

Navigating a Lawyer's Departure from a Law Firm

DISCIPLINARY COMMISSION
OPINION #1-25

Question

What are some key considerations for successfully and ethically navigating the departure of a lawyer from a firm?

Short Answer

The departure of a lawyer from a firm is often fraught with emotion as other firm attorneys struggle with losing someone in whom they have likely made a significant investment. Nonetheless, all involved must remember that they owe fiduciary duties to one another and to affected clients when a departure is imminent. Clients are not property; the firm and the departing lawyer each owe a duty of clear communication so that clients can make an informed decision regarding the representation in their matters moving forward.

When the departing lawyer has maintained significant client contact, the best practice is for the departing lawyer and firm representatives to agree upon a joint communication to send to impacted clients.¹ This communication should explain that the lawyer's departure is imminent, and the clients have the choice whether to 1) stay with the firm; 2) leave with the departing lawyer; or 3) receive their files to hire a different attorney or to represent themselves in the matter. Clients also must be informed about the status of their fees, whether outstanding or previously tendered; how their property will be handled; and what is expected of them in response to the letter. Departing attorneys must continue to be available to ease the transition of matters to another attorney if the client stays with the firm or hires a new attorney. Similarly, firms must not impede the orderly transition of client files and the remaining fees of clients who choose to go with the departing lawyer or a new attorney.

¹ In ABA Formal Opinion 489, the American Bar Association observed, "'Significant client contact' would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client. 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." *Id.* at p. 3.

Recommended Rules for Review

[Indiana Rules of Professional Conduct: 1.1, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.16](#)

[ABA Formal Opinion 489 \(2019\)](#); ABA Formal Opinion 99-414 (1999)

Summary

The following general rules should be considered by both the firm and the departing lawyer:

- 1) Both the firm and the departing lawyer owe a duty to current clients to provide adequate communication about a lawyer's departure such that clients can make informed decisions about the future of the representation. Indiana Professional Conduct Rule [1.4\(a\)\(3\)](#); [1.4\(b\)](#).
- 2) Files must be complete and thoroughly documented in a manner that the representation of clients can proceed competently, regardless of whether the client goes with the departing attorney or stays with the firm. Indiana Professional Conduct Rule [1.1](#); [1.3](#).
- 3) Departing lawyers and their firm should endeavor to agree on a strategy for how fees (those previously collected and those outstanding) will be split.

The following general rules should be considered by the departing lawyer:

- 4) A departing lawyer must have access to a list of cases in which that attorney had a significant role so that proper conflicts checks can be performed at the new employer. Indiana Professional Conduct Rule [1.7](#).
- 5) A departing lawyer must be cognizant of the duties of confidentiality and loyalty owed to former clients. Indiana Professional Conduct Rule [1.6](#); [1.7-1.10](#).
- 6) A departing lawyer should be aware of how employment agreements and intellectual property laws apply to equipment and work product that belong to the firm. See ABA Formal Ethics OP. 99-414 (1999).
- 7) Departing lawyers should not remove files prior to informing their employer of their departure or giving their employer an opportunity to retain a copy. Indiana Professional Conduct Rule [8.4\(c\)](#).

The following general rules should be considered by the firm:

- 8) Firms must perform a competency evaluation of their remaining staff to determine whether they can ethically keep the departing lawyer's clients. Indiana Professional Conduct Rule [1.1](#).
- 9) Care should be taken to attend to ministerial tasks to avoid lingering issues upon the departure of a lawyer from the firm. Substitution of counsel pleadings need to be filed in each of the departing lawyer's cases. Indiana Professional Conduct Rule [1.3](#); [1.16\(d\)](#).

10) Client files and their content, with some exceptions, belong to clients, and the firm should be prepared to transmit them to wherever the client directs.

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Competency Concerns

Hypothetical #1: Lawyer A is the only member of the patent bar at Law Firm X and exclusively works in patent law. Lawyer A has recently been elected to the position of Superior Court Judge with the term to begin within a matter of weeks. Can Law Firm X offer itself as an option for patent clients who want to stay with the firm?

Under this set of facts, Law Firm X is probably not competent to retain the clients who have hired the firm for patent work under Lawyer A's expertise unless Law Firm X is able to associate with another lawyer with established competence in patent law. In this instance, it is best practice for Law Firm X and Lawyer A to send a joint letter to patent clients that announces Lawyer A's departure and outlines the firm's plan for supporting clients through Lawyer A's transition out of the firm. This support should include the following: 1) locating suitable referrals for clients, 2) informing the referral attorneys that they should be expecting calls from the firm's former clients, 3) making sure that the files are fully documented for transition before Lawyer A's departure, 4) designating a person to be available for the transition of files, and 5) accounting for fees paid. Firms should refund all unearned fees and possibly be prepared to refund sufficient advance funds to allow the client to take advantage of the referral for whatever work remains to be done in the legal matter.

