THE SHELY FIRM, PC

Ethical Obligations When Lawyers Change Firms

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This article focuses on Arizona law. If a firm has offices in other jurisdictions, check the rules of professional conduct, ethics opinions, and case law in those jurisdictions, as ethics advice unfortunately may vary state by state. Lynda is an active member of the Arizona and District of Columbia Bars. Reading this article does not create an attorney/client relationship with Lynda.

I. Duties of Firms *and* Lawyers When someone Leaves

Lawyers rarely stay with the same law firm their entire careers. When lawyers leave a firm, there are certain ethical obligations, client relations issues, and other duties that arise. This article will only address the ethical and professional considerations when lawyers change firms and not any tort, contract, or employment law issues.

From an ethics perspective, the goal is that lawyers changing firms – and their former and future firms – all behave like grown-ups. Really. Law firm changes may feel personal but as professionals, lawyers must nevertheless abide by their ethical obligations when transitioning firms.

In addition to ethical obligations to the firm and clients, departing lawyers also may be subject to both civil and criminal charges for theft of firm property, misuse of firm assets, misrepresentations, and interfering with contracts a firm has with clients. *See, e.g, Florida Bar v. Winters & Yonkers (Sept., 2012)(*two lawyers suspended from the practice of law for copying firm files, which constituted theft and made misrepresentations to the firm and clients to divert clients away from firm).

A departing lawyer must *always* tell her firm partners first, before telling clients, staff, or others that she is leaving a firm. In addition to ABA Op. 99-414's recommendation that the firm bet told first, surreptitious solicitation of firm clients done while employed at a firm, prior to notifying the firm of the intended departure breaches a lawyer's (partners and associates) fiduciary duty of loyalty to the firm. *See* Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989). The recent amendments to the ABA Model Rules on Professional Conduct, ER 1.6 specifically note that lawyers may have fiduciary duties to their current firms. Departing lawyers also must avoid interfering with the contracts the firm has with existing clients. *See ,e.g., Raymond H. Wong Inc. v. Xue,* No. 115269/04 (N.Y. Sup. Ct. N.Y. Cty.

1/21/05)(associate enjoined from attempting to lure away firm clients); *Reeves v. Hanlon*, 33 Cal.4th 1140, No. S114811, (Cal. 8/12/04)(departed lawyers liable for damages to firm for luring away clients and associates). Business tort litigation against departed lawyers is a growing practice area. However, the caution to avoid stealing clients must be balanced against the departing lawyer's *ethical* obligation to notify clients that an attorney is departing. This balance means that the firm and departing lawyer *should* work together to notify clients, *neither* should try to bribe clients from the other, and *neither* should disparage the other.

If lawyers read nothing else, read these essential ethics opinions regarding lawyer transitions:

Ariz. Op. 10-02
Ariz. Op. 09-02
Ariz. Op. 99-14
ABA Op. 99-414
ABA Op. 14-468

A. Ethical Obligations When Changing Firms

Two primary directives must be remembered when lawyers change law firms: 1) lawyers have a duty to tell "their" (not all clients of the firm) clients that they are leaving; and 2) clients are not chattels – the firm and departing lawyer cannot decide which clients can stay and which can go – the clients decide. Lawyers must keep clients informed so that clients may make informed decisions about what the clients want to do. However, lawyers who are leaving need to tell the firm *first*, and then communicate with clients.

Arizona Opinion 10-02 summarizes many of the ethics requirements that departing lawyers and law firms have to cooperate with each other and share information on client matters to avoid any prejudice or harm to clients when a lawyer leaves the firm.

Practice Tip When Hiring a Lateral: Confirm they cease affiliations with any other firms – except for the reasonable (corporation/bank accounts may be open for months but not advertising or websites) winding down of a prior solo practice.

Practice Tip II When Hiring a Lateral: Confirm clients that come with the lateral enter into new fee agreements with the hiring firm.

Practice Tip III When Replacing a Departing Attorney on Litigation: If the firm will continue to represent a client on a litigation matter and just wants to substitute on the pleadings a new associate/partner and remove the departed attorney, 2017 Arizona Rule of Civil Procedure 5.3(a)(2)(D) provides that the firm should simply file a "Notice of Substitution":

> (D) Change of Counsel Within the Same Firm or Office. If there is a change of counsel within the same law firm or governmental law office, an order of substitution or association is not required. Instead, the new attorney must file a notice of substitution or

association. The notice must state the names of the attorneys who are the subjects of the substitution or association and the current address and email address of the attorney substituting or associating.

1. Departing Lawyers Must Update Files and Enter Time

Arizona Opinion 10-02 explains that departing attorneys have an obligation to assure that client files remaining with the firm are up to date and in order, containing all necessary information for the firm to continue the representation.

Departing lawyers should *never delay performing legal services* so the time/fees can be charged at their new firm. That would violate several ethical rules, including ERs 1.3, 1.5, and 3.2. Departing lawyers need to enter their time in the existing firm's timekeeping system as part of the lawyer's obligations to update the client files and assist in the transition to other counsel. Departing lawyers also need to organize files, assure they are up to date, and follow the firm's procedures for storing electronic documents and emails by client.

Not only is it bad form for a departing lawyer to delay doing work or billing work so they can charge for the work at the new firm, such misconduct also can violate ER 1.3 for lack of diligence – and constitute theft from the firm.

2. Which clients to tell

Arizona Opinion 99-14 provides some guidance on when a departing lawyer may communicate directly with *certain* firm clients. A departing lawyer who has had "significant personal contacts" with the client, should inform the client that the lawyer is leaving the firm. Note: this does not mean that an associate who met a client once or twice and has prepared discovery requests has had "significant personal contacts" – the standard is that if the client were asked "which lawyer(s) at the firm represent you?" the lawyers mentioned would be those that have had "significant personal contacts."

Note: A departing attorney, whether partner or associate, cannot simply download the entire firm database of client information and take it with them. On the other hand, the firm cannot prohibit a departing lawyer from communicating their departure to clients with whom the lawyer has had "significant contact" as noted in Opinion 99-14.

Who is a client with whom the departing lawyer has had "significant contact"? Any client who if asked who represented them would name the departing lawyer as one of the lawyers representing them. Certainly notice should go to any clients for whom the departing lawyer has made court appearances or sat in negotiations representing the clients' interests. As Ariz. Op. 10-02 mentions, if there is any doubt, err on the side of providing the client notice. That means, if the client perceives the departing lawyer to be one of the lawyers representing the client, the client needs to be notified of the departure.

3. How to tell clients

Again - departing lawyers need to inform firm management about their anticipated departure *before* the lawyer starts contacting clients. Section 9(3) of *the Restatement of the Law Governing Lawyers* (2000) provides:

> "Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients:
>
> (a) prior to leaving the firm: (i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and
> (ii) only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose; and
> (b) after ceasing employment in the firm, to the same extent as any other nonfirm lawyer."

