

Ethical Duties When Leaving a Firm and Candor to the Tribunal

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Ethical Considerations for a departing attorney and the firm:

- ABA Formal Opinion 489
- Diligence [1.3]
- Communication [1.4]
- Expediting Litigation [3.2]
- Restrictions on Right to Practice [5.6]
- Terminating Representation [1.16]

ABA Formal Opinion 489
(December 4, 2019)

Obligations Related to Notice
When Lawyers Change Firms

- Lawyers have the right to leave a firm and practice at another firm.
- Likewise, clients have the right to switch lawyers or law firms, subject to approval of a tribunal, when applicable (and conflicts of interest).

Clients generally choose who will represent them.

- Rule 1.2(a): A lawyer shall abide by a client's decisions concerning the objectives of the representation.
- Comment [1] to Rule 1.2: "Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."

Clients generally choose who will represent them.

- Rule 1.16(a)(3) – A lawyer shall withdraw from the representation of a client if the lawyer is discharged.

Lawyers must represent clients competently and diligently.

- Rule 1.3 – A lawyer shall act with reasonable diligence and promptness in representing a client.
- Rule 3.2 – A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

- Lawyers also have an obligation to communicate relevant information to clients in a timely manner, according to Rule 1.4.
- This includes promptly notifying a client if a lawyer changes firms.

Rule 1.4(a) – A lawyer shall:

...

(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;

Rule 1.4(b) – A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

NOTICE TO CLIENTS OF THE ATTORNEY'S DEPARTURE:

- Firm and departing attorney should agree on a joint communication to those clients the departing attorney has had significant contact.
- Give the clients the options to:
 - remain with the firm,
 - leave with the departing attorney, or
 - choose another attorney.

NOTICE TO CLIENTS OF THE ATTORNEY'S DEPARTURE:

- The departing lawyer and the firm each may unilaterally inform clients of the lawyer's impending departure at or around the same time that the lawyer provides notice to the firm.
- “Significant client contact” would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client.
- If a firm and departing lawyer cannot promptly agree on the terms of a joint letter, a law firm cannot prohibit the departing lawyer from soliciting firm clients.

- Lawyers AND law firm management have ethical obligations to assure the orderly transition of client matters.
- Law firm management also has obligations to establish reasonable procedures and policies to assure the ethical transition of client matters when lawyers elect to change firms.

Rule 5.1(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.

- Firm management should establish policies and procedures to protect the *confidentiality* of client information from inadvertent disclosure or misuse.
- The duty of confidentiality requires that departing attorney return and/or delete all client confidential information in their possession, unless the client is transferring with the departing attorney.

- Firms may require advance notice of an intended departure.
- Minimum timeframe necessary for:
 - Clients to decide who will represent them,
 - Firm to assemble files,
 - Firm to adjust staffing if the firm is to continue as counsel, and
 - Firm to secure its property in the departing lawyer's possession.

- Firm agreements cannot impose a notification period that would:
 - Unreasonably delay the diligent representation of the client or
 - Unnecessarily interfere with a lawyer's departure beyond the time necessary to address transition issues.

- Firm may not penalize a client who wants to go with a departing lawyer.
- Firm cannot withhold firm resources the departing lawyer needs to continue representing the client prior to departure.

COOPERATING BEFORE AND AFTER DEPARTING THE FIRM:

- A departing lawyer who does not continue to represent a client nevertheless has the obligation to take “steps to the extent reasonably practicable to protect a client’s interests.” I.R.P.C. 1.16(d).
 - Updating files and lawyers who take over the representation.
 - Docketing of deadlines, and
 - Cooperating reasonably in billing matters.

RETURNING PROPERTY TO THE FIRM:

- A departing attorney may be required to return or account for firm property, such as intellectual property, proprietary information, equipment/devices, and to allow firm data to be deleted from all devices retained by the departing attorney, unless the data is part of the client files transitioning with the departing lawyer.

- The exception:
- A departing lawyer may retain names and contact information for clients for whom the departing lawyer worked while at the firm in order to determine conflicts of interests at the departing lawyer's new firm and comply with other applicable ethical or legal requirements.

Where the departing lawyer has principal or material responsibility in a matter, firms should not assign new lawyers to a client's matter, pre-departure, displacing the departing lawyer, absent client direction or exigent circumstances arising from a lawyer's immediate departure from the firm and imminent deadlines needing to be addressed for the client.

- Firms cannot prohibit or restrict access to email, voicemail, files, and electronic court filing systems where such systems are necessary for the departing attorney to represent clients competently and diligently during the notice period.
- Once the lawyer has left the firm, the firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries.

A supervising lawyer at the firm should review the departed lawyer's firm emails, voicemails, and paper mail in accordance with client directions and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer.

The ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements except regarding retirement benefits or sale of the practice.

I.R.P.C. 5.6 prohibits restraints on a client's choice of counsel.

- 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 . . .
- Firms have an ethical obligation to assure that client matters transition smoothly and therefore, firm partnership/shareholder/member/employment agreements may request a reasonable notification period, necessary to assure that files are organized or updated, and staffing is adjusted to meet client needs.

Please remember ...

- Clients are not property.
- Law firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm.
- Subject to conflicts of interest considerations, clients decide who will represent them going forward when a lawyer changes firm affiliation.

Rule 3.3: Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Rule 3.3: Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

Rule 3.3: Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measure, including, if necessary, disclosure to the tribunal.

Rule 3.3: Candor Toward The Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3: Candor Toward The Tribunal

(c) The duties in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.3: Candor Toward The Tribunal

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.3: Candor Toward The Tribunal

Comment [1]: This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

Rule 3.3: Candor Toward The Tribunal

Comment [2]: This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Rule 3.3: Candor Toward The Tribunal

Comment [4]: Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Rule 3.3: Candor Toward The Tribunal

Comment [5]: Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

Rule 3.3: Candor Toward The Tribunal

Comment [6]: If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

Rule 3.3: Candor Toward The Tribunal

Comment [8]: The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Rule 3.3: Candor Toward The Tribunal

Comment [9]: Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate....

Rule 3.3: Candor Toward The Tribunal

Comment [10]: Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer.

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Rule 3.3: Candor Toward The Tribunal

Comment [10]: ... In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action.

Rule 3.3: Candor Toward The Tribunal

Comment [10]: ... If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Rule 3.3: Candor Toward The Tribunal

Comment [13]: A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.