

Ethical Issues in Joining and Leaving a Law Firm

February 2025

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Watch the slides at <https://join.freeconferencecall.com/downeycle>

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Questions – Please submit questions during the program by chat or during/after the program by email to Paige Tungate at ptungate@downeylawgroup.com

CLE Information

- *Kansas Credit* – If you are seeking Kansas credit, you will need to enter the two Attendance Verification Words and your Kansas Bar information into the Program Survey
 - Please complete the Survey *within this week*, so we can ensure you receive proper credit
- *Certificate of Completion* – Available through the Program Survey
- Three ways to access Program Survey:
 1. Link available in the *CHAT*
 2. Link available in *the slides* (here or at www.DowneyEthicsCLE.com)
 3. Link sent to you in an *email within 30 minutes* of program ending



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Joining a Firm

(or “Beware the Partner Trap . . .”)

Risks of Joining a Firm

- Financial risks
- Administrative burdens
- Control over practice
- Cultural issues
- Reputational risk

Risks of Becoming Partner

- Financial contribution – capital
- Assumption of liabilities
- Irregular compensation – paid last

- *Plus all the prior risks*

Dishonest Firms

- Make promises that will not be kept
- Add new partners to raise capital or cover expenses instead of asking existing partners to pay more
- Mislead new partners to join the firm so existing partners can usurp the new partner's practice
- Add new partners to project confidence, despite knowing the firm may face a potential devastating event – such as a major malpractice claim

Protect Yourself

- Be mindful of risks
- Review governance documents
- Conduct due diligence – financial, cultural, current status
- Obtain assurances – in writing
- Join with care – perhaps in interim/transitional status

Key Information Sources

- Public records (Internet, CaseNet, PACER)
- Financial statements
- Tax returns
- Liability insurance application
- Former partners and employees

Leaving a Law Firm

Highest Priority – for Firm and Departing Lawyer

- Take care of the clients
- Competent (4-1.1) and diligent (4-1.3) representation
- Protect confidences (4-1.6) and property (4-1.15), including client files

In re Cupples (Mo. 1997)

- Prior to withdrawal, lawyers within a firm have a duty to treat each other fairly and honestly and to put the interests of the law firm regarding firm business before their individual interests.
- The lawyer may not compete with the firm for business opportunities.
- Each lawyer has a duty to the firm to represent firm clients diligently, competently, and zealously.

In re Cupples (Mo. 1997)

- After an attorney withdraws from the firm, the fiduciary duties no longer prohibit competition. However, the firm and the departing attorney have a duty to deal in good faith in winding up the firm business.
- Both the withdrawing attorney and the firm have a duty to inform firm clients of any material change in representation and to obtain the clients' informed direction as to how the client wishes his work to be handled.
- The withdrawing attorney and the firm also have a duty to orderly maintain or transfer the clients' files in accordance with the clients' directions and to withdraw from representing those clients by whom they are discharged.
- Both the withdrawing attorney and the firm have a mutual duty, not only to the client, but to each other as well, to make certain that these tasks are completed in a competent and professional manner to the reasonable satisfaction of their clients ...
- For matters concerning lawyer discipline, we are most concerned when the failure to fulfill these duties affects client representation and not the mere division of firm assets and liabilities.

Fiduciary Obligations to Clients

- Change only when relationship with client ends
- Rule 4-1.16(a) – client discharges lawyer
- Rule 4-1.16(b) and (c) – lawyer resigns and (if necessary) tribunal allows lawyer to withdraw from representation

In re Cupples (Mo. 1997)

- The **client has the right to choose the attorney** or attorneys who will represent it.
- "[C]lients are not the 'possession' of anyone, but, to the contrary, control who represent them."
- "**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."
- "**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.
- [A]n attorney representing a client has a duty to communicate with the client regarding the client's representation. Rule 4-1.4(b)(1997). . . . **This duty includes communicating with the client about material changes in who represents the client**. See Rule 4-1.16(d); Rule 4 (Preamble) . . .

Rule 4-1.4

- (a) A lawyer shall:
 - (1) keep the client reasonably informed about the status of the matter;
 - (2) promptly comply with reasonable requests for information; and
 - (3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules 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.