Reality check: The departing lawyer should not offer a discounted rate to try to lure the clients away from the firm, nor should the original firm offer to discount fees because both situations could be deemed contrary to ER 7.2(b), which prohibits giving "anything of value" to someone for referring work to a firm – including to a client.

The *preferred* method of advising firm clients about the impending departure of an attorney is a joint letter from the firm and departing lawyer to all clients with whom the lawyer had significant personal contacts. Such a letter should advise the clients:

- When the lawyer is leaving and where they are going
- The client has the option of going with the lawyer, staying with the firm, or getting a new firm
- How any advance fee deposit will be treated/transferred after the departing lawyer enters time and runs a final invoice.
- A place for the client to sign and return the letter, with instructions on where their file should go.
- Put a due date to return the letter/email – without a deadline, clients may ignore the communication.

This letter preferably should be sent prior to the lawyer's departure and should be calendared to assure that written responses are received from all clients to confirm how each file should be handled. The letter needs to tell clients where the departing lawyer is going so that clients may check for conflicts before agreeing to a change.

Caution: While there is no Ethical Rule that requires a letter signed by a client to transfer a file, it is preferable to confirm that the client actually is authorizing the transfer. Just as when a firm receives a letter from another lawyer, telling the firm it has been fired and the firm

should transfer the file to the new lawyer, the firm is entitled to get confirmation from the client directly – either by phone, email, or letter.

For those clients that want their files sent with the departing lawyer, the firm should review their malpractice policy for requirements on maintaining a copy of certain parts of the file for a period of time – that copying of course is at the firm's expense because the client file is client property that belongs to the client. ER 1.16(d).

Note that if a joint letter is not sent, separate letters may be sent by the lawyer (or the firm) to clients with whom the departing lawyer had significant personal contact as long as: 1) the letters do not disparage the firm or the departing lawyer; and 2) the clients' directions are followed.

Reality check #I: Files should be transferred "promptly" – that term is not defined in the Ethical Rules but consistent with ER 1.16(d)'s duty to not prejudice the interests of a client when withdrawing from a representation, the original firm should transfer all files as soon as possible for clients that have litigation (or even transactional) deadlines arising in the upcoming next few weeks. For all other clients that want their files transferred to a new firm, a week to copy the file and transfer the file is a customary amount of time.

Reality check II: Frequently firms and departing lawyers cannot agree on the language in a joint letter or email – sending individual letters or emails to all clients with whom the departing lawyer has had "significant contact" is fine – ethically, if the departing lawyer and firm have at least attempted to negotiate a joint letter.

Reality check III: the departing lawyer and the firm may call clients to notify the clients they will be receiving such a letter or email, after the firm is first notified of the intended departure. Once the client chooses who will continue to represent them, the non-retained lawyer/firm should CEASE contacting the client.

Ethics check: ER 7.3's prohibitions on soliciting work from people by telephone or in person does not apply to departing attorneys because they have/had a professional relationship with the clients. ER 4.2's prohibitions on communicating with someone represented by counsel ALSO DOES NOT APPLY to the departed attorney who calls a former client after the lawyer leaves the firm because the departed attorney is not representing a party in the matter – unless the lawyer or firm are contacting the client about paying earned fees. If the client instructs that they are represented by counsel on the fee issue, the firm cannot continue to contact the former client directly – the firm must go through counsel.

- **Special Considerations When Joining *Opposing Counsel's Firm***

ABA Op. 96-400 (1996) helps clarify when you must tell your client that you want to join the opposition. The ABA Opinion concluded that lawyers must disclose the possibility of joining

the opposing firm when the lawyers' interest in combining becomes "concrete, communicated and mutual."

This means that a lawyer must tell clients (and the current firm) when the lawyer has finalized a decision to change firms. Then everyone will need to resolve whether both firms will be disqualified from continuing in the case if the moving lawyer "drags" that former client conflict to the new firm, which is opposing counsel. *See ER 1.10.* Note that the moving lawyer drags the conflict with her, even if she does not (and obviously could not) bring the client with her to opposing counsel's firm.

4. Other People Who Should Be Told About the Departure

Whenever a lawyer changes firms the following people/groups need to be notified about the new address (and other contact information), and the effective date of the change:

- State Bar Membership Records Department
- Law school alumni association
- Family/friends (really)
- Courts: including clerk's office *and* the Judicial Assistants for each judge where the lawyer has a pending matter. (Notifying all judges' judicial assistants is a courtesy to the judge – also follow local court rules on filing a change of address/firm affiliation notice with the clerk)
- Opposing counsels
- Arbitrators
- Vendors, expert witnesses, court reporting services
- publications such as *Arizona Attorney magazine* and *Business Journal*
- Other professional organizations in which the lawyer is a member (ABA, MCBA, Inn of Court, local bar associations and specialty groups, etc.)
- The firm's malpractice carrier, accountant, landlord, and banker.
- All internet listings for the attorney – including Avvo, YELP, lawyers.com, SuperLawyers, etc.

5. Firm Name Changes

If a named partner leaves a law firm, the firm cannot continue to use that lawyer's name in the firm name UNLESS the named partner is retiring from the practice of law – then the firm may continue to use the retired partner's name. Ariz. Op. 91-11. If, however, the partner is leaving to start a different firm or join a new firm, the old firm name must change. If a lawyer leaves to join the bench, the firm name must change. Firm names may not include the names of nonlawyer employees and must be factually accurate. For instance, if the firm name is "Smith and Associates," the firm must employ more than one full-time associate. Similarly, "Law *Offices* Of John Smith" requires that Mr. Smith have more than one office. "Group" connotes more than one attorney.

B. Trust Account Monies

Clients that have given the firm an advance fee or advance cost deposit take the money with them (less earned fees and costs), if they go with the departing lawyer. While simple in theory, application sometimes can be problematic. The "old" firm should write a check, consistent with the written instructions of the client, to either the client or to the trust account for the departed lawyer's new firm, when the client instructs that the trust balance should be transferred.

Reality check again: Departing lawyers must assist the firm in running final invoices and should never ever delay doing work at the old firm in order to bring the work to a new firm.

C. Fee Divisions In General

1. When the firm is dissolved:

There is some disagreement regarding how fees earned *after* a law firm split may be apportioned between the firm and the departed lawyer, when the case initiated with the old firm. For example, in contingent fee cases where some or much of the work was performed at the existing firm, but the case is going with the departing lawyer, the firm and lawyer must agree how the contingent fee will be apportioned among them, based upon their respective contributions to the case (i.e., *quantum meruit)* or based upon terms in the partnership agreement.

