

A night sky with a comet and a cracked desert floor. The sky is dark blue with many stars. A comet with a white tail is visible in the upper center. The foreground is a cracked, dry desert floor with a grid-like pattern of cracks. In the distance, there are dark silhouettes of mountains.

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Protecting Clients and the Profession When Changing Law Firms

by Keith A. Call

Several years ago I received an urgent – even frantic – phone call at 8:05 on a Monday morning. It was my elderly mom’s financial advisor. He was letting me know he had just told his employer he was changing firms and was calling to make sure that my mom’s account would go with him. (Given the very modest size of Mom’s account, I was surprised I got the call so early.) I’m sure he was doing that with all of his clients. And so the frenzy of competing for clients upon the advisor’s departure went

Anyone who practices a significant amount of non-compete law knows this drill. A salesperson or account manager decides to change jobs, and the frantic fight to retain clients and customers ensues.

This should not be happening in the legal world, at least according to a recent American Bar Association (ABA) ethics opinion. According to the ABA, the lawyer changing law firms and the law firm have ethical duties to orchestrate a more orderly transition of clients when a lawyer changes firms. This transition must be guided by client choice. *See* ABA Standing Comm. on Ethics & Prof’l. Resp., Formal Op. 489 (Dec. 4, 2019). Opinion 489 describes the notice requirements for both the lawyer and the law firm when a lawyer changes firms.

Client Choice

A foundational principle of Opinion 489 is client choice. “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.” *Id.* at 3. The opinion continues, “[C]lients 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.” *Id.* at 4. This is consistent with a Utah ethics opinion. *See* Utah State Bar Ethics Advisory Opinion Comm., Utah Ethics Op. 132 (1993) (“It is the client, and not the departing or remaining lawyers, who determines who will be its counsel and who may keep the files.”).

Thus, the departing lawyer and the former law firm do not get to decide who will represent the client going forward. That is solely up to the client.

Orderly Communication

Lawyers have a duty to represent clients with diligence, keep the client reasonably informed, and make reasonable efforts to expedite litigation consistent with the interests of the client. Utah. R. Prof’l. Cond. 1.3, 1.4, & 3.2. In furtherance of these obligations, Opinion 489 asserts that “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.” Opinion 489 at 2. The opinion contemplates that this joint communication may occur before the departing lawyer actually leaves the firm. *See id.* at 2–3. While the opinion emphasizes that “[l]awyers and law firm management have ethical obligations to assure the orderly transition of client matters,” *id.* at 1, the opinion recognizes that, in the absence of a joint agreement, both the departing lawyer and the law firm may unilaterally inform clients of the lawyer’s impending departure at or around the same time that the lawyer provides notice to the firm, *see id.* at 2. A law firm cannot prohibit the departing lawyer from soliciting firm clients. *See id.* at 2–3.

Departing lawyers should communicate with all clients with whom the departing lawyer had significant contact. “Significant client contact’ would include [any] client identifying the departing lawyer, by name, as one of the attorneys representing the client.”

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Id. at 3. A departing lawyer has not had “significant client contact” if, for example, the lawyer prepared one research memo for another attorney in the firm but never actually spoke with the client. *Id.*

“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.” *Id.* The firm should offer to continue representing the client only if it has the capacity or expertise (or the ability to retain lawyers with sufficient capacity and expertise) to handle the matter. Neither the departing lawyer nor the firm may engage in false or misleading statements to clients. *Id.* at 3–4.

Orderly Transition

Both the departing lawyer and the law firm have a duty to protect client interests during the transition. Law firms may require departing lawyers to notify firm management contemporaneously with the departing lawyer communicating to clients, employees of the firm, or others, so that the firm and the departing lawyer can work together to assure professional transition of client matters. The firm and the departing lawyer must assure that all electronic and paper records for client matters are organized and up to date. When a client decides to stay with the firm, the departing lawyer has a responsibility to update both the client files and the lawyers taking over the client matter. The departing lawyer and law firm should in all instances endeavor to coordinate, even after departure, to protect the client’s interests. *See id.* at 4; *see also* Utah Ethics Op. 132 (“[N]either a law firm nor the departing lawyer should deny the other access to information about the matter that is necessary to protect the client’s interests.”).

The law firm and departing lawyer also have a duty to protect confidential client information. To do so, a departing lawyer whose client is not transferring with the lawyer shall return or delete confidential client information in his or her possession. Opinion 489 at 4–5.

Notice Requirements

In order to assure the orderly transition of client matters, law firm policies and agreements may request that lawyers provide reasonable notice prior to departure. In practice, such notice periods may not be fixed or rigidly applied without regard to client instruction and may not be used to punish a lawyer for choosing to leave the firm. If such policies would affect a client’s choice of counsel or serve as a financial disincentive to a competitive departure, the notification period could violate Rule 5.6 of the ABA Model Rules and the Utah Rules of Professional Conduct

(restrictions on the right to practice law). Opinion at 5–6.

Access to Firm Resources during Transition Period

After the firm knows the lawyer intends to depart and before he or she actually departs, the departing lawyer must have access to adequate firm resources to competently represent the client. For example, the firm cannot require the lawyer to work from home, withhold appropriate support staff, or withhold the assistance of associates or other lawyers previously assigned to the matter. *See id.* at 6.

Once the lawyer has departed, “the firm should set automatic email responses and voicemail messages . . . , to provide notice of the lawyer’s departure, and offer an alternative contact at the firm for inquiries.” *Id.* at 7. A supervising lawyer at the firm should review the departed lawyer’s mail and messages in accordance with client instructions. *See id.*

Conclusion

Being a lawyer is a time-honored service profession. For most lawyers most of the time, it is also a competitive, for-profit business. Lawyer departures can be messy. Opinion 489 provides guidance that will help lawyers and law firms navigate the discomfort of lawyer departures in an orderly and fair manner – and one that keeps client choice and protection at the forefront.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.