No Non-Compete Agreements – Rule 4-5.6

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

“Benefits on Retirement”

- Retirement = stop being a lawyer
- Not “don’t compete”

Fees After Departure

- Must be reasonable division
 - Avoid having lawyer receive case but no incentive to work on case
- Often reasonable agreements are respected
- If no agreement, then *quantum meruit*
 - Support for percentage, not just hours/lodestar

Dividing Fees Among Firms – Rule 4-1.5(e)

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in **proportion to the services** performed by each lawyer **or** each lawyer assumes **joint responsibility for the representation**;
- (2) the client **agrees to the association** and the agreement is **confirmed in writing**; and
- (3) the **total fee is reasonable**.

Rule 4-1.5 cmt [8]

Rule 4-1.5(e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

For the Departing Lawyer

Highest Priority

- To provide reasonable protection for the **clients' interests**

Fiduciary Obligations

- To clients (highest priority)
- To firm
 - Definitely if partner
 - Possibly if non-partner – *see Johnson v. Brewer Pritchard*, 73 S.W.3d 193 (Tex. 2002)

Client Confidences When Moving – Rule b)(5)

A lawyer **may reveal** information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (5) **to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm**, but only if the **revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.**

Departing Lawyer Obligations to Firm

- Contractual
- Fiduciary
- Common law
- Statutory

Impact of Fiduciary Obligations to Firm

- Need to protect confidences
 - Particularly fees, client identities, revenues, etc.
- Need to avoid “taking” corporate opportunities
- Change upon giving notice to firm

Missouri Computer Tampering Act

Mo. Rev. Stat. § 569.095

1. A person commits the offense of tampering with computer data if he or she knowingly and without authorization or without reasonable grounds to believe that he has such authorization:

- (1) Modifies or destroys data or programs residing or existing internal to a computer, computer system, or computer network; or
- (2) Modifies or destroys data or programs or supporting documentation residing or existing external to a computer, computer system, or computer network; or
- (3) Discloses or takes data, programs, or supporting documentation, residing or existing internal or external to a computer, computer system, or computer network; or
- (4) Discloses or takes a password, identifying code, personal identification number, or other confidential information about a computer system or network that is intended to or does control access to the computer system or network;
- (5) Accesses a computer, a computer system, or a computer network, and intentionally examines information about another person;
- (6) Receives, retains, uses, or discloses any data he knows or believes was obtained in violation of this subsection.

2. The offense of tampering with computer data is a class A misdemeanor, unless the offense is committed for the purpose of devising or executing any scheme or artifice to defraud or to obtain any property, the value of which is seven hundred fifty dollars or more, in which case it is a class E felony.

Tampering With Computer Equipment

Mo. Rev. Stat. § 569.097

1. A person commits the offense of tampering with computer users if he or she knowingly and without authorization or without reasonable grounds to believe that he or she has such authorization:
 - (1) Accesses or causes to be accessed any computer, computer system, or computer network; or
 - (2) Denies or causes the denial of computer system services to an authorized user of such computer system services, which, in whole or in part, is owned by, under contract to, or operated for, or on behalf of, or in conjunction with another.
2. The offense of tampering with computer users is a class A misdemeanor unless the offense is committed for the purpose of devising or executing any scheme or artifice to defraud or to obtain any property, the value of which is seven hundred fifty dollars or more, in which case tampering with computer users is a class E felony.

Actions Before Notice to Firm

- “Preparatory” actions
 - Talking to/interviewing with new firm
 - Locating office space
 - Setting up new office
- Avoid soliciting clients
 - What about vague “if I left, would you follow me” conversations?
- Avoid soliciting non-equal colleagues
- Avoid taking firm information

After Notice to Firm

- Notice to clients who may be materially affected by LAWYER's (not partner's) move
- PREFERRED – joint letter
 - Fact and date of departure
 - Location of new practice
 - Choice – Firm, departing lawyer/new firm, or another lawyer

If NO “Preferred” Joint Letter

- Notice must be given within reasonable time
- Notice should be candid, non-defamatory
 - Choice – firm, departing lawyer (or another lawyer)
- Sent to any client who may be materially impacted

Documents Upon Departure

- Client files – client controls
 - Entire file “from cover to cover” (electronic or not)
- Firm forms and the like – generally firm controls
- Lawyer’s “personal” files – generally lawyer may take

Don't Upon Departure

- Steal **clients** (or fees) before departure
- Steal **firm documents**, client lists, etc.
- Take **client files** without client permission