If the hypothetical is adjusted slightly, however, the result may be different so that Law Firm X could be deemed competent to retain the patent clients. For example, if Associate B of Law Firm X has been working closely with Lawyer A for a number of years and is preparing to sit for the patent bar exam and Law Firm X knows a patent attorney the firm could employ on contract in the interim while filling Lawyer A's position (or while Associate B prepares for the exam), then the firm could be in a good position to propose to affected clients that staying with the firm is a viable option.

Ethical Minefield #2 – Conflicts Checks

Hypothetical #2: Lawyer B is leaving Law Firm Y to work for its largest competitor, Law Firm Z. Lawyer B wants to notify Lawyer B's clients before notifying the firm of Lawyer's B resignation because Lawyer B expects there to be some animosity about the departure decision. Meanwhile, once the departure comes to light, Law Firm Y is hesitant to provide a list of clients for whom Lawyer B has done work, citing confidentiality obligations and concerns that Law Firm Z may attempt to poach clients from Law Firm Y. Further, Law Firm Y argues that Lawyer B had no appearances on file, as it is firm policy to list only the firm and its founding partner on appearances.

Lawyer B should not notify clients of the departure before notification to the firm because of the fiduciary duty Lawyer B owes to the firm. Lawyer B should determine if any employee manual or contract with Law Firm Y obligates Lawyer B to provide specific notice of departure. If not, Lawyer B should draft a proposed joint letter to clients with whom Lawyer B had substantial client contact for consideration with firm representatives to see if Lawyer B and Law Firm Y can agree on a proposed letter to send to affected clients. While the best practice is to come to an agreed joint notification letter, if the parties cannot agree to a negotiated letter, then Lawyer B has the right and the duty to tell affected clients about the planned departure after Lawyer B has notified Law Firm Y.

When only the founding partner is named on filed legal matters, all lawyers involved should consider whether Lawyer B had a significant role in a client's pending matter, and, if so, notice should be made about Lawyer B's departure. For instance, if a client would use Lawyer B's name when discussing the legal representation, or if Lawyer B drafted significant pleadings or was a significant spokesperson in a matter, then the client must be informed. It should be remembered that "[a]n attorney-client relationship need not be express, but may be implied by the conduct of the parties." *Matter of Anonymous*, 655 N.E.2d 67, 70 (Ind. 1995); *see also Krieg DeVault LLP v. WGT V, LLC*, 206 N.E.3d 1171 (Ind. App. 2023).

Also, these clients and legal matters should be included on the conflicts check list for Law Firm Z to use in its conflicts checks, regardless of whether the client stays with Law Firm Y or goes with Lawyer B to Law Firm Z. ABA Model Professional Conduct Rule 1.6(b)(7) includes an exception to the duty of confidentiality for this specific purpose. Indiana's Rule [1.6](#) does not include that specific exception to confidentiality, but the conflicts check list can be considered as "impliedly authorized to carry out the representation." Ind. Prof. Cond. R. [1.6\(a\)](#). Alternatively, permission can be sought from the clients to use the client's information for the limited purpose of conflicts

checks when disclosure of departure is made. A remedy for Law Firm Y's concern about Law Firm Z poaching clients would be for the firms to negotiate an agreement that the client list will be used exclusively for conflict check purposes and not for solicitation of clients. See ABA Formal Opinion 99-414 (1999).

Ethical Minefield #3 – Splitting Fees

Hypothetical #3: Lawyer A works in criminal law at Law Firm X, and the majority of cases Lawyer A handles are for flat fees. Lawyer A has approximately 65 clients in different stages of their criminal representation. Lawyer A announces her intention to leave the firm at the end of the month to open her own firm. The managing partner of Law Firm X wishes her luck and states that Law Firm X is not interested in maintaining a criminal law practice any longer, so Lawyer A is welcome to take all of the 65 clients. The managing partner indicates that the only caveat is that Law Firm X considers flat fees to be earned on receipt, and the firm has no intention of returning any of the flat fees Lawyer A collected as a member of Law Firm X.

Because Law Firm A has no intention of continuing a criminal law practice, the mandatory notice to clients would offer the choice of going with Lawyer A or advising clients to hire new counsel.