But can a departing lawyer keep *all* of a contingent fee case that came into the old firm but ultimately settled when the lawyer was at a new firm? Probably not, according to several cases. *See, e.g., Meyer & Susman v. Cohen*, 194 CalRptr 180 (Calif CtApp 1983)("The partner may take for his own account new business even when emanating from clients of the dissolved partnership and the partner is entitled to the reasonable value of the services in completing the partnership business, but he may not seize for his own account the business which was in existence during the term of the partnership"). A lawyer may be entitled to only his partnership portion of the fees earned on a case, even if he performed most of the work after the dissolution of the firm. *See Jewel v. Boxer*, 203 CalRptr 13(Calif CtApp 1984); *Frates v. Nichols*, 167 So2d 77 (Fla. Dist. Ct. App. 1964); *Ellerby v. Spiezer*, 138 485 NE2d 413 (Ill AppCt 1985); *Resnick v. Kaplan*, 434 A2d 582 (Md CtApp 1981); *Smith v. Daub*, 365 NW2d 816 (Neb SupCt 1985); *Platt v. Henderson*, 361 P2d 73 (Ore SupCt 1961).

Moreover, some decisions hold that *all* revenue generated by cases that originated with a law firm that then dissolves belong to the originating firm – even if the work is completed after the firm disbands. *See Jewel v. Boxer*, 203 Cal Rptr. 13 (1984)(profit from transferred matters belongs to the original law firm); *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 1918705 (S.D.N.Y. May 24, 2012).

2. When the firm remains but a lawyer leaves and takes cases:

If the firm continues to exist and a lawyer leaves the firm and takes a case with him, he may be entitled to the *quantum meruit* value of the work he performed after he left the firm. Similarly, the firm will be entitled to the value of work performed at the firm. How this is calculated may be an open issue, but as a starting point, courts will look to the hours spent (lodestar) and then decide if any other factors under ER 1.5(a) apply to determine the fair apportionment of the fee between the former firm and current firm.

The *Schwartz v. Schwerin*, 85 Ariz. 242, 245-46, 336 P.2d 144, 146 (1959) analysis provides: "Before discussing the separate counts, it seems advisable that we state the well-known basic elements to be considered in determining the reasonable value of an attorney's services. From a study of the authorities it would appear such factors may be classified under four general headings (1) *the qualities of the advocate:* his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done:* its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (2) *the work actually performed by the lawyer:* the skill, time and attention given to the work; (4) *the result:* whether the attorney was successful and what benefits were derived. *See*, 7 C.J.S. Attorney and Client § 191 a. (2), p. 1080 et seq.; 5 Am.Jur., Attorneys at Law, section 198. *Cf. Ives v. Lessing,* 19 Ariz. 208, 168 P. 506. Furthermore, good judgment would dictate that each of these factors be given consideration be the trier of fact and that no one element should predominate or be given undue weight."

The final step in the attorney fee analysis is the reasonableness of the fees sought, which includes consideration of the hourly billing rate and the hours expended. *Schweiger v. China Doll Rest ., Inc.*, 673 P.2d 927, 931-32 (Ariz.Ct.App.1983). *See Geller v. Lesk,* 644 Ariz. adv. Rep. 4 (Ariz. Ct. App. 2012)(hourly rate determines reasonable fee and any enhancement for the risk of nonpayment is reserved for exceptional cases).

Additionally, the majority view of "no extra compensation" upon dissolution of a firm does not apply to either the situation where the firm is completing work for a deceased partner or if the partnership agreement provides for a different compensation plan upon dissolution or departure. Such terms in partnership agreements will be upheld as long as they are not grossly inequitable. See *Smith v. Daub*, 365 NW2d 816 (Neb SupCt 1985).

Note also that Comment [9] of ER 1.5 explains that "Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm." This means that the decision on how fees will be split between the former firm and the departed lawyer does not need to comply with the writing and joint responsibility requirements of paragraph (e) of Rule 1.5. *Tomar, Seliger, Simonoff, Adourian & O'Brien PC v. Snyder*, 601 A.2d 1056 (Del. Super. Ct. 1990); *Miller v. Jacobs & Goodman PA*, 699 So. 2d 729 (Fla. Dist. Ct. App. 1997); *Romanek v. Connelly*, 753 N.E.2d 1062 (Ill. App. Ct. 2001); *McCroskey, Feldman, Cochrane & Brock PC v. Waters*, 494 N.W.2d 826

(Mich. Ct. App. 1992); *Hendler & Murray v. Lambert*, 537 N.Y.S.2d 560 (App. Div. 1989); *Baron v. Mullinax, Wells, Mauzy & Baab Inc.*, 623 S.W.2d 457 (Tex. Ct. App. 1981); *Restatement (Third) of the Law Governing Lawyers (2000) § 47* Comment g.

Regardless of whether the fees go to the firm, are divided on a *quantum meruit* basis, or divided by agreement, the fees must be reasonable for the services performed. *See Matter of Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984). In other words, the clients cannot be charged more than a reasonable fee.

D. Client Files

Clients decide who will represent them – not the lawyers or law firm.

Firms cannot hold client files hostage, even if the client that is leaving with the lawyer owes the current firm money. Model Rule 1.16(d) requires that the client's interests not be prejudiced when the attorney/client relationship is terminated.

Have the client or a runner from the departed lawyer's new firm sign for the file – the old firm will want a record of who took possession of the file.

Also, it is appropriate to request in a litigation matter that the departed lawyer file a substitution of counsel or at least notification of address change with the court, to assure that the old firm is still not listed as counsel of record.

Note that Arizona Ethics Opinion 08-02 discusses record retention policies and that if electronic copies of documents are maintained by the firm, the firm should provide the documents electronically. Thus, if a departing client wants their file transferred with a departing lawyer electronically, the firm should do so.

Arizona Opinion 10-02 further explains that when lawyers leave firms, they have a duty to assure that the files on which they worked are complete and in order. This means that attorneys must assure that files are up to date so that another attorney may take over the file, if the client elects to stay with the firm.

As noted in §91:716 of the *ABA/BNA Lawyers' Manual on Professional Conduct (2015):*

> Lawyers who are leaving a law firm must not surreptitiously take client files from the firm or delete client records, even if they fear that otherwise the firm will interfere with the clients' representation. *Maryland Attorney Grievance Comm'n v. Potter*, 844 A.2d 367, 20 Law. Man. Prof. Conduct 176 (Md. 2004) (imposing 90-day suspension on departing associate who secretly removed paper files of two clients and destroyed firm's computer records for those clients in middle of night).
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> The clandestine removal of files has been uniformly condemned. *E.g., Phil Watson PC v. Peterson*, 650 N.W.2d 562, 18 Law. Man. Prof. Conduct 570 (Iowa 2002); *In re*

Cupples, 952 S.W.2d 226 (Mo. 1997); In re Smith, 843 P.2d 449 (Or. 1992); *Shein v. Myers*, 576 A.2d 985 (Pa. Super. Ct. 1990).

