

## The Right Way to Leave Your Firm

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Lawyers change firms on a regular basis. Often, the departure of a lawyer from a firm is similar to the dissolution of a marriage. Sometimes it is amicable; sometimes it is not. Regardless of the emotional aspects, important ethical issues must be addressed. The primary focus should be the best interests of the client. **Under no circumstances should the client become the rope in a tug-of-war between the firm and the departing attorney.**

The most authoritative statements available on this process are found in an attorney discipline case, *In the Matter of Cupples*, 952 S.W.2d 226, 234-236 (Mo.banc 1997):

The client has the right to choose the attorney or attorneys who will represent it. Rule 4-1.16(a)(3) (1997); see also Model Code, DR 2-110 (B)(4). "[C]lients are not the 'possession' of anyone, but, to the contrary, control who represent them." *Kelly v. Smith*, 611 N.E.2d 118, 122 (Ind. 1993). "Clients are not merchandise. They cannot be bought, sold, or traded. The attorney-client relationship is personal and confidential, and the client's choice of attorneys in civil cases is near absolute." *Koehler v. Wales*, 556 P.2d 233, 236 (Wash. App. 1976); see also *Ellerby v. Spiezer*, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985); *Resnick v. Kaplan*, 434 A.2d 582, 588 (Md. Ct. Spec. App. 1981); Corti, *supra*; HENRY S. DRINKER, LEGAL ETHICS 211 (1953); HILLMAN, *supra*, sec. 2.3.1.1; HAZARD & HODES, *supra*, sec. 7.3:202, at 885. The client's files belong to the client, not to the attorney representing the client. The client may direct an attorney or firm to transmit the file to newly retained counsel. *In re Grand Jury Proceedings*, 727 F.2d 941, 944 (10th Cir.), cert. denied, 469 U.S. 819 (1984); *Rose v. State Bar of Cal.*, 779 P.2d 761, 765 (Cal. 1989); HILLMAN, *supra*, sec. 2.3.2.1. Finally, an attorney representing a client has a duty to communicate with the client regarding the client's representation. Rule 4-1.4(b)(1997); see also Model Code, EC 9-2. This duty includes communicating with the client about material changes in who represents the client. See Rule 4-1.16(d) (1997); Rule 4 (Preamble); *Vollgraff v. Block*, 458 N.Y.S.2d 437, 440 (1982); Judy R. May, COMMENT: In Search of Greener Pastures: Do Solicitation Rules and Other Ethical Restrictions Governing Departing Partners Really Make Sense Today?, 40 VILL. L. REV. 1517, 1528 (1995).

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In situations where an attorney withdraws from a law firm, it is the responsibility of both that attorney and the law firm to ensure that the clients for whom that attorney had provided material representation are informed of the change in the circumstances of the clients' representation. This duty requires communication with those clients whether written, personal, or by some other means that is professional in nature and content. The primary purpose of the communication is

to assist these clients in determining whether their legal work should remain with the law firm, be transferred to the departing attorney, or be transferred elsewhere. While it is natural to expect both the firm and the departing attorney to want the clients' continued legal representation, the primary purpose of the communication is to assist the clients in their needs and not to solicit the clients' business. A failure by the attorney or the firm to fulfill this duty appropriately may justify disciplinary action.

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A partner's fiduciary duty includes the duty to be candid concerning business opportunities, the duty to be fair, the duty not to put self-interests before the interests of the partnership, and the duty not to compete with the partnership in the business of the partnership. Johnson, *supra*, at 100. In the context of a withdrawing lawyer, these duties have been applied to lawyers who solicit clients before withdrawing from the firm, who withhold business opportunities from the partnership, and who secrete files from the firm. See, e.g., *In re Silverberg*, 438 N.Y.S.2d 143, 144 (1981) ("The solicitation of a firm's client by one partner for his own benefit, prior to any decision to dissolve the partnership, is a breach of the fiduciary obligation owed to each other and the partnership . . ."); *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1265 (Mass. 1989) ("[The departing lawyers] excluded their partners from effectively presenting their services as an alternative to those of [the departing attorneys]."); *In re Smith*, *supra*, at 452 (noting that attorney violated ethical rules implicit obligation to be candid and fair with partners by secreting files).

### **No one owns the client.**

The Court makes it clear that clients do not belong to anyone. It does not matter who brought the client to the firm or whether the contract was in the name of the firm or the individual attorney. The client's right to choose counsel is not affected by these factors.

