

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2005-2**

Ethical Obligations When a Lawyer Changes Firms

Question Presented

The Committee has been asked to address the ethical considerations which govern the responsibilities of a lawyer departing a firm to work for another firm and whether Alaska would adopt Formal Opinion 99-414 of the American Bar Association, dated September 8, 1999, which addresses this same issue.

The Committee has elected to adopt the ABA opinion, albeit in truncated form, as set forth below.

Conclusion

A lawyer's ethical obligations upon departure from one firm to join another rest on the premise that the client's interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent them. The departing lawyer and the former firm must take reasonable measures to assure that the departure is accomplished without material adverse effect on the interests of clients and the matters upon which the lawyer currently is working.

The departing lawyer and the former firm have ethical obligations to assure that prompt notice is given to clients on whose active matters the departing attorney is working and to protect client information, files, and other client property.

Finally, the departing lawyer is prohibited by ethical rules from making in-person or live telephone contact prior to their departure with clients with whom they have no family or client-lawyer relationship.

Discussion

When a lawyer ceases to practice at a law firm, both the departing lawyer and the responsible members of the firm who remain ("former firm" or "former law firm") have ethical responsibilities to clients on whose active matters the lawyer is currently working to assure that the representation is not adversely affected by the lawyer's departure. These obligations include:

- (1) Disclosing the pending departure in a timely fashion to clients for whose active matters the departing lawyer is responsible or plays a principal role in representing the client;

- (2) The departing lawyer must assure that client matters to be transferred with the lawyer to the new law firm do not create conflicts of interest in the new firm and can be competently managed there;
- (3) Both parties have a duty to protect client files and property and assure that, to the extent reasonably practicable, no client matters are adversely affected as a result of the withdrawal;
- (4) Both parties must avoid conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with the planned withdrawal; and
- (5) The departing lawyer must maintain confidentiality and avoid conflicts in their new affiliation respecting client matters in the lawyer's former firm.

Notification to Current Clients

The impending departure of the lawyer who is responsible for the client's representation, or who plays a principal role in representing the client, is information that may affect the status of the client's matter. Accordingly, a lawyer who is departing one law firm for another has an ethical obligation, along with the former law firm, to assure that those clients are informed the lawyer is leaving the firm. This can be accomplished by the departing lawyer, the former law firm, or the lawyer and the firm jointly. Because clients have the ultimate right to select counsel of their choice, information that the lawyer is leaving and where they will be practicing will assist the client in determining whether the legal work should remain with the law firm, be transferred to the 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 make informed choices as to who will represent them.

Because lawyers have a present professional relationship with their current clients, a departing lawyer does not violate Rule 7.3(a) by notifying those clients that they are leaving for a new affiliation.¹ However, a departing lawyer is prohibited from making in-person or live telephone contact with firm clients with whom the lawyer does not have a prior professional or family relationship. A lawyer does not have a prior professional relationship with a client merely by having worked on a matter for a client along with other lawyers in a way that afforded little or no direct contact with the client.

¹ RPC 7.3(a) prohibits a lawyer from soliciting "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."

The Committee is also of the opinion, for those clients who elect to transfer their existing matters to the departed lawyer and the new firm, the former firm must take steps pursuant to Rule 1.16(d) to protect the departing client's interest in terms of surrendering papers and properties to which the client is entitled and refunding any advance payment of fees that has not been earned.

Notice to the Clients 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 resigns 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 for at the time of the notice, or whom the departing lawyer has performed significant professional services while at the firm;
- (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 responsibility for the matters upon which they are currently 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 avoid statements involving dishonesty, fraud, deceit or misrepresentation in describing or characterizing the former firm.

In order that the client may make an informed decision, the departing lawyer may also inform the client whether the representation can be continued at the new law firm. If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever information 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's matter. The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the former firm, the departing lawyer and the new firm, or some other lawyer will continue the representation.

The best approach to protect the client's interest is for the departing lawyer and the former 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. 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 immediate termination. When the departing lawyer reasonably anticipates that the firm will not cooperate in providing such a joint notice, the lawyer must provide notice to those clients for whose active matters they are currently responsible, or play a principal role in the representation, according to the manner described above, and preferably any in-person conversations should be confirmed in writing so as to memorialize the details of the communication and compliance with Rules 7.3 and 7.1.²

Entitlement to Files, Documents and Other Property

A departing lawyer also may wish to take files and other documents such as research memoranda, sample pleadings and forms when they leave. To the extent that these documents were prepared by the departing lawyer and are considered the lawyer's property or are in the public domain, they may take copies with them. Otherwise, the lawyer may have to obtain the former firm's consent to do so.

The Committee is of the opinion that, absent special circumstances, the departing lawyer does not violate any ethical rules by taking copies of documents prepared or created for general use in their practice. However, the question of whether a departing lawyer may take continuing legal education materials, practice forms, or computer files generated during their practice 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 the representation of former clients provided, however, there are assurances that confidential client information is protected in accordance with Rules 1.6 and 1.9.

Conclusion

Lawyers who are terminating their association with the 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.

² RPC 7.1 states: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services" which is defined as, among other things, "compar[ing] the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated."

Before preparing to leave one law firm for another, the departing lawyer should take steps to be informed of applicable law other than the Alaska Rules of Professional Conduct, including the law of fiduciaries, property and unfair competition. They should also take care to act lawfully in taking and utilizing the former firm's information or property, intellectual or otherwise.

Approved by the Alaska Bar Association Ethics Committee on September 1, 2005.

Adopted by the Board of Governors on September 8, 2005.

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