Departing attorneys also need to maintain their professionalism when leaving a firm, which includes entering their time so that the firm can calculate final invoices. Departing attorneys need to work with the firm on collections of past due accounts if the client is leaving the firm with the lawyer. Again (for the fourth time) Attorneys obviously should not defer completing work at their old firm to attempt to bill that time at their new firm.

Reality check #I (again): Files should be transferred "promptly" – that term is not defined in the Ethical Rules but consistent with ER 1.16(d)'s duty to not prejudice the interests of a client when withdrawing from a representation, the original firm should transfer all files as soon as possible for clients that have litigation (or even transactional) deadlines arising in the upcoming next few weeks. For all other clients that want their files transferred to a new firm, a week to copy the file and transfer the file is a customary amount of time.

E. Other Files/Contact Lists/Forms

There are no ethics opinions or cases in Arizona that define whether a departing lawyer may take her: 1) contact information (including personal contacts as well as expert witnesses, etc.); 2) form files; and 3) CLE materials. As professionals *and* grown-ups, work out these issues prior to the dissolution – preferably in a firm policy.

Generally firms permit departing lawyers to take their contact information (not lists of all clients of the firm unless the lawyer has had significant contact with them) and CLE materials. Forms that the departing lawyer prepared may go with the departing lawyer - unless there is some proprietary claim by the firm. Departing lawyers should ask firm management prior to removing firm property/information because any articles or other copyrighted materials may be owned by the firm under a "work made for hire" concept under developed by associates clearly belong to the firm under the "work for hire" doctrine set out in 17 U.S.C. §101(1).

Downloading copious amounts of firm data before departing the firm may constitute theft of firm property, unless there is a good faith basis to assert that the information is being taken to protect client interests for those clients going with the departing attorneys. While client names may not be held to be trade secrets, departing lawyers should never copy or download lists of firm clients. *See ABA Op. 99-414; Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853 (Ohio 1999); *see also Reeves v. Hanlon*, 17 Cal. Rptr.3d 289 (Cal. 2004) (lawyers who left firm to start their own practice violated Uniform Trade Secrets Act by using client data from former firm). Departing lawyers also may be subject to a breach of fiduciary duty claim if they give their new firm confidential information from the former firm. *See Gibbs v. Breed, Abbott & Morgan*,710 N.Y.S.2d 578 (N.Y. App. Div. 2000).

Reality check: Do not take form files, client lists, or ANYTHING besides personal property unless the firm authorizes the removal. Even copies of documents are either firm property or client property.

Reality check II: Do not start working at another firm without notifying the former firm of your resignation. Really – this happens.

Reality check III: Do not use firm resources/time to set up your new firm – including refraining from stealing telephone numbers, establishing identical websites, and diverting new clients from the current firm to the soon-to-be firm or delaying working on a client matter at the original firm, so the work can be done at the new firm.

F. Phones, Email, and Mail

It is ethically inappropriate to have the receptionist or anyone at the former firm tell callers who are looking for a lawyer who recently left the firm "we don't know where he is." That game is not professional and not acceptable.

Assure that all staff are instructed to provide the departed lawyer's phone number and assign a partner to answer any client inquiries – this is required by Ethical Rules 1.4 and 4.1.

Voicemail for the departed lawyer's direct line should be changed to note the same – "the lawyer is no long with the firm, the lawyer may be reached at the following new number but if the caller would like to speak to another lawyer at the firm, please press ___ to transfer the call to partner _____ who will be able to assist you."

Emails sent to the departed lawyer's email account should receive an automated message for a period of time, noting the departed lawyer's new address or telephone number and providing a contact person at the original firm – or just the managing partner's contact information. For example:

> *Bob Smith no longer is with the firm. Please contact partner Jane Doe at _____ for additional information.*

The managing partner (or designated attorney) then must review emails and respond promptly to explain that the lawyer no longer works at the firm. If asked, the partner must provide the lawyer's new contact information. Depending upon the practice areas, this automated message should be sent for at least 30 – 60 days after dissolution.

Law firm websites need to be changed promptly after a lawyer's departure to remove the departed lawyer's contact information.

Regular paper mail addressed to the departed lawyer at the firm should be opened to confirm if it involves a client matter that remained with the firm and if not, *promptly* forwarded to the departed lawyer unless the firm and the departed lawyer have made specific arrangements for mail from certain addresses to be opened by the firm (e.g., when a file is staying with the firm and the correspondence is from the opposing counsel's firm). Work related mail ethically must be opened and either responded to or forwarded promptly after receipt. Firms should designate a specific lawyer to review mail received for a departed lawyer to confirm if it is mail that needs to be forwarded on a client matter that went with the departed lawyer or stays with the firm for a client who stayed with the firm.

Reality check: Departing lawyers have a duty to notify EVERYONE of their new contact information, including updating State Bar records and online profiles. This should be completed within no more than two weeks after departure from firm.

Reality check: Firms have a duty to review and process communications addressed to a departed attorney and then promptly forward matters that went with the attorney.

G. Partners and Associates Leaving Must Abide By Fiduciary Duties to Firm

It is worth noting *again* that lawyers who are leaving a firm have certain fiduciary duties to the firm to not interfere with the contracts that the firm has with existing clients, to not use firm resources to set up their new firm, and to not attempt to steal away associates and staff while the lawyers are still working for the firm. As explained in the *ABA/BNA Lawyers' Manual on Professional Conduct,§ 91:707 (2005):*

> In *Meehan v. Shaughnessy*, 535 NE2d 1255, 5 Law. Man. Prof. Conduct 119 (Mass SupJudCt 1989), a distinction was drawn between the "logistical arrangements" made by partners planning their departure, and concerted efforts they made in secret, while still at the firm, to lure away some of the firm's clients immediately after the lawyers' withdrawal. The former, the court said, did not constitute a breach of the partners' fiduciary duties. They were free to make pre-withdrawal arrangements for their new firm, such as leasing office space and obtaining financing by preparing for the bank a list of clients they expected to take with them and the fees they anticipated these clients' cases would generate. But the secret plans to contact and persuade clients to remove their cases to the new firm were a violation of the departing lawyers' fiduciary duties, the court said. As partners, they were required to act in utmost good faith and loyalty toward their fellow partners, and to "render on demand true and full information of all things affecting the partnership to any partner." These duties were contravened when, in secret, the withdrawing partners prepared authorization forms and letters, on the firm's stationery, informing clients with whom they worked of their departure and failing to make clear to the clients that they could choose to keep their business with the firm rather than removing their cases to the lawyers' new firm.
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> Even after the partners made known to the partnership their impending withdrawal, they continued to violate their fiduciary duties, the court said, by sending the letters to firm

clients and to referring attorneys, and delaying giving a list to the partnership of clients they intended to solicit until after a majority of these clients had already authorized removal of their cases to the new firm. The court held the former partners would be required to pay to their former colleagues the profits the new firm earned on all cases taken from the partnership, except on those cases for which the former partners could prove that the clients had acted of their own accord in deciding to remove their cases to the new firm.

