

PROPOSED OPINIONS

RULES, PROCEDURE, COMMENTS

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at the next quarterly meeting. Any comment or request should be directed to the Ethics Committee at ethicscomments@ncbar.gov (<https://mail.google.com/mail/?view=cm&fs=1&tf=1&to=ethicscomments@ncbar.gov>) no later than March 21, 2025.

Council Actions

At its meeting on January 24, 2025, the State Bar Council adopted the ethics opinion summarized below:

2024 Formal Ethics Opinion 3

Fee Agreement Requiring Payment of Estate Planning Lawyer's Future Legal Fees

Opinion rules that estate planning engagement agreement may require payment of legal fees for lawyer's participation in collateral litigation related to the estate plan under certain conditions.

Additionally, the council withdrew 2005 Formal Ethics Opinion 8, URL for Firm Website is Trade Name and Must Register with Bar, on the basis that the opinion addressed a Rule of Professional Conduct and State Bar process that no longer existed.

Ethics Committee Actions

At its meeting on January 23, 2025, the Ethics Committee considered a total of seven inquiries, including the adopted opinion referenced above. Three inquiries were sent or returned to subcommittee for further study, including an inquiry addressing a lawyer's ability to increase the rate charged for services during the representation and an inquiry opining on a lawyer's ability to negotiate licensure reporting capabilities during mediation. The committee also withdrew Proposed 2024 FEO 2, Withholding Criminal Discovery in District Court, which was published last year and received negative comment. The committee also approved the publication of one new proposed formal ethics opinion for comment, which appears below.

Proposed 2025 Formal Ethics Opinion 1

Obligations Related to Notice When Lawyer Leaves a Firm

January 23, 2025

Proposed opinion sets out the requirements of the notice that must be sent to affected clients when a lawyer leaves a law firm.

Departing Lawyer is employed by Law Firm. Departing Lawyer has decided to terminate his employment with Law Firm and begin practicing with another law practice. Departing Lawyer requests the contact information for his clients so that he can give the clients notice of his change in employment and offer the clients the opportunity to transfer their matters to his new firm.

Law Firm maintains that there is no ethical requirement to notify any of Law Firm's clients of the lawyer's departure and that Departing Lawyer is not entitled to the clients' contact information.

Inquiry #1:

Do the Rules of Professional Conduct require that notice be given to any of Law Firm's clients that Departing Lawyer is leaving the firm?

Opinion #1:

Yes. Our ethics opinions have consistently held that when a lawyer leaves a law firm, clients affected by the lawyer's departure must be notified. *See* CPR 24 (1974); RPC 48 (1988), RPC 200 (1995), 2021 FEO 6. These opinions highlight a lawyer's professional responsibilities to diligently represent a client as set out in Rule 1.3, and the accompanying duty to properly communicate with the client throughout the representation as required by Rule 1.4. Rule 1.3 requires lawyers to "act with reasonable diligence in representing a client." The duty of diligent representation requires lawyers involved in firm dissolutions or lawyer transitions to take care that they continue to fulfill the lawful objectives of their clients. RPC 48. Rule 1.4 requires lawyers to "keep the client reasonably informed" about the status of the client's matter and to provide the client with enough information "to permit the client to make informed decisions regarding the representation." In order to fulfill the client's objectives during periods of transition, communication between the lawyer and the client is necessary. Rule 1.4, cmt.[1].

The departure of a lawyer who plays a principal role in a client's representation "is information that may affect the status of a client's matter" and the transition requires the conveyance of sufficient information to the client to "permit the client to make informed decisions" regarding the continuation of the representation. ABA Formal Op. 99-414 (1999). "In most situations, a lawyer's change of affiliation during the course of a representation will be material to a client, as it could affect such client concerns as billing arrangements, the adequacy of resources to support the lawyer's work for the client, and conflicts of interest." D.C. Bar Ethics Op. 273 (1997). Accordingly, the Rules of Professional Conduct require that any client affected by a lawyer's departure be notified of the lawyer's planned departure.

Inquiry #2:

Which law firm clients must be notified of the lawyer's departure from the firm?