The managing partner of Law Firm X is correct that in Indiana flat fees are considered earned upon receipt for trust account purposes. See *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004); *In re O'Farrell*, 942 N.E.2d 799 (Ind. 2011). However, when the agreed upon work is not completed upon discharge of the attorney or firm, some portion of the flat fee must be refunded to the client or provided to subsequent counsel if one has been hired. Since none of the cases of those 65 clients would be complete upon Lawyer A's departure, and Law Firm X does not intend to have a criminal law practice, Law Firm X is not entitled to keep the full flat fee for any of those matters. The best practice would be for Lawyer A and Law Firm X to come to an agreement on how to split the fees. This could entail assigning value to each stage of the case, such as pre-charge work, investigative stage, trial preparation, and trial participation, and then dividing the fees based upon the stage at which each case is when Lawyer A departs the firm.

If Law Firm X and Lawyer A cannot come to an agreement as to how the flat fees can be split, a *quantum meruit* evaluation may have to ensue based on approximate hours Lawyer A worked on each case while at the firm. If the earned fees through *quantum meruit* analysis exceed the flat fees, such that Law Firm X is entitled to the entire fee in a significant number of these cases, Lawyer A may need to evaluate whether the flat fees charged by Law Firm X were too low and

possibly renegotiate the fee with her clients before moving forward with the representation. However, in doing so, Lawyer A must be cognizant of complying with the mandates of Indiana Professional Conduct Rule [1.8\(a\)](#)² when renegotiating a client's fee agreement.

With respect to any clients that Lawyer A is taking who paid retainers as opposed to flat fees, the firm owes a duty to account for those fees and to pass on to Lawyer A any remaining funds. Lawyer A has a duty to keep these funds separate from her own funds under Indiana Professional Conduct Rule 1.15 and should open an IOLTA account into which she must place advance payments of client fees.

Ethical Minefield #4 – Duty to Notify

Hypothetical #4: Lawyer B has been missing deadlines and Managing Partner of Law Firm X believes that Lawyer B may have been misleading clients about work performed. Managing Partner has been quietly monitoring Lawyer B's work performance with an eye toward firing Lawyer B upon confirmation of deceit or continued neglectful behavior. Lawyer B suspects he is being monitored and abruptly announces his resignation one afternoon after accepting a position at another firm. Lawyer B drafts a letter to clients and proposes to Managing Partner that Lawyer B and the firm jointly send the letter to clients. Managing Partner is hesitant to do so.

While it is generally preferable for the parties involved to draft and send a joint letter to affected clients, this is an instance when Managing Partner is likely justified in hesitating to send a joint letter, as such action could be construed as endorsing the departing lawyer's services. In this instance, it is advisable that each party should send individual letters representing the party's interests. Managing Partner would be well advised to consult the Law Firm X's insurance

²² Ind. Professional Conduct Rule 1.8(a) provides:

"A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

See *Matter of Hefron*, 771 N.E.2d 1157 (Ind. 2002)(holding that respondent violated Rule 1.8(a) by renegotiating fee agreement when terms of renegotiated agreement favored respondent, terms of renegotiated agreement were not fully disclosed to client in writing, and respondent failed to allow client to seek independent counsel on the transaction); see also *Matter of Thayer*, 746 N.E.2d 207 (Ind. 2001).

provider for advice on what level of disclosure should be made to Lawyer B's clients regarding Lawyer B's missteps.

Also, Managing Partner must be cognizant of Indiana Professional Conduct Rule [5.1's](#) duty of supervision and must become familiar with each of the files on which Lawyer B worked. After reviewing the files, Managing Partner must decide whether the Partner "know[s] that [Lawyer A] has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" to determine whether the Partner is duty bound to report a violation to the Disciplinary Commission under Indiana Professional Conduct Rule 8.3(a).

Conclusion

The hypotheticals above represent only a few examples of issues that can arise when a lawyer departs from a law firm. All involved need to be aware of the duties owed to one another and to affected clients. Law firms can prevent many of the issues that often arise when lawyers leave the firm by having robust employment policies that enumerate procedures for orderly notification and transition in anticipation of lawyers departing. Additionally, firms with a team approach model that employ client portals in which communication can be made from and to multiple parties, and who place an emphasis on keeping client files well documented, will be more insulated from the disruption occurring due to attorney departures. The Commission strongly recommends review of the above noted ABA opinions for all departing lawyers and the firms with departing lawyers.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.