Lawyers should inform the firm's management as soon as possible if they are intending to leave. Once the partner informs management, the partner and firm should agree on a joint communication to all relevant clients. If that cannot be achieved, the departing lawyer may send a letter directly to clients, informing them about their choices. The Firm also may contact clients to inform them about their choices.

Departing lawyers must enter their time for work done while at the firm and assist the firm in running file invoices for clients. Failure to provide the firm with billable information and/or *delaying* performing work in order to have the billable time attributable to the new firm violates the lawyer's fiduciary obligations to the firm *and* the lawyer's duty of diligence in representing a client (ERs 1.3 and 3.2).

Both the firm and the departing lawyer should be professional in all written and verbal communications to clients – neither the firm nor the departing lawyer should disparage the other or offer any financial inducement to go with whichever firm.

1. Associates forming New Firms

Remember that firm resources (and TIME) cannot be used by departing attorneys to start establishing their new firm. While it is necessary for a departing lawyer to interview and/or arrange office space for a new firm while still employed at the "old" firm, lawyers cannot use old firm resources or work time for these endeavors. Nor can they copy firm proprietary information, such as forms and websites, to use for their new firm without firm consent (unless the forms are not proprietary to the firm but court or government templates). Not only is this dishonest (a violation of ER 8.4(c)) but it could be a business tort.

Attorneys may take client files and documents without specific client consent only in order to protect client interests while waiting for client confirmation on whether the client wants to go with the departing attorney or stay with the firm, if the departing attorney has primary responsibility for the matter. If a client's interests could be prejudiced by leaving a firm without, for instance, covering a hearing scheduled that week, or filing an appeal due that week, the departing lawyer, who has had primary or significant client contact, may take documents/files in order to protect the clients' interests. However, such files should be returned promptly to the firm if the client ultimately informs everyone that they want their file to stay with the firm.

2. Partnership Obligations

A partnership/shareholder agreement should include at least the following provisions to assure that measures are in place to address what happens when a partner leaves the firm:

—the expulsion of a partner
—the death of a partner
—what notice is to be given to the partnership by a withdrawing partner and timing of the notice
—the firm's right to accelerate the departure of a withdrawing partner
—the timing and method of notification of clients
—which clients will be contacted
—the content of the notice
—the retention and/or transfer of client files
—the compensation of partners upon withdrawal or dissolution, including repurchase of shares
—the formula for the distribution of profits and losses
—the payment of the capital account
—whether a withdrawing partner shall be paid any share of work in process and accounts receivable
—the method by which the practice and assets shall be valued
—the allocation of responsibility and compensation for closed files and ongoing financial obligations of firm

3. Don't place restrictions in lawyer agreements that restrict the lawyer's ability to practice. ER 5.6

Most lawyers form partnerships with other lawyers with the anticipation that you'll stay together for a while. Thus, *no one* wants to think that the severance provisions in the partnership agreement will ever be needed. The reality is that lawyers are becoming more mobile; they change locations, they change practice areas, and they change firms. A partnership agreement cannot restrict a lawyer's ability to practice law after the lawyer leaves the firm. ABA Model Rule 5.6 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. . .

That appears to be pretty clear but apparently not – at least when it comes to firms merging with each other. In a twist on the usual departing partner scenario, the D.C. Bar Legal Ethics Committee recently explained that Rule 5.6 also precludes a firm from making an agreement among partners that they won't get paid for work done *before* the merger unless they agree to stay with the merged firm. Opinion 325 (Oct. 2004) explained that it is a violation of the Ethical Rules for a partnership agreement to say that a partner forfeited his or her right to pre-merger receivables if the partner leaves the new firm within two years of the merger (unless he

dies, retires, or is sick); *See, also*, *Hackett v. Moore*, 939 N.E.2d 1321 (Ohio Ct. Com. Pl. 2010) (contract void as against public policy when it required departing lawyer to turn over 95 percent of fees from case he took with him, and finding that agreement probably infringed on client's right to choose his own counsel and likely violated Rule 1.5(e) and Rule 5.6); *but see Fearnow v. Ridenour, Swenson, Cleere & Evans P.C.*, 138 P.3d 723 (Ariz. 2006)(upheld partnership agreement that required departing lawyer to turn over stock to firm for no compensation as a reasonable disincentive to leaving the firm to practice elsewhere).

As for associates leaving, Arizona Opinion 09-01 clarified that a firm may not "charge" a departing associate $3500 for each client matter the associate (and client) want to take – such a penalty clause to be paid before the associate may take the matter would violate ER 5.6 as a restraint on the lawyer's ability to practice as well as the client's choice of counsel.

However, reasonable fee-splitting provisions in firm partnership/shareholder agreements may be upheld and most likely will not violate ER 5.6. *See Miller v. Jacobs & Goodman PA*, 699 So. 2d 729 (Fla. Dist. Ct. App. 1997); *McCroskey, Feldman, Cochrane & Brock PC v. Waters*, 494 N.W.2d 826 (Mich. Ct. App. 1992); *Barna, Guzy & Steffen Ltd. v. Beens*, 541 N.W.2d 354 (Minn. Ct. App. 1995); *Groen, Laveson, Goldberg & Rubenstone v. Kancher*, 827 A.2d 1163 (N.J. Super. Ct. App. Div. 2003); Maryland Ethics Op. 89-29 (1989).

II. Additional Ethical Duties When Switching Firms

A. Duties of Lawyers Interviewing With Other Firms – Check for Conflicts

> *Hypothetical: You are interviewing with Aye, Bigge & Cable for a lateral position in their corporate litigation section. While interviewing with partner Aye, she asks you what cases you're currently working on. What can you say?*

Ethical Rule 1.6 prohibits disclosing "information relating to the representation of a client" unless the client consents to the disclosure or one of the exceptions to the confidentiality rule applies. This ethical duty is far broader than the evidentiary rule on attorney/client privilege. A lawyer's duty of confidentiality will even include the client's identity and whereabouts. *See In re Goebel*, 703 N.E. 2d 1045 (Indiana 1998).

However, ER 1.6 changed January 1, 2015 to permit the disclosure of client names ONLY for the purpose of checking for conflicts at a new firm – that disclosure should be limited to only the individuals at the potential new firm who need to check for conflicts. Note too that Arizona Ethical Rule 1.10 regarding imputed conflicts, changed effective January 1, 2016, to permit screening in more situations where opposing counsels join firms.