### **The client owns the file.**

The file belongs to the client, not the attorney or firm. Under Formal Opinion 115, as amended, an attorney or firm must turn over the client's file to the client or at the client's direction, even if the attorney has not been paid. This includes "work product" but does not include items for which the attorney or firm has paid third parties out-of-pocket without reimbursement.

### **Client property, including unearned fees, must be surrendered as directed by the client.**

Rule 4- 1.16(d) provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering

papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

This rule applies equally when the termination arises from the departure of an attorney from the firm. Any fees that have been deposited with the firm must be refunded or transferred to new counsel, if they have not been earned. This requirement includes the unearned portion of flat fees and fees that were described as “nonrefundable.” There are no “nonrefundable” fees in Missouri. The only fee where a client is not entitled to a refund is a fee that has been earned by the attorney. *See*, Informal Opinion 2005-0059. Whether the entire fee can be considered earned must be determined under Rule 4-1.5(a), which sets out the factors to consider in determining whether a fee is reasonable.

**The client must be notified, in a professional manner.**

Ideally, the departing lawyer and the firm will jointly notify the clients, for whom the departing attorney provided material representation. If joint notification is not feasible, the clients must still be notified. The clients may be notified by the firm, the departing attorney, or both, separately. The communication should be professional in tone and should not be a solicitation. It should be for the purpose of advising the client of a significant change in the representation. The best method of notification is by letter. However, in some circumstances, timing or other factors dictate that the communication will be oral.

The notification should inform the client: (1) that the attorney is leaving the firm and when, (2) where the departing attorney is going, (3) that the client can stay with the firm (if that is actually an option), (4) that the client can go with the departing attorney (if that is actually an option), (5) as always, the client is not limited by these choices and can choose any other attorney, and (6) where the client’s file will be and who will be handling the client’s matter until the client expresses a choice.

In some instances, the client may not have the option to go with the departing attorney or stay with the firm. The attorney may not be continuing the same type of practice or the new firm may have a conflict. The old firm may decide not to have anyone handling that type of matter in the future. If there are reasons that the client doesn’t have one of these options, that should be explained to the client and the option should not be offered.

It may be desirable to include a form for the client to check his or her preference and return.

**The firm must be notified, first.**

Although the notification need not be joint, *Cupples* makes it clear that it would be a breach of the fiduciary duty to the firm for the departing attorney to notify clients before the attorney notifies the firm.

One of the things that should be addressed with the firm is where the client’s file will be until the client expresses a choice. This is especially true if the attorney will be departing the firm

soon after notification to clients. Prior to the client's decision, the departing attorney should only take the file by agreement with the firm or if there is no one in the firm who is willing or able to handle the matter in the interim. The firm and the departing attorney, each, have ethical obligations to approach this issue in a manner that will best serve the client.

**Subsequent inquiries must not be misleading or dishonest.**

The firm must not mislead people who attempt to contact the attorney at the firm, after the attorney's departure, in any way. The firm must instruct all staff to provide honest information and to avoid omitting information that would reasonably result in misleading the person. Remember, even truthful information can be misleading. *See, In reRMJ*, 102 S.Ct. 929, 936, 938-939 (1982).

**Liens by prior attorney or firm.**

The attorney or firm the client does not choose may be able to assert a lien. Despite the lien, if there is any dispute about whether the "lien holder" is entitled to the amount claimed, the attorney and the firm have an obligation to cooperate, to the extent necessary, to allow the client to receive undisputed funds in a timely manner.

**CHECKLIST FOR LEAVING A FIRM**

- Gather a list of clients and matters, including client contact information and the style of cases as well as information that will be necessary for future conflicts checking.
- Make any arrangements that would be necessary for you to function if you are immediately evicted from the firm once you have notified them.
- Notify your firm.
- Provide the firm with a draft of a letter to be sent from you and the firm to all active clients for whom you have provided material representation notifying the clients of:
  - Your departure
  - The date of your departure
  - Your new contact information
  - Their options, which may include:
    - Staying with the firm
    - Going with you
    - Choosing a completely different attorney
  - Where their file will be until they communicate their choice
  - Any critical matters that require their immediate attention

- What will happen with any balance they have in the firm's trust account or unearned fees, if they choose to leave
- What will happen with any balance due
- Send the notice, jointly or individually, as soon as practicable after notice to the firm.
- It may be helpful, in some situations, to include a form and self addressed, return envelope to facilitate clients communicating their choices.

This article cannot begin to address every ethical issue that might arise when an attorney is leaving a firm. However, some issues are almost universal in these situations. One universal concern is to make sure the client's matter is handled properly and the client is treated professionally, regardless of the quality of the relationship between the firm and the departing attorney.