Special Concerns

- Former clients
- Closed files
- Insurance coverage
 - Tail policy
- Property

Beware Firm Demise

- Departure may cause breach of firm's line of credit or finance agreements
- If the firm fails, it may create liability for departing (and remaining) lawyers

For the “Old” Firm

Firm's Obligation to Clients

- HIGHEST PRIORITY – “Same” as for lawyer
- Managers/supervisors of firm may be disciplined for breach

Firm's Obligations to Departing Lawyer

- Contractual
- Common law obligations
- Statutory

Reasonable File Transfer

Duty for both the lawyer and firm to “orderly maintain or transfer the clients’ files in accordance with the clients’ directions and to withdraw from representing those clients by whom they are discharged.” *In re* (Mo. 1997).

Common Issues

- Marketing – remove lawyer – Rules 4-7.1 and 4-7.2
 - What about lawyer’s activities/contributions?
- Telephone, mail and email communications
 - Forward to lawyer
 - Bounce-back or oral message to sender or caller
- Payment of amounts due
- Furniture, equipment, etc.

Good Risk Management

- Employment agreement
 - Require reasonable notice before leaving
 - Include limits/guidance on notice to clients
- Separation agreement – *Vance v. Griggs* (Mo. App. W.D. 2010) – Rule 4-1.5 does not apply to lawyers leaving firms
 - If agreement made after separation, *Law Offices of Gary Green, P.C. v. Morrissey* (Mo. App. S.D. 2006), requires compliance with Rule 4-1.5(e)

For the New Firm

Dangers from Bringing in Lawyer

- Liability – Need to respect obligations to former firm
 - Do not aid misappropriation of confidential information or trade secrets
- Conflicts – Need to know of all cases brought in
 - Avoid “lost” cases
 - All new matters must pass conflict checks

Client Confidences When Moving – Rule b)(5)

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Rule 4-1.9

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 Rule 4-1.6 and 4-1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Retirement/Sale

Can I sell my law practice?

- Yes – Rule 4-1.17

Requirements and Limitations of Rule 4-1.17 Sale

- Must sell whole practice or (whole) distinct part
 - No “cherry picking” best cases
- Must cease (foreseeable) practice in that area
- Limitation on raising fees with sale
 - But buyer can decline clients who decline to pay buyer’s usually fees for “substantially similar services”

Alternative – Transfer of Cases

- “Seller” could transfer cases to “co-counsel” and then reduce work on the matters
- Fee division then handled under Rule 4-1.5(e)
 - Reasonable fees
 - Either proportionate to work done or both lawyers take responsibility for matter
 - Client approves division of fees in writing

Alternative – Merge to Retire

- “Seller” could bring “buyer” into firm – or merge firms – and then transfer firm to buyer
- No Rules regulate such a transfer, or division of fees thereunder
- Much harder than anticipated

Confidences and Sale

If not “merge to retire,” Rule 4-1.6(b)
governs confidentiality

Questions to Ask Before Joining a New Law Firm

- Culture?
 - Work environment
 - Social environment
 - Live to work or work to live
- Work expectations
 - Hours and days
 - Flexibility
 - Live to work or work to live
- Reputation
- Direction and goals
- Compensation and benefits
 - Salary
 - Bonuses
 - Benefits
 - Liabilities
- Attorney development
 - Training
 - Mentoring
 - Team functionality
 - Advancement
 - Marketing and support

Thank you



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Conclusory Matters

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- **Post-Program Survey** – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

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Timed Agenda

12:00-05 Introduction

12:05-55 Discussion of legal ethics and related issues when lawyers join or leave a firm

Future Programs

February 19 - Wednesday at 12:00 Noon CT - *Privilege and Confidentiality Update*

February 27 – Thursday at 12:00 Noon CT – *Addressing Bias: LGBTQ+ and Gender Issues*

Special Co-Presenter – Sara Marler of Marler Law Partners

March 4 -Tuesday at 3:00 PM CT - *Legal Ethics of Lawyer Collaboration*

March 19 - Wednesday at 12:00 Noon CT - *Trust Accounting Quiz - With Prizes*

April 10 - Thursday at 12:00 Noon CT - *Legal Ethics and Client Development*

April 23 - Wednesday at 12:00 Noon CT - *Addressing Bias - Ableism and Disability Discrimination*

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