive activities imposed on the withdrawing partner.<sup>14</sup> Courts routinely refuse to enforce provisions in partnership agreements or the like that restrict the right of a lawyer to practice law by means of financial disincentives to competitive departures. “[C]ourts will not enforce contract terms that violate

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<sup>14</sup> See *Pettingell v. Morrison, Mahoney & Miller*, 687 N.E.2d 1237, 1238 (Mass. 1997) (reduction in payments based on the net worth of the firm); *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 741 (Tex. App. 1995) (same); *Jacob v. Norris McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992) (reduced payments based on annual draws); *Gray v. Martin*, 663 P.2d 1285 (Or. Ct. App. 1983) (reduced share of future firm profits).

public policy . . . the foundation for Rule 5.6 rests on considerations of public policy, and it would be inimical to public policy to give effect” to provisions inconsistent with the rule.<sup>15</sup>

There is no meaningful distinction for the purposes of Rule 5.6 between an agreement provision that imposes a financial disincentive to a competitive departure irrespective of the pre-departure notice requirements and a provision that imposes a financial disincentive for the failure to comply with a fixed, pre-established notice period that extends beyond the time necessary, generally or in a particular case, to ensure an appropriate transition, as discussed above. “Although ‘reasonable’ notice provisions may be justified to ensure clients are protected when firm lawyers depart, what is ‘reasonable’ in any given circumstances can turn on whether it is truly the client’s interest that is being protected or simply a thinly disguised restriction on the right to practice in violation of RPC 5.6(a).”<sup>16</sup> Moreover, to the extent that a firm routinely waives the full notice requirement, enforcement in a particular instance is problematic when used to penalize a lawyer who leaves to compete with the firm.<sup>17</sup>

### E. Access to Firm Resources During Transition Period

After the firm knows that a lawyer intends to depart but such lawyer has not yet, in fact, left the firm, the lawyer must have access to adequate firm resources needed to competently represent the client during any interim period. For instance, the lawyer cannot be required to work from home or remotely, be deprived of appropriate and necessary assistance from support staff or other lawyers necessary to represent the clients competently, including access to research and drafting tools that the firm generally makes available to lawyers. A lawyer cannot be precluded from using associates or other lawyers, previously assigned to a client matter or otherwise normally available

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<sup>15</sup> *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 370 (Ill. 1998); *see also* *Stevens v. Rooks Pitts and Poust*, 682 N.E.2d 1125, 1130 (Ill. App. Ct. 1997) (“courts have overwhelmingly refused to enforce provisions in partnership agreements which restrict the practice of law through financial disincentives to the withdrawing attorney”); *Pettingell*, 687 N.E.2d at 1239 (“[t]he strong majority rule . . . is that a court will not give effect to an agreement that greatly penalizes a lawyer for competing with a former law firm”); *Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston*, 678 So.2d 765, 767 (Ala. 1996); *Gray*, 663 P.2d at 1290. *But see* *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993). The Supreme Court of California reviewed a partnership agreement which provided that departing partners who competed in the Los Angeles area in the field of insurance defense during the year following their departure forfeited their entitlement to withdrawal benefits other than their capital accounts. The court upheld the forfeiture provision: “[a]n agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law.” *Id.* at 156. The *Babcock* decision has been rejected by courts outside of California that have considered it. *Pettingell*, 687 N.E.2d at 1239 (“[c]ourts have not been attracted to the contrary view expressed in *Howard v. Babcock*”); *see also* *Stevens*, 682 N.E.2d at 1130–33; *Zeldes, Needle & Cooper v. Shrader*, 1997 WL 644908, at \*6 n.6 (Conn. Super. Ct. 1997); *Whiteside*, 902 S.W.2d at 744 (“[w]e are unwilling to follow this distinctly minority position and abandon the concept of client choice that we believe remains the premise underlying DR 2-108”); RESTATEMENT, *supra* note 7, at § 13 RN to cmt. b. (“Only in California . . . are restrictive covenants in law-firm agreements enforced”); *but see* *Capozzi v. Latasha & Capozzi, P.C.*, 797 A.2d 314, 320-322 (Pa. Sup. Ct. 2002) (holding that forfeiture for competition provisions were enforceable but striking down the clause at issue as unreasonable).

<sup>16</sup> Mark J. Fucile, *Moving On: Duties Beyond the RPCs When Changing Law Firms*, OR. ST. B. BULL. (June 2013); *see also* *Borteck v. Riker, Danzig, Scherer, Hyland & Perretti LLP*, 179 N.J.246, 260–261 (N.J. 2004) (“firms must guard against provisions that unreasonably delay an attorney’s orderly transition from one firm to another”).

<sup>17</sup> *See* Angela Morris, *Are Law Firms Invoking Obscure Contractual Clauses to Delay Lateral Moves? Or Does It Just Seem That Way?*, ABA J., Apr. 1, 2019.

to lawyers at the firm to represent firm clients competently and diligently during the pre-departure period.

Similarly, firms cannot prohibit or restrict access to email, voicemail, files, and electronic court filing systems where such systems are necessary for the departing attorney to represent clients competently and diligently during the notice period. Once the lawyer has left the firm, the firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries. A supervising lawyer at the firm should review the departed lawyer's firm emails, voicemails, and paper mail in accordance with client directions and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer.

#### **F. New Matters Coming in During Transition Period**

During the notification period the lawyer and firm should determine how any new matters or new clients coming into the departing attorney will be treated—as a new client (or matter) of the existing firm or the new firm. To avoid client confusion and disputes, the firm and departing lawyer should discuss and clarify how new client matters will be addressed at the time that the departing lawyer notifies the firm of the impending departure.

#### **G. Conclusion**

Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to the approval of a tribunal, when applicable (and conflicts of interest). The ethics rules do not allow non-competition clauses in partnership or employment agreements. Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm. Firms may require some period of advance notice of an intended departure to provide sufficient time to notify clients to select who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be fixed or pre-determined in every instance, cannot restrict or interfere with a client's choice of counsel, and cannot hinder or unreasonably delay the diligent representation of a client. Firms also cannot restrict a lawyer's ability to represent a client competently during any pre-departure notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. Firms should not displace departing lawyers before departure by assigning new lawyers to a client's matter, absent client direction or exigent circumstances requiring protection of clients' interests. A firm's reliance on a fixed notice period set forth in an agreement either to attempt to require the lawyer to stay at the firm for that period or to impose a financial penalty for an early departure must be justified by particular circumstances related to the orderly transition of client matters and must account for the departing lawyer's offer to cooperate post-departure in these and other matters. Otherwise, a firm's imposition of a fixed notice period may be inconsistent with Rule 5.6(a).

**Abstaining:** Hon. Goodwin Liu.

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