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## Changing Teams: Moving from One Firm to Another

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The Alaska Bar issued an ethics opinion in September outlining the ethical obligations lawyers face when changing firms. After 20 years at the same professional home, I started a new firm in October with my long-time trial partner. Launching a start-up gave me first hand experience with the issues involved in moving from one firm to another. In this article we'll look at three. *First*, when can you ask your clients to come with you? *Second*, how are file transfers handled? *Third*, what are the conflict rules involved?

The new Alaska opinion—2005-2—is available on the Bar's web site at [www.alaskabar.org](http://www.alaskabar.org). It, in turn, adopts in abbreviated form an ABA opinion on the same subject: ABA Formal Ethics Opinion 99-414 (1999). The ABA opinion is available on the ABA Center for Professional Responsibility's web site at [www.abanet.org/cpr](http://www.abanet.org/cpr).

### ***When Can You Ask Your Clients to Come with You?***

In leaving a firm, a lawyer's first duty is to his or her clients. At the same time, a lawyer also owes fiduciary duties to the soon-to-be-old firm. Therefore, the scope of notice to clients varies depending on the lawyer's exit strategy.

If the lawyer announces an intention to leave but will remain at the firm for a transition period, the lawyer's continuing fiduciary duties to the firm constrain

the content of the client notification. In this scenario, the notice can come from the departing lawyer, the old firm or jointly. Its content is generally limited to:

- “(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.” 2005-2 at 2.

If the client requests additional information about the departing lawyer’s new firm, the lawyer can then provide further information such as the new firm’s rates and resources.

By contrast, if the lawyer tenders his or her resignation effective immediately the lawyer is no longer constrained by fiduciary duties to the old firm.

In this scenario, the lawyer is free to communicate unilaterally with the client because RPC 7.3(a) allows a lawyer with a prior professional relationship with a client to solicit the client directly for business. And, as long as the lawyer's statements to the client are truthful, the lawyer is equally free to immediately describe the new firm's rates and resources and let the client know of the new firm's interest in continuing the client's work.

Under either scenario, however, the decision to leave the work at the old firm, move it to the new firm or seek entirely new counsel remains the client's alone. Again under either scenario, both the old firm and the new one must manage the transition so that the client's interests are at all times protected fully.

***How Are File Transfers Handled?***

If a client decides to have the departing lawyer continue handling the client's work, the old firm (assuming that there is no lien for unpaid fees) must relinquish the client's file and other property to the departing lawyer on the client's direction. 2005-2 at 4. The Alaska Bar has three principal ethics opinions dealing with file transition issues: 95-6, which addresses a lawyer's possessory lien rights over a client's file; 2003-3, which governs file transition generally; and 2004-1, which applies the other two in the context of expert and investigators' reports.

95-6 notes that a client's need for a file "trumps" a lawyer's lien rights under AS 34.35.430. Therefore, if the client needs the file, 95-6 counsels that

the old firm must turn it over notwithstanding the old firm's otherwise valid possessory lien rights.

2003-3, in turn, outlines what must be transferred and takes the position that the client should generally be entitled to the entire file subject to narrow exceptions. The primary exceptions are for a third party's materials that a lawyer placed in the file for the lawyer's convenience and items that go to the business relationship between the lawyer and the client rather than to the representation itself. A legal research memo prepared for another client dealing with the same issue is an example of the former and a conflict check or collection note that the lawyer did for the lawyer's own purposes are examples of the latter.

2004-1 reiterates the general position that the client is entitled to the entire file and applies that to expert and investigative reports. It echoes 95-6 by noting that the client's need for these materials takes priority over the old firm's possessory lien rights.

All three of these opinions are available on the Alaska Bar's web site at [www.alaksabar.org](http://www.alaksabar.org) and were outlined in more detail in an article I did for the January-March 2004 issue of the *Bar Rag* called "Parting Company: Who Gets What When Lawyers and Clients Split."

### ***What Are the Conflict Rules Involved?***

When a lawyer leaves a firm and takes all of the client's work, that client then becomes a former client of the old firm. RPC 1.10(b). At that point, the

lawyer's old firm may represent clients adverse to the former client unless, under RPC 1.9, the proposed new matter is substantially related to a matter that the old firm handled for the former client or would involve the use of the former client's confidential information adversely to the former client. As with all former client conflicts, however, this prohibition can be waived. RPC 1.9, 1.10(c). Moreover, under RPC 1.10(b), if all of the lawyers who worked on the former client's matter have left the old firm and the firm no longer has the former client's file, then the old firm no longer has a former client conflict. If the lawyer joining a new firm wants to bring a client with the lawyer that would create a conflict with a client of the new firm, then those clients must both consent under RPCs 1.7 and 1.10(a).

### ***Summing-Up***

Changing firms presents challenges and occasional tensions for both the "old" firm and the "new" one. Alaska Ethics Opinion 2005-2 and ABA Formal Ethics Opinion 99-414 stress that for both the "old" and the "new," protecting the client's interests during any transition should be the paramount objective.

### **ABOUT THE AUTHOR**

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