

ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday January 30, 2020

No. 4 Update and possible action regarding Former State Bar Ethics Opinions

o Op. 10-02

Staff will present information at the meeting.



State Bar of Arizona Ethics Opinions

10-02: Communication with Clients; Departing Lawyer; Law Firm's Obligations 3/2010

When a lawyer's employment with a firm is terminated, both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued representation and avoid conflicts. These ethical obligations can best be satisfied through cooperation and planning for any departure.

FACTS

Lawyers who are employed by law firms may be terminated or may choose to terminate their own employment for various reasons. This opinion discusses the ethical obligations of the firm and the departing lawyer in connection with that lawyer's separation from the firm. Given the importance of this subject, the Committee on the Rules of Professional Conduct has determined that it is appropriate to issue a *sua sponte* opinion for the guidance of lawyers in Arizona.

QUESTION PRESENTED

When a lawyer's employment with a law firm is terminated for any reason, whether voluntarily or involuntarily, what are the ethical obligations of the law firm and the departing lawyer with regard to the client matters on which the departing lawyer is working or has worked while employed at the firm?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ER 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

ER 1.4 Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in ER 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rule of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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ER 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) the degree of risk assumed by the lawyer.

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ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

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ER 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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Comment

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by ERs 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See ER 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files or all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See ERs 1.6 and 1.9(c).

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ER 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interest materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in ER 1.7.

(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 matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role;
- (2) the personally disqualified lawyer is timely screened from any participation in the matter and is appointed no part of the fee therefrom; and
- (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

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ER 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- ...
- (7) other good cause for withdrawal exists.

(c) A lawyer shall comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) 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 documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

ER 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ER 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ER 5.6 Restrictions on Right to Practice

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; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

ER 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

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RELEVANT ETHICS OPINIONS

Ariz. Ethics Ops. 09-01, 08-02, 99-14; ABA Formal Op. 99-414

OPINION

Lawyers who are employed by law firms may be terminated or may choose to terminate their own employment for various reasons. When a lawyer's employment with a firm is terminated by either the lawyer or the employer, both parties may wish to end their association quickly and with a minimum of post-termination contact. When a lawyer leaves the employment of a law firm, however, both the lawyer and the firm he or she is leaving have ethical obligations to the firm's clients and must work together as necessary to ensure that the lawyer's departure does not prejudice any of the clients for whom that lawyer was working.

Informing the Client and the Client's Right to Choose Counsel

In Op. 99-14, we discussed some of the obligations of a departing lawyer with regard to his or her then-current clients. While that opinion was primarily focused on the extent to which a voluntarily departing lawyer *could* reach out to current clients about continuing to represent them after his or her departure, the opinion did make clear that, when a lawyer who is working on a client matter leaves a firm, the lawyer "has an ethical obligation, under ER 1.4, to advise his or her clients of the impending departure, so that the clients may decide who they want to continue the representation." Ariz. Ethics Op. 99-14.

This duty to inform the client of a lawyer's departure arises because the client, not the lawyer or law firm, chooses which lawyer will continue to represent the client. See Ariz. Ethics Op. 09-01 (discussing client's right to choose lawyer in context of agreements restricting departing lawyer's practice). In the words of the American Bar Association, which has reached the same conclusion, "informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him." [1] ABA Formal Op. 99-414. Even if the firm or the lawyer believes it is unlikely that the client would choose to retain new counsel because of the lawyer's departure, the client nonetheless has the right to make that decision. ER 1.4 requires that the lawyer keep the client reasonably informed of both the status of the matter and any information "reasonably necessary to permit the client to make informed decisions regarding the representation." [2] The firm may not take any actions that impedes or prevents the departing lawyer's compliance with ER 1.4 or any other Ethical Rule. See ER 8.4(a) (defining professional misconduct to include inducing another's violation of the Rules of Professional Conduct).

This analysis assumes that the departing lawyer had a significant enough role in the representation of the client that informing the client would be reasonable and necessary. The departing lawyer may have been only one of a many-member team of lawyers handling a matter or may have done only a very small amount of work on a matter (such as a few hours of legal research). Whether the client needs to be informed of the lawyer's departure and reminded of the client's right to choose counsel depends on whether, viewed from the perspective of the client, the client's decision about who should continue the representation might depend on the continued involvement of the departing lawyer. Cf. ABA Formal Op. 99-414 (requirement of notification applies to "lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter"). This analysis will not necessarily depend on the status or title of the departing lawyer, or even the amount of time devoted to the matter, but rather on the degree of that lawyer's substantive involvement in the case. In order to protect the client's interest, it is advisable to resolve close cases in favor of informing the client.

Avoiding Prejudice to the Client from Departure of the Lawyer

In addition to timely informing the client of the lawyer's departure, the firm and the lawyer must both act as necessary to ensure that the client is not prejudiced by the lawyer's departure. ER 1.16(d) requires that whenever a lawyer withdraws as counsel, the lawyer "shall take steps to the extent reasonably practicable to protect a client's interests."

