

Minimizing Disruption from Attorney Departures in Ongoing Cases – The Client-Centered Approach –

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An attorney's departure from a law firm in the middle of an ongoing matter can be a significant disruption—both legally and emotionally—for the affected client. The client is confronted with the unwanted choice between remaining with the firm, leaving with the departing attorney who had primary responsibility for the client's matter, or retaining new counsel that will have the unenviable task of quickly learning a case that could have years of history.

The departing attorney and the law firm each have ethical duties to the client in connection with the departure that take priority over their own competing interests.¹ This article explores the contours of the ethical duties that the departing attorney and the law firm owe to the client in an ongoing matter and provides practical guidance on how to best protect the client's interests during such transitions.

The Client's Right to Choose Counsel

In California, the client's right to the counsel of their choice has a long history and derives from the principle that a client, with or without cause, may freely discharge the attorney and hire another.² Moreover, law firms are not the owners of their client matters.³ The client owns their matter. The most a law firm has is an expectation of future business.⁴ Thus, when an attorney leaves a law firm, neither the law firm nor the departing attorney can claim priority over the client matter. The fundamental principle underlying departure scenarios is that the client has complete freedom to choose to remain with the law firm, leave with the departing attorney, or abandon both in favor of new counsel.

Accordingly, the protection of the client's choice of counsel in particular and the client's interests in general are central to the working out of the ethical obligations of the departing attorney and the law firm. The departing attorney's change of employment does not by itself terminate the representation of the client.⁵ Rather, the departure of the attorney from an ongoing representation implicates several ethical duties, such as the duty of competence, communication and confidentiality. Other ethical considerations relating to transitioning the client matter include of cooperation between the departing attorney and the law firm, screening for conflicts of interest, the disposition of the client file and withdrawal from the client matter. Each of these ethical duties and considerations will be further explained below.

The Client-Centered Approach to Attorney Departures

The first step in the "client-centered" approach to attorney departures is understanding that both the departing attorney and the law firm have several distinct ethical obligations to all clients who will be materially affected by the departure.⁶ Whatever the role of the departing attorney (e.g., partner, associate, "of counsel", etc.), the applicable ethical obligations are the same.⁷ Further, if a conflict arises between a departing attorney's and/or the law firm's obligations to each other and their ethical obligations to a client, the latter should always prevail. This means any conduct or procedure that interferes or even delays the fulfillment of ethical obligations by the departing attorney or the law firm is prohibited and may even become ethical misconduct.

1. The Duty of Competence

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When a client decides to remain with the law firm, consistent with the duty of competence the law firm must determine whether, after the departing attorney leaves, there will be any attorney remaining in the law firm with the experience, knowledge and ability to handle the affected client's matter.⁸ If the client elects to continue the representation by the departing attorney, then the departing attorney must ensure that when the client's matter is transferred to the new firm, the departing attorney will still have the skill, support and resources necessary to handle the matter at the new firm. Finally, if neither the departing attorney nor the law firm will have the ability to handle the affected client's matter with competence, Rules of Professional Conduct, rule 1.1(c) requires that they associate with or professionally consulting another lawyer whom they reasonably believe to be competent, acquire sufficient learning and skill before performance is required, or refer the matter to another lawyer whom they reasonably believes to be competent.⁹

Another aspect of the duty of competence is the supervision of attorneys by any attorney with managerial authority.¹⁰ Since November 2018, the duty of supervision has been promulgated in rules, 5.1, 5.2 and 5.3. The application of the supervisor/subordinate rules in departure situations would require attorneys with managerial authority to "...make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act."¹¹ In addition, the supervisory attorney could not take action to prevent or otherwise obstruct the departing attorney in complying with their ethical obligations during a departure.¹² Finally, although any subordinate departing attorney is permitted, but not required, to take action pursuant to a supervisory attorney's reasonable resolution of an arguable question of professional duty, that attorney's compliance with the Rules of Professional Conduct and the State Bar Act will be evaluated independently despite the fact that the attorney acts at the direction of another lawyer or other person.¹³

2. The Duty of Communication

The departure of an attorney who has been providing meaningful legal services on a client matter is a "significant development" with respect to the affected client. California Rules of Professional Conduct, rule 1.4(a)(3), states:

A lawyer shall...keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed...