Conclusion: Be very careful when interviewing to disclose only client names to clear conflicts or have client(s) consent to the disclosure. Otherwise, the interviewing firm should first confirm whether it is adverse to the lawyer's current law firm and then discuss with the lawyer whether there are specific matters that the interviewing lawyer *knows* are adverse and on which the lawyer has worked.

Reality check: When interviewing, lawyers should request confirmation from the new firm that the firm will only use information about the lawyer's clients to clear conflicts and not for any other purposes – and that the list of client names will be circulated only to the employees who have a need to know to clear the conflicts.

B. Law Firm Due Diligence When Hiring Laterals

In addition to confirming that a lateral is not an opposing counsel on pending litigation that could conflict the firm, law firm management *always* (no matter the size of the book of business) conduct basic due diligence for every lateral interviewee, including checking at least the following:

- Any pending malpractice/legal negligence claims (including demands without filed litigation);
- Any pending lawyer disciplinary charges – in any jurisdiction;
- Any court ordered sanctions against the lawyer (not their clients);
- Any bankruptcies filed in the past five years;
- Any civil litigation pending against lawyer;
- Number of suits filed by lawyer against former clients for fees;
- Any other government investigations involving lawyer conduct (Attorneys General, SEC, Department of Justice, IRS, INS, etc.);
- Any criminal convictions or charges that could affect law license;
- Status of bar license in each jurisdiction where admitted;
- Amount of A/R over 90 days old;
- Any employment law claims against attorney in past five years;
- Any ancillary business ownership;
- Any pro bono or nonprofit board service that could cause a conflict; and
- Any government investigations involving businesses or nonprofit associations in which the lawyer is an officer/owner/board member.
- Any trial dates set in the next six months for which clients will *not* be able to pay a trial fee deposit.
- Social media presence: What do they post? Where do they post? Do those posts identify their employment?

Checking all of these items requires not just taking the lateral lawyer's word for these answers, but actually reviewing court and Bar records. More than a few firms have suffered financially, ethically, and reputation harm by hiring someone who assures them they have no "problems," only to find out after they join the firm that they are being sued/disbarred/prosecuted, etc…

C. Screening an "Infected" Lateral Hire

Arizona Ethical Rules 1.10 and 1.18 now permit screening of lawyers with certain types of conflicts. ER 1.10(d) *previously* permitted screening a lawyer who has a former client conflict *as long as,* among other things, it was not a litigation matter in which the conflicted lawyer played "a substantial role." The U.S. District Court for the District of Arizona helped define what constitutes "a substantial role" in February in *Eberle Design, Inc. v. Reno A & E,* 2005 U.S. Dist. LEXIS 2323 (D. Ariz. Feb. 8, 2005). The court determined that a lawyer's drafting

of *voir dire* questions and billing only 9 hours of time to the former client did not constitute a "substantial role." Nevertheless, in unreported decisions in Maricopa County Superior Court, judges have disqualified a firm that hired an associate who simply worked on pleadings but had no client contact. Thus, whenever a firm hires a lateral attorney, the firm should assure that it checks for conflicts *before* extending an offer….

However, Arizona ER 1.10 was amended, effective January 1, 2016 and now provides that a lateral lawyer with a conflict may be screened from infecting everyone in the new firm – without seeking the former client's consent – if:

> (d) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under ER 1.9 unless:
>
> > (1) the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9;
> >
> > (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
> >
> > (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule, including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the former client's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the former client about the screening procedure; and
> >
> > (4) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its client.

Note too that the Comments to ER 1.10 also were amended to clarify that if a lawyer leaves the firm and no one remaining at the firm worked on a matter, and the only information remaining at the firm about the matter is data or file documents, that data and file information can be screened from imputing the former client conflict to everyone in the firm.

Assuming that a conflict from a lateral hire is one that can be screened, the screening procedures according to ER 1.10 must include the following:

1. *Prompt* notice to the affected client that the conflicted lawyer has been screened (and what those screening procedures include).
2. Notice to all staff regarding the lawyer or staff person who is screened.

3. Physical notice of the screen in both the paper and electronic file of the conflicted matter identifying who is screened and who should be contacted if there are any questions about accessing the data.

This assumes that the conflict is one that is screenable and that the other lawyers in the office will not have their independent professional judgment materially limited by the screened lawyer's conflict. In order to be effective, screening must occur as soon as the conflict is known and must be thorough.

A thorough screen should assure that:

- *all* firm staff have been notified of the screen,
- measures are implemented to lock out the infected lawyer or employee from the document database,
- measures must be implemented to assure that the infected lawyer not receive emails or voicemails that discuss the matter (e.g., an email sent to all partners discussing a matter must not be sent to the infected lawyer),
- notice to all staff that they cannot discuss the screened matter with/in the presence of the screened lawyer,
- the screening notice is resent periodically to all staff, and
- the paper file must have a written warning and should be in a secure location, such as an attorney's office or locked file cabinet (not stored in the general file room).

Note again that the "prompt" notice to the affected client must identify what screening precautions have been implemented.

III. Other Law Firm Transitions

A. Merging One Firm Into Another

When two firms "marry" the first thing they must do before walking down the aisle and signing the marriage/partnership agreement, is to check for conflicts.

- **When two firms are considering merging, you *will need to clear conflicts.***

In *Kinzenbaw v. Case LLC*, No. C 01-133 LRR, (N.D. Iowa 5/20/04), a court refused to disqualify a firm that only learned two years after a merger that it had a conflict of interest caused by merging with an opposing firm – but this should *not* be relied upon to ignore checking for conflicts prior to merging. In 2002 Cahill, Christian & Kunkle was acquired by Perkins Coie. At the time Perkins Coie had numerous offices. Lawyers in Perkins Coie's Seattle office were representing Case Corp. on a variety of matters. Cahill's Chicago office was representing a company named Kinze. When the merger occurred the conflict check

between Cahill and Perkins noted that there might be a conflict with Case but for some unknown reason the red flag was not investigated further. After the merger Seattle lawyers of Perkins continued to represent Case, while Chicago lawyers of former Cahill – now Perkins, represented Kinze - against Case.

When Perkins ultimately learned of the conflict in 2004 all work for *both clients* was frozen until Perkins could investigate the matter. Several months later the firm terminated its relationship with Case and the Chicago Cahill/Perkins lawyers continued to represent Kinze.

Ruling upon Case's motion to disqualify Perkins, the court declined to disqualify the firm even though it did find that the firm violated DR 5-105 (Iowa's conflict of interest rule) because the court concluded that disqualification is only one of several different sanctions that can be imposed for a conflict and the hardship that would be imposed upon Kinze for losing its counsel of choice would be too great. The court explained that a conflict of interest does not mean per se disqualification. In this matter Perkins lawyers did not represent Case on any matters that were related to the litigation and did not have confidential information that could be used against Case.