First, before terminating a lawyer, the law firm must consider the possible effect of the termination on the client. ER 1.16(b)(1) permits voluntary withdrawal only if it "can be accomplished without material adverse effect on the interests of the client." ER 1.16(b)(1). To comply with this rule when terminating a lawyer, the firm therefore must take steps to avoid prejudice to the client, including by considering the work being done by the lawyer and the status of the matters on which the lawyer is working, and developing plans for ensuring the continuity of work for the client after termination of the lawyer. See ER 5.1 (ethical responsibilities of supervising and managing law firms).

Once the decision to terminate the working relationship has been made, the law firm and the departing lawyer must both take steps to ensure that the departing lawyer's clients will be competently and diligently represented pursuant to ERs 1.3 and 1.4. Unlike the duty to inform the client of the lawyer's departure, which may not be required for clients with whom the departing lawyer has had only insubstantial contact, the duty to share information necessary for competent and diligent representation exists in every matter. Thus, even if the departing lawyer did only a few hours of research for the client, he or she must ensure that the work product generated during that research is left with the firm in a form that will be usable for the continued representation of the client. See *also* Ariz. Ethics Ops. 08-02 and 98-07 (regarding client's right to the contents of the lawyer's file). Regardless whether the client will stay with the firm, follow the departing lawyer, or retain a third-party lawyer, further representation of that client will require access to information about the status of the matter and the proceedings to date, notes reflecting the personal knowledge of the lawyers who will no longer be involved with the client matter, and complete information about any pending deadlines. The law firm and the departing lawyer are both obligated to the client under ERs 1.3 and 1.4, regardless of the status of their contractual employment relationship. They must cooperate to ensure that all obligations to the client are fulfilled. If the law firm and departing lawyer cannot or will not cooperate, then each must take the steps necessary to protect the client's interests without impeding or preventing the fulfillment of the other's obligations. See *generally* ERs 5.1 and 5.2 (discussing the independent ethical obligations of both supervisory and subordinate lawyers in a firm setting).

The lawyer or firm that undertakes the ongoing representation of the client also should be cautious regarding the reasonableness of fees charged during the transition. New lawyers may need to be brought up to speed on the client's matter, or lawyers may need to spend time documenting their recollection of the matter to date. This work should only be charged to the client to the extent that doing so is consistent with the lawyer's obligations under ER 1.5 to charge a fee that is reasonable for the representation of the client.

Ensuring that Both Parties Have Sufficient Information to Fulfill Ethical Responsibilities

Both the law firm and the departing lawyer have ongoing obligations regarding their former shared clients. The duty to maintain confidentiality outlasts the lawyer-client relationship. ER 1.9(c) and ER 1.9, comment 7. Both the law firm and the departing lawyer also must avoid impermissible conflicts of interest arising from the representation of those clients under ERs 1.7 and 1.9, and any firm that the departing lawyer joins also must comply with ER 1.10(d), including timely screening of the lawyer to avoid impermissible conflicts. [3] To the extent that the firm must share information with the departing lawyer about all of the clients and matters on which that lawyer worked to prevent impermissible conflicts, the law firm is obligated by ER 8.4(a) to do so, lest it induce misconduct by denying the departing lawyer information necessary to comply with the Rules.

CONCLUSION

Termination of a lawyer's employment or partnership with a firm, for whatever reason, requires the lawyer and firm involved to (1) provide timely notice to affected clients to permit those clients to make informed decisions regarding their continued representation, (2) work to ensure the continued competent and diligent representation of the client, (3) avoid charging excessive fees in connection with any work done as a result of the departure and related transitions, and (4) share information as necessary to permit the firm, the lawyer, and his or her future law firm to comply with their duties to avoid conflicts. Neither the lawyer nor the firm may impede or prevent the other's fulfillment of any ethical obligations or duties to a client or the court.

Both the departing lawyer and the firm remain obligated to keep the client's confidences and avoid impermissible conflicts, and should cooperate to facilitate the continued competent and diligent representation of clients.

Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. This opinion is based on the Ethical Rules in effect on the date the opinion was published. If the rule changes, a different conclusion may be appropriate. © State Bar of Arizona 2010

[1] In the case of a lawyer who has been discharged for misconduct amounting to an ethics violation that triggers the law firm's reporting obligation under ER 8.3, the firm may also have the duty to inform the client that it has reported the lawyer to the bar. Those obligations are outside the scope of this opinion.

[2] This same obligation may arise when changes in the staffing of a case occur for other reasons, such as a medical or disability leave or the reassignment of a lawyer to other cases because of workload issues. As in the case of a departing lawyer, the touchstone is reasonableness – does the client reasonably need to be informed of the change in staffing because the client may need or want to make decisions or take actions as a result of that change?

[3] For additional discussion of conflicts involving lawyers moving between firms, see Ariz. Ethics Ops. 94-06, 95-04, and 95-06.