Opinion #2:

Clients who will be affected by a lawyer's departure must be given notice of the departure. Previous North Carolina ethics opinions state that notice must be given to each client with whom the departing lawyer "has an ongoing professional relationship" or "for whose work [the departing lawyer] was responsible at the time of his departure from the firm." RPC 48; RPC 200. The American Bar Association has also published ethics opinions addressing this issue. ABA Formal Opinion 99-414 (1999) provides that notice must be given to clients for whose active matters the departing lawyer currently is responsible or for whom the departing lawyer plays a "principal role" in the current delivery of legal services. ABA Formal Opinion 19-489 (2019) provides that departing lawyers should give notice to all clients with whom the departing lawyer has had "significant client contact."

Generally, affected clients are clients for whom the lawyer provided significant legal services, or with whom the lawyer has had significant client contact. Providing "significant legal services" or having "significant client contact" refers to the extent and nature of the involvement a lawyer has with a client's legal matters. Providing significant legal services would include drafting legal documents, conducting legal research, or representing the client in court. Significant client contact refers to meaningful interactions between a lawyer and their client. Such interactions would include regular communication with the client to discuss case updates, strategies, and decisions. Lawyers who have significant client contact are often seen as the primary point of communication for the client. Therefore, the issue of which clients must receive notice should be analyzed from the perspective of the client. Significant client contact would include contact that would result in a client "identifying the departing lawyer, by name, as one of the attorneys representing the client." ABA Formal Op. 19-489 (2019). A lawyer who merely prepares one research memorandum without direct client interaction does not meet this threshold. *Id.*

Both terms indicate that the lawyer has played a principal role in the client's legal matter. In either instance, these clients must be informed of the lawyer's departure. If the identity of a client's lawyer is debatable, Departing Lawyer and Law Firm should err on the side of caution by providing notice to the client. Ariz. Ethics Op. 10-02 (2010).

Inquiry #3:

Who may or must send the notice to the affected clients?

Opinion #3:

Departing Lawyer and Law Firm have joint professional responsibility to ensure that clients affected by lawyer's departure are notified of the lawyer's departure. In giving this notice, the right of clients freely to choose counsel must be preserved. The preferred method of advising clients of the lawyer's departure is "by the sending of a notice upon which the remaining and departing lawyers agree and which clearly informs the clients of their right freely to choose counsel." RPC 200. Law Firm and Departing Lawyer should agree on the content of the notice as well as who will provide the communication to the affected clients.

However, if Law Firm and Departing Lawyer cannot agree on the language of a joint letter or cannot agree on who should provide the agreed upon notice to the affected clients, Departing Lawyer and Law Firm each have a responsibility to communicate the requisite information to the clients in a truthful, nondisparaging manner. *See* RPC 48; ABA Formal Op. 99-414 (1999). Departing Lawyer and Law Firm must cooperate to ensure that all professional obligations to the client are fulfilled. Ariz. Ethics Op. 10-02 (2010). If Departing Lawyer and Law Firm "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." *Id.* "A law firm cannot prevent a departing lawyer from notifying affected clients for whom he or she has principal responsibility." Law Firm may not take any action that "impedes or prevents" Departing Lawyer's compliance with his duties under the Rules of Professional Conduct. *Id.* Specifically, Law Firm may not restrict Departing Lawyer's access to client contact information because Departing Lawyer has the ethical obligation to notify current clients of his departure. Tenn. Ethics Op. 2023-F-169 (citing ABA Formal Op. 19-489 (2019)). "The responsible members of the law firm must not take actions that frustrate the departing lawyer's current clients' right to choose their counsel" by denying access to the clients' file or otherwise. ABA Formal Op. 99-414 (1999).

Both Law Firm and Departing Lawyer have the right to send individual letters to these same clients. In addition to their professional duty to communicate with these clients regarding the lawyer's departure, they each have the right to communicate with these clients to express their desire to continue the representation.

Inquiry #4:

May Departing Lawyer inform his clients that he is leaving Law Firm before informing Law Firm of his intentions?