This case presents a practical reminder: when two firms are considering merging, you will need to provide both your current and former client lists to check for conflicts. Either one lawyer from each firm or a committee of lawyers in each firm must be assigned responsibility for investigating and resolving all potential conflicts that appear when the client lists are cross-referenced. Only the information necessary to check for conflicts should be disclosed to the committee. The due diligence checklist for pre-merger should include a memo from that committee/lawyer, confirming that all potential conflicts have been resolved and providing copies of letters to affected clients obtaining their "informed consent" to waive the conflicts or memos to the file explaining the committee's conclusion on why the firm does not need to obtain such waivers.

- **Notice to Clients of Firm Merging Into Another Firm**

Once the decision is made to merge an existing firm into another or for a sole practitioner to join a larger firm, the moving lawyer needs to notify clients – and *ideally* obtain their consent. "Ideally" because assuming there are no actual conflicts of interest in joining the large firm, clients nevertheless may not want to go to another firm.
Thus, moving lawyers need to inform clients, in advance of a move, that: a) the lawyer will be joining XYZ Firm as of ___date; b) that the fee terms *will remain the same as the current fee arrangement*; c) that even though the fees are staying the same, the new firm will send client a confirming letter; and d) moving lawyer will continue to have responsibility for the file. That written notice (letter or email) should ask the clients to call moving lawyer if they have any questions. It is not necessary, ethically, to get client consent for the transition because it will be the same lawyer working on the matter. So the notification letter should be simply that – notice – and not ask for permission. The default will be that all clients move with the lawyer <u>unless</u> a client expressly asks not to go to the new firm.

- **Former firm bank accounts, website, telephone number, etc.**

When a firm dissolves with the lawyers either going to other firms, forming their own firms, or retiring, the former firm will continue to "live" for at least several months if not a year, in order to collect receivables owed to the former firm, refund unearned advances to former clients, and generally wind down business affairs. Accordingly, bank accounts (trust and operating) as well as internet presence may continue to exist but at least with respect to the former firm's website, there should just be a home page that notes when the firm ceased to operate and how to contact the lawyers from the former firm. Depending upon the number of equity owners of the former firm, the owners may agree to have links to their new firms, to facilitate people finding them. Similarly, when a firm ceases to operate, notify the State Bar and assure that all lawyers update their contact information with the State Bar (and all courts).

B. Selling a Law Firm

In 2003 the Ethical Rules were amended to permit the sale of law firms….with very specific requirements. The new Rule provides:

> A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:
>
> (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area(s) in which the practice has been conducted;
> (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
> (c) The seller gives written notice to each of the seller's clients regarding:
> (1) the proposed sale;
> (2) the client's right to retain other counsel or to take possession of the file; and
> (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.
> If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.
>
> (d) The fees charged clients shall not be increased by reason of the sale.

These criteria are similar to when a lawyer leaves a firm: the clients are not chattels – they get to decide who will be their lawyer *and* their fees cannot be increased because of the change.

In order to sell an entire practice (or practice area) under ER 1.17, the selling lawyer must cease practicing law in that area (whether geographic or substantive). Ariz. Op. 06-01 provides that the written notice of sale sent to clients also may include the seller's reason for selling the practice, why the seller selected the particular purchaser, and a recommendation that the client agree to the sale.

- **Firm Name**

The firm may continue to use the name of the lawyer selling the practice *if* the selling lawyer ceases to practice in that geographic area and practice areas. If the lawyer continues to practice elsewhere, there may be a difficulty in continuing to use the lawyer's name, as this could generate client confusion over ownership and whether the selling lawyer is still involved with the firm.

- **Structuring Payment for a "Firm"**

When documenting the sale of a practice be careful about the ethical issues in sharing legal fees with lawyers who are not in the same firm (ER 1.5(e)) and sharing fees with nonlawyers (ER 5.4). Rarely will the buyer of a law firm have the money to pay the full value in cash. Frequently the seller and buyer must negotiate deferred payment arrangements. If the deferred payments appear to be a percentage of the future fees earned on clients "purchased" as part of the practice, this could run afoul of ER 1.5(e). *See ABA/BNA Lawyers' Manual on Professional Conduct at §91:815(2015); Iowa Op. 96-5 (1996)*(no payment of percentage of future fees but can agree to structured installment payments)*; NY State Ethics Op. 699 (1998)(*lawyer leaving firm to become a judge cannot receive ongoing percentage of fees from firm)*; But see Kansas Op. 93-14 and Phila. Op. 96-1 and Supp. Op. 96-1(*1996)(selling lawyer may get percentage of revenue over period of time for sale of clients, with client consent).

- **Intra-firm Transfers**

ER 1.17 does *not* apply to transfers of interests/shares within a firm. *See* North Carolina Ethics Op. 98-6 (1998) (transfer of shares in firm from retiring partners to remaining lawyers employed by firm is not subject to Rule 1.17); *see also Chance v. McCann*, 966 A.2d 29 (N.J. Super. Ct. App. Div. 2009) (partner who was retiring from firm was not obligated by Rule 1.17 to notify clients for whom he did legal work).

- **Sale of Just tangible assets**

The *ABA/BNA Lawyers' Manual on Professional Conduct at §91:809(2015)* further explains that the sale of *just* physical assets of a company are not subject to ER 1.17:

> The sale of tangible assets of a law practice—including real estate, law books, office equipment, and even accounts receivable—has long been allowed in all jurisdictions. Such a sale simply does not implicate the rule on sale of a law practice. Model Rule 1.17 cmt. [14]. Several states, including California, Illinois, New Jersey, and Pennsylvania, make this point in the text of their versions of Rule 1.17.

Caution! Arizona Ethics Opinion 98-05 *prohibits* a lawyer from selling accounts receivable to a "factor." While there are no Arizona ethics opinions interpreting whether the sale of *just* accounts receivable to another lawyer is subject to ER 1.17, it should be presumed that such a sale should comply with the Rule.

- **Seller Assisting With Transition**

As of 2014, the State Bar of Arizona ethics opinions and Rule 1.17 *did not contemplate* a selling lawyer continuing to practice with the firm, after the sale, to assist with transitioning clients – either as a contract lawyer or "of-counsel" or associate. Once the selling lawyer sells the practice, the Rule contemplates the lawyer *ceasing to practice* in that geographic area and practice area.

However, ABA Opinion 14-468 acknowledges that selling lawyers should continue to assist the firm in transitioning clients for a period of time after the sale – and the Opinion acknowledges that such assistance is consistent with the duties owed to clients and permissible under the Ethical Rules.