Accordingly, pursuant to rule 1.4(a)(3), the departing attorney and the law firm must inform any affected clients about the attorney's departure as soon as reasonably practicable to allow the affected client to make an informed choice of counsel as well as minimizing the disruption and avoiding foreseeable prejudice to the affected client.¹⁴

The departing attorney must give notice of the departure to any client whose matter the departing attorney is responsible for or plays a principal role in the law firm's representation to date. In addition, any client the departing attorney reasonably believes may want to transfer its files to the new firm should also receive notice of the attorney's departure.¹⁵ Whether a client should be informed of the departure must be viewed from the client's perspective. In this manner, communications with the client will always be "governed by the overall principle of what is in the best interest of the client."¹⁶

In addition, whenever practicable, the departing and the law firm should agree to provide a joint written notice to all affected clients. In situations where the departure is not amicable, or if there is no agreement

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on the language contained in the joint notice or a party is using the time needed to draft the joint notice to delay formal client notification, unilateral notice will then be required.

Whether joint or unilateral, the notice should provide the client with enough information to allow the client to understand both the significance of the departure on the representation, and to allow the client to make an informed decision regarding the representation going forward.¹⁷ Thus, at a minimum, the notice should inform the client:

- That the departing attorney is leaving the law firm;
- The timing of the departing attorney's departure;
- The departing attorney's current and new contact information after departure;
- The ability and willingness or inability and unwillingness of the departing attorney and the law firm to continue to represent the client;
- The client's options should be spelled out (i.e., the client may choose to stay with the law firm, go with the departing attorney or choose a new attorney or law firm);
- Who will be handling the client's matter until the client expresses a choice; and
- The location of the client's file at all times.

3. The Duty of Confidentiality

During any such transition or departure, due consideration should be given to the obligations to protect client confidences. There may be tension between the duty of confidentiality and other ethical duties the departing attorney and the law firm face during any departure, but every attorney involved must make efforts to manage this tension in the transition to protect and preserve confidential client information.¹⁸ This duty often is implicated when a departing lawyer must check for conflicts with a potential new law firm; however, it can also arise in the context of communicating with a new firm before, during and after the departure.

4. Cooperation in Transitioning the Client Matter

As discussed above, pursuant to the duty of competence (and rule 1.1) both the departing attorney and the law firm have ethical obligations to ensure any affected client matters continue to be handled diligently and with competence during the transition period of the departure. As a practical matter, this means the departing attorney and the law firm must cooperate with each other during the transition process to protect the clients' interests.¹⁹

For example, prior to any departure the departing attorney should cooperate with any reasonable law firm protocols and requests for information to help the law firm evaluate its capacity to continue to service any client, facilitate the transition or comply with the law firm's ethical obligations to clients. The law firm should not cut off access to documents or information needed by the departing attorney to carry out the continued representation or take away/re-assign the affected client's case from the departing attorney unless the client has already made the choice to stay with the law firm.

5. Considerations Regarding Conflicts of Interest

A detailed conflicts check must be conducted with respect to the departing attorney's client relationships and those of the new firm during any attorney transition, as several potential conflict issues may arise. This conflicts check should not only reveal whether any of the departing attorney's clients have a conflict

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or a potential conflict with the new firm, but also whether any of new firm's current or former client relationships present a conflict for the departing attorney.

Further, the duty to maintain client confidences and the duty to avoid conflicts of interests with clients may be in tension during the departure transition. Thus, as the departing attorney endeavors to provide information about current and former client relationships to the new firm for purposes of a conflicts check, care must be taken to avoid revealing client confidential information protected from disclosure under Business & Professions Code section 6068(e) and/or rule 1.6.

6. Disposition of the Client File

Generally, if the client elects to follow the departing attorney (or retains another firm), the law firm left behind must promptly forward the client's entire file to the client or its new attorney.²⁰ However, until the client makes a decision, reasonable access to the file by both the departing attorney and the law firm must be maintained in order to best protect the client's interests. Furthermore, once the client requests that the file be transferred to the departing attorney, the law firm should be given reasonable notice and an opportunity to copy the file.

The law firm needs to act quickly to copy the file to minimize any potential prejudice to the client. In situations when the departure transition is occurring where there are time-sensitive and pressing client matters that are in active litigation or with pending deadlines, the law firm must prioritize the timely delivery of the client files to the departing attorney or to the client. In addition, to avoid any prejudice to the client's ability to retain new counsel, the law firm must promptly return any original client property and unearned client funds to the client.