Opinion #4:

Maybe. There is no rule of professional conduct requiring Departing Lawyer to inform Law Firm of his intentions prior to notifying his affected clients. However, when deciding when to notify Law Firm and his clients, Departing Lawyer may not put his own personal or financial interests ahead of his clients. *See* Rule 1.4, cmt. [5]. Cooperation between the departing lawyer and the law firm will be necessary for an orderly transition of client matters to take place. *Tenn. Ethics Op. 2023-F-169*. Informing Law Firm prior to notifying clients will allow Law Firm to assist in handling the separation in the appropriate manner. *See* RPC 48; RPC 200. Therefore, Departing Lawyer may only inform his clients of his intended departure prior to notifying Law Firm if Departing Lawyer reasonably believes such a course of action is necessary to protect his clients' interests. This course of action should only be taken in extreme circumstances. For example, if a law firm has a history of "cutting off" or "ushering out" a departing lawyer as soon as the firm is notified of the planned departure, thereby preventing the departing lawyer from continuing to represent his current clients, departing lawyer may reasonably believe that he needs to inform his clients before informing the firm so that he can protect his clients' interests.

Although the Rules of Professional Conduct do not mandate that a departing lawyer inform his law firm before notifying his clients, Departing Lawyer must consider other obligations and restrictions applicable to this issue, such as his employment contract as well as legal fiduciary duties. This opinion does not address the possible legal and fiduciary duties of a departing lawyer to his or her former firm or the possibility of civil remedies. Similarly, the interpretation of the employment contract or of any applicable legal obligations is outside the purview of the ethics committee and is not addressed in this opinion.

Inquiry #5:

When should the notice be sent to the affected clients?

Opinion #5:

Notice should be timely and should prioritize the client's best interests over the interests of the departing lawyer or the firm. "[I]nforming the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him." *ABA Formal Op. 99-414* (1999). Specifically, a lawyer has an obligation under Rule 1.4 to notify a client "sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue representation by the departing lawyer and, if not, to make other representation arrangements." *D.C. Bar Ethics Op. 273* (1997). The timing must be reasonable under the circumstances and consistent with the client's best interests. *Ohio Board of Professional Conduct, Op. 2020-06*. "Recognizing that the severing of a relationship with a law firm can occur suddenly or without warning to either party[,] the notice, preferably in writing, to the affected clients should be delivered as soon as feasibly practicable to protect the interests of the clients." *Id.*

Inquiry #6:

What must be included in the notice to the affected clients?

Opinion #6:

Notice should be given to each affected client informing the client of the lawyer's departure from the firm and advising the client of the right to freely choose counsel. The fact that the lawyer is leaving and where the lawyer will ultimately practice is information that will aid the client in determining whether to stay with the law firm, leave with the lawyer, or seek legal representation elsewhere. *Tenn. Ethics Op. 2023-F-169*.

Generally, affected clients will have the option of staying with the current law firm, transferring their matter to the departing lawyer, or obtaining entirely new counsel. *RPC 48*. If one or more of these options is not available, clients need only be advised of the existing options. For example, departing lawyer is changing practice areas, will work for the opposing side, is moving to another part of the state or out of state, or joining a corporation as in-house counsel. To comply with Rule 1.4, the notice should provide enough information for the client to make an informed choice as to the continued representation.

When determining the options that should be presented to the client, Departing Lawyer must consider whether the transition to the new firm will create any conflicts of interests. In addition to potential personal conflicts, Departing Lawyer will need to consider whether conflicts arise under Rule 1.9(b) or Rule 1.10(c). Departing Lawyer "should also be prepared to provide to the client information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm." *D.C. Bar Ethics Op. 273* (1997). Affected clients should be informed that if they choose to follow Departing

Lawyer to their new firm, they will need to sign a new fee agreement. The notice should provide details about the terms of the new fee agreement, such as any changes to billing rates, fee structures, or terms. The notice should explicitly state if the fee structure or terms will remain the same.

Departing Lawyer must ensure that he has the knowledge and resources necessary to handle the matter at his new firm. Law Firm also has a duty to ensure that, after Departing Lawyer leaves the firm, there are other lawyers in the firm with the ability to handle the client's matters. Tenn. Ethics Op. 2023-F-169. "The law firm management should assess if it has the capacity to and expertise to offer to continue to represent the clients. If the departing lawyer is the only lawyer at the firm with the expertise to represent a client on a specific matter, the firm should not offer to continue to represent the client unless the firm has the ability to retain other lawyer with similar expertise." Tenn. Ethics Op. 2023-F-169. Departing Lawyer and Law Firm may consider whether they have the ability to consult with or retain other lawyers with the necessary expertise to continue the competent representation of the client. See Rule 1.1(c).