- **Death/Incapacity of a Lawyer**

Law firms with more than one lawyer always should have provisions for what happens to handle client matters if a lawyer passes away or becomes incapacitated for an extended period of time. Law firms with more than one lawyer usually do not have significant ethical issues regarding deaths within the firm. Solos must have back-up counsel who can come into the firm and notify clients of the lawyer's incapacity, file for extensions of time and/or obtain new counsel for clients. Remember that partnership/shareholder interests may be paid to the estate of the deceased lawyer, pursuant to ER 5.4(a) even if this means the money will be paid to a non-lawyer surviving beneficiary.

**Note that the Arizona Supreme Court amended Supreme Court Rule 41(i), effective January 1, 2016 to *require*:

> (i) To protect current and former client interests by planning for the lawyer's termination of or inability to continue a law practice, either temporarily or permanently.

Sole practitioners should notify clients, in the fee agreement, that the lawyer has back-up "assistance counsel," in the event of the solo's death or disability, who will contact clients to transition their files.

Attached to this article are a checklist of considerations for succession planning and a short form notice of "assisting attorney" information.

For additional forms and resources on succession planning, visit the State Bar website: http://www.azbar.org/professionaldevelopment/practice20/successionplanning/

Sample Letter to Clients from a Departing Attorney

(this letter may be sent by both the departing lawyer and current firm, just the departing lawyer, or just the current firm)

Dear [client]:

Effective [date], _____ [departing attorney] will be leaving [name of old law firm] to pursue different opportunities and joining [name of new firm].

The decision as to who represents you and who handles your legal matters in the future is completely yours. Accordingly, please:

(1) Check the appropriate statement below that reflects what you prefer and return the form in the envelope provided; and
(2) Retain one of the two copies of this letter for your records.

To best protect your interests and promote continuity of representation, please respond by_____ [**insert specific date only a week out**].

If you have any questions about this, please contact either [name of departing attorney] or [name of managing partner].

Sincerely,
[name of departing attorney and/or managing partner]

Client Choices
[**option: ask clients to email the firm with their choice of counsel]**:

[ ] I wish to continue being represented by [departing attorney]. Please transfer to [him/her], at his new address, any records, files, advanced fees and costs held in trust, and any other property in the possession of [name of former firm] as quickly as possible. I understand that the firm will provide me with a final accounting of fees earned by the firm and will transfer any remaining trust balance to [departing attorney] within 60 days of the transfer of the file after earned fees have been deducted from my trust balance.

[ ] I wish to continue being represented by [name of firm]. Please have a firm representative contact me to discuss continuing the representation.

_____ _____ ___/___/___
Client Printed Name Signature Date

CHECKLIST FOR LAWYER SUCCESSION PLANNING

Consider these basic steps to assure your firm and your clients are covered by an "Assisting Attorney" in the event of your death, disability, or incapacity to practice law.

1. Use fee agreements that explain to clients that you have arranged for an "Assisting Attorney" to close your practice in the event of death, disability, impairment, or incapacity. An example of language you should incorporate into your fee agreement is available on the LOMAP portion of the State Bar website.

2. Have a thorough and up-to-date office procedure manual that includes information on:

   a. How to check for a conflict of interest;
   b. How to use the calendaring system;
   c. How to generate a list of active client files, including client names, addresses, and phone numbers;
   d. Where client billing is kept;
   e. How the open/active files are organized;
   f. How the closed files are organized and assigned numbers (and where is off-site storage located);
   g. Where the closed files are kept and how to access them;
   h. The office policy on keeping original client documents;
   i. A list of all current contracts the firm has with any vendors (IT company, Lexis/Westlaw, online subscriptions, voluntary bar associations, subscriptions, copy service, cleaning service, process server)
   j. Where the safe deposit box is located and how to access it;
   k. The bank name, address, account signers, and account numbers for all law office bank accounts;
   l. The location of all law office bank account records (trust and general);
   m. Where to find, or who knows about, the computer passwords including email password;
   n. How to access your voice mail (or answering machine) and the access code numbers;
   o. Names and telephone numbers for: landlord, malpractice carrier, estate planning lawyer, accountant, IT company, storage company, banker, emergency contact, and a list of all memberships in professional organizations;
   p. List of all internet sites that are the property of the firm including websites, social media sites, blogs, etc. and contact information for webhost;
   q. Where the post office or other mail box is located and how to access it.

3 Confirm all client deadlines (including follow-up deadlines) are calendared.

4. Keep client files organized, up to date, and RETURN original documents to clients.

5. Keep your time and billing records up-to-date.

6. Attach the written agreement you have with an attorney who will close your practice (the "Assisting Attorney") that outlines the responsibilities involved in closing your practice. Determine whether the Assisting Attorney will also be your personal attorney.

7. If your written agreement authorizes the Assisting Attorney to sign general account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event. In some instances, you and the Assisting Attorney will have to sign bank forms authorizing the Assisting Attorney to have access to your general account**.**

8. If your written agreement provides for an Authorized Signer for your trust account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event. In most instances, you and the Authorized Signer will have to sign bank forms providing for access to your trust account. Choose your Authorized Signer wisely; he or she will have access to your clients' funds.

9. Familiarize your Assisting Attorney with your office systems and keep him or her apprised of office changes.

10. Introduce your Assisting Attorney and/or Authorized Signer to your office staff and confirm your staff know where you keep the written agreement and how to contact the Assisting Attorney and/or Authorized Signer if an emergency occurs before or after office hours. If you practice without regular staff, make sure that Assisting Attorney and/or Authorized Signer knows whom to contact (the landlord, for example) to gain access to your office.

11. Inform your spouse or closest living relative and the personal representative of your estate of the existence of this agreement and how to contact the Assisting Attorney and/or Authorized Signer.

12. Review and renew your written agreement with your Assisting Attorney and/or Authorized Signer annually.

13. Give the Assisting Attorney a copy of the keys to your office, mailbox, and necessary access codes.

14. List all electronic devices on which firm data may be located, and who is supposed to have possession of the devices and the passwords for all software and devices.

NOTICE OF DESIGNATED ASSISTING ATTORNEY

I, _____, have authorized the following attorneys to assist with the closure and/or temporary coverage of my practice to perform all actions/transactions necessary to transition client files to other counsel, notify all necessary organizations/people, and perform such other activities as is necessary to manage my firm:

Name of Authorized Assisting Attorney: _____
Address: _____
Phone Number: _____
Email:

Name of Assisting Attorney's Alternate: _____
Address: _____
Phone Number: _____
Email: _____

_____ _____
[Affected Attorney] Date

_____ _____
[Assisting Attorney] Date

_____ _____
[Alternate Assisting Attorney] Date

Copies of This Authorization Have Been Sent to:

- Professional Liability Insurance Carrier:_____
  (Contact Number:_____)
- Personal Representative of Estate:_____
- State Bar Membership Records:_____
- Estate Planning Counsel: _____

KEEP THIS DOCUMENT CURRENT AND RETAINED WITH OTHER IMPORTANT FIRM RECORDS.