Conclusion

As discussed above, there are two guiding principles in any attorney departure situation—the client's right to the counsel of its choice and the protection of the client's best interests. Moreover, the departing attorney and the law firm must act to avoid any reasonably foreseeable prejudice to the rights of a client during any changes in the representation that will occur during departure. The departing attorney and the law firm must prioritize the ethical obligations they owe to any affected client over any personal or other competing interests. In sum, both the departing attorney and the law firm must ensure that any affected client will continue to have competent representation, that any affected client is properly notified regarding the departure, that all client confidences are protected from disclosure, that any conflicts of interests between the client of the law firm, the departing attorney and the new firm are properly addressed, that there is reasonable cooperation in the transition of any client matter and that the disposition of the client's file corresponds with the affected client's request.

¹ Other important considerations that pertain when an attorney departs a law firm are the existence of fiduciary duties owed to the other attorneys at the law firm as well as contractual obligations that govern departure from the law firm. While these considerations are not discussed because they are beyond the scope of this article, departing attorneys would be well advised to analyze them in detail to determine if compliance with any additional obligations or duties must occur prior to, during or after departure from the law firm. For more information see e.g., *Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups*, Third Edition which provides definitive guide to this area of law.

² *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790; Code Civ. Proc., § 284

³ The existence of any contractual or statutory liens in a client matter involve separate and independent contractual considerations and are beyond the scope of this article.

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⁴ See *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 Cal.5th 467, 556 [“we affirm that client matters belong to the clients, not the law firms, and the latter may not assert an ongoing interest in the matters once they have been paid and discharged.”]

⁵ See California Rules of Professional Conduct, rule 1.16.

⁶ See Cal. State Bar Formal Opn. No. 2020-201 (<https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL-2020-201-13-0003.pdf>)

⁷ See, Cal. State Bar Formal Opn. No. 2014-190 ([https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202014-190%20\(11-0003\)%20v1.pdf](https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202014-190%20(11-0003)%20v1.pdf)) [“When a client retains a law firm, the client’s relationship generally extends to all attorneys in the firm”]

⁸ See California Rules of Professional Conduct, rule 1.1.

⁹ Note, pursuant to Rule 1.16(a)(2), there is an obligation to withdraw if continued representation would result in violation of the rules.

¹⁰ Prior to the enactment of the current California Rules of Professional Conduct, effective November 1, 2018, the duties set forth in former rule 3-110 included the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342; *Palomo v. State Bar* (1984) 36 Cal.3d 785; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81.)

¹¹ California Rules of Professional Conduct, rule 5.1(a)

¹² California Rules of Professional Conduct, rules 5.1(b) and (c).

¹³ See California Rules of Professional Conduct, rules 5.2(a), Rule 5.2(b) and Comment.

¹⁴ See *Jewel v. Boxer* (1984) 156 Cal.App.3d 171, 177 (“...clients have an absolute right to the attorney of their choice.”)

¹⁵ **Compare:** in the context of a law firm dissolution, the departing attorney’s notice obligation is more limited than the obligation of a lawyer in a law firm dissolution context where pursuant to Cal. State Bar Formal Opn. No. 2014-190, requires all attorneys employed by the law firm to comply with rule 1.16(d) as to all clients of the firm, regardless of their connection to any specific client or the specific nature of their affiliation with the firm. Rule 1.16(d) provides “A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).”

¹⁶ See e.g., *Jewel v. Boxer* (1984) 156 Cal.App.3d 171; Cal. State Bar Formal Opn. No. 1985-86.

¹⁷ California Rules of Professional Conduct, rules 1.4(a)(3) and (b).

¹⁸ Pursuant to Business & Professions Code section 6068(e), an attorney has a duty to: “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Also, under rule 1.6(a), “[a] lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.”

¹⁹ For a case involving a “grab and run” by the departing attorneys see *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154-1155 (lawyers abruptly resigned from firm, taking list of firm’s clients, left no memoranda concerning cases they were working on, apparently deleted computer files, and recruited many of firm’s employees to join new firm.)

²⁰ See California Rules of Professional Conduct, rule 1.16(e)(1) which provides in relevant part: “Upon the termination of a representation for any reason: [¶] (1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property....” The failure to deliver the client file as requested by the client can (and often does) lead to state bar discipline or even legal malpractice liability. Further, retainer agreement provisions that permit the charging of fees for copying the client’s file are problematic as the client is entitled to the *original* file, not a copy and thus any copy of the client’s file is primarily for use by the former law firm. In any event, even where the copy charge is enforceable, delivery of the file to the client or successor counsel cannot be conditioned on payment.