

January 2020 Multnomah Lawyer Ethics Focus

**New Year, New Beginning:
Leaving a Law Firm**

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Advising lawyers and law firms on legal ethics and risk management isn't typically a seasonal business. There is one facet, however, that does have a seasonal dimension: lawyers seem to leave their firms disproportionately in January. My suspicion is that this is tied to a corresponding seasonal aspect of the traditional law firm compensation calendar. Many firms distribute bonuses and firm profits at the end of the year or in early January. Many firms also announce their compensation schedules for the coming year around that same time. Lawyers who are considering leaving a firm to either move to another firm or to start their own will often wait until they have received their year-end distribution in January before making the move.

In this column, we'll look at three related issues when lawyers are on the move. *First*, when should clients be notified? *Second*, how are file transfers handled if the clients concerned move their work with the departing lawyer? *Third*, what are the conflict rules involved? By looking at these three, I don't mean to exclude others such as how firm receivables and contingent fee revenues may be divided. The entitlement to fee income, however, is ordinarily determined by looking to the partnership or shareholder agreement concerned or the attorney lien statutes in the absence of a controlling contract.

With all three, we'll examine the questions within the context of the two leading ethics opinions in the Northwest: OSB Formal Opinion 2005-70, which was updated in 2015; and WSBA Advisory Opinion 201801, which was issued in 2018. Both, in turn, borrow heavily from ABA Formal Opinion 99-414, which, despite being over 20 years old, remains a key resource in this area.

Notifying Clients

Under the Oregon and Washington versions of the “communication rule”—RPC 1.4 in both states—lawyers have a duty to keep their clients reasonably and timely informed of material events in the matters they are handling. The departure of the lawyer who is the client’s principal firm contact or another firm lawyer who is the primary handler of the client’s work on a matter fits this definition. The Oregon and Washington opinions note that this is a duty shared by both the firm and the departing lawyer.

Often, notice is accomplished through a joint letter to clients asking for instructions on whether, in light of the departure, they would like to keep their work at the firm, move it with the departing lawyer or transfer it to an entirely new firm. Although a joint letter is described as the “preferred” approach, the opinions acknowledge that the dynamics of a given situation may warrant separate notification. The PLF has sample forms for each on its web site.

While the departing lawyer remains at the old firm, the lawyer's fiduciary duties to that firm may limit the scope of the competitive information the lawyer can provide absent specific client questions. Once a lawyer has left the old firm and those fiduciary bonds no longer apply, however, the lawyer is generally free to provide more detailed competitive information—as long as it is truthful.

Both the Oregon and Washington opinions note that the question of whether a departing lawyer may inform clients before telling the lawyer's soon-to-be old firm is controlled by fiduciary law and the particular facts involved rather than the RPCs. Regardless, neither the departing lawyer nor the firms involved are permitted to engage in misrepresentation.

Transitioning Files

The Oregon and Washington opinions on lawyer departures both summarize but ultimately defer more detailed discussion of file transitions to their counterparts that address this topic comprehensively—Formal Opinion 2017-192 in Oregon and Advisory Opinion 181 in Washington. The latter opinions define the term “file” broadly to include both paper and electronic components, generally require that the entire file be transferred to new counsel (subject to a few exceptions) and conclude that a client's need for the file ordinarily trumps a firm's lien rights. Both opinions also permit the old firm to keep a copy of the file for risk

management purposes to document the state of the matter concerned at the point it left the firm.

Handling Conflicts

Oregon RPC 1.6(b)(6) and Washington RPC 1.6(b)(7) were both amended comparatively recently to make clear that a lawyer is generally permitted to provide a prospective new firm with a list of clients and matters so that the new firm can run conflict checks. Advance planning on this front can be critical to avoiding potentially expensive disqualification litigation.

When a lawyer leaves an old firm and does not bring clients along, the old firm's clients become the lawyer's former clients under RPC 1.9. Both the Oregon and Washington versions of 1.10 permit the new firm to unilaterally screen an incoming lawyer who has worked opposite the new firm in an ongoing matter so that the incoming lawyer's potentially disqualifying former client conflict will not be imputed to the new firm.

If a lawyer is bringing clients, a conflict check is equally important. If the firm is opposing those clients on other matters, appropriate waivers must be obtained. Under the so-called "hot potato rule," firms are generally not allowed to "pick and choose" clients in this scenario or to "fire" one client to "cure" a conflict with a more economically attractive one.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.