If Law Firm cannot continue the representation due to the unavailability of competent lawyers in a particular legal area, and Departing Lawyer cannot carry out the representation due to a conflict at the new firm, Departing Lawyer and Law Firm must work together to assist the client in obtaining new counsel. See Rule 1.16(d). "Both the departing lawyer and the law firm have an ethical duty to ensure that active matters pending while the client chooses counsel are handled with the requisite competence and diligence and that all steps are taken to ensure the withdrawal of representation by either party protects the client's interests." Ohio Board of Professional Conduct, Op. 2020-06.

If both Departing Lawyer and Law Firm have the means to continue representing the client and are not precluded from doing so by a conflict of interest, both Departing Lawyer and Law Firm should be offered as a choice to the client. Lawyers may not elevate their personal financial interests above those of the client. The same principles of client protection and client choice are paramount when a lawyer retires and sells his law practice. "[C]lients of a retiring or departing lawyer must be given an opportunity to select their own new counsel." *The Law of Lawyering*, §22.04. Rule 1.17(b) requires that when a retiring lawyer sells his practice, that the "entire practice, or the entire area of practice" be sold to one or more law firms. This requirement helps protect "those clients whose matters are less lucrative and who might find it difficult to secure other counsel..." Comment [5] to Rule 1.17. Likewise, neither Law Firm nor Departing Lawyer can use Departing Lawyer's transition to cherry pick higher fee-generating client matters and reject others. Comment [5] to Rule 1.5 provides that "[o]nce a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain."

The notice should provide information regarding the current status of the matter as well as an accounting of any client property held in trust. The notice should also include information about any responsibility the client has for fees and costs already incurred. The notice should explain that the client's file will remain with Law Firm unless the client directs Law Firm to return the file to the client or instructs Law Firm to transfer the file to Departing Lawyer or new counsel. RPC 200.

The notice should advise the client that any entrusted funds will remain with Law Firm unless the client directs Law Firm to return the funds to the client or transfer the funds to Departing Lawyer or new counsel. The notice should provide a date by which clients need to indicate their choice of counsel and should inform clients that failure to make an election by that date will be considered a choice to remain with the current firm.

As noted above, Departing Lawyer and Law Firm each may communicate the requisite information to the affected clients, but they are prohibited from making false or misleading statements or from disparaging each other. See ABA Formal Op. 99-414 (1999). ABA Formal Op. 03-429 counsels that, when providing a client with information about the departed lawyer, a firm lawyer "must be careful to limit any statement to ones for which there is a reasonable factual foundation." In circumstances where there are concerns such as those set out in 2013 FEO 8 (Responding to the Mental Impairment of Firm Lawyer), or where the departing lawyer is under investigation for serious ethics violations such as embezzlement, the law firm may have a professional responsibility to disclose this information to the departing lawyer's current clients. 2013 FEO 8; Tenn Ethics Op. 2023-F-169; ABA Formal Op. 03-429. The communication must be factual, avoid defamation, and be made in good faith. It should not come across as a competitive attempt to retain the client. Therefore, it's critical to tread carefully and base any communication on objective facts.

Sample language in a joint notice letter may include:

Dear [Client's Name],

We hope this letter finds you well. We are writing to inform you of an important change regarding your legal representation at [Law Firm Name]. Effective [Date], [Departing Lawyer's Name] will be departing from our firm to pursue a new opportunity.

We want to assure you that your legal matters remain our top priority during this transition. As a valued client, you have several options regarding your representation moving forward:

Continue with [Law Firm Name]: If you would like to continue your legal representation with [Law Firm Name], please rest assured that our team will remain dedicated to providing you with high-quality legal services. Your case will continue to be handled by [New Lawyer's Name or Team], who is fully briefed on your matters and ready to assist you. We will provide you with an updated status of your case,

including any upcoming deadlines or important actions needed. Additionally, any outstanding accounting of fees and costs incurred will be shared with you. All client files and documents will remain with [Law Firm Name]. Any trust funds currently held in your matter will also remain with the firm to be managed in accordance with our standard procedures.

Transition to Departing Lawyer's Name]: If you prefer to continue working with [Departing Lawyer's Name], you are welcome to follow him or her to their new firm, [New Firm Name], where he or she will be practicing starting [Date]. If you choose this option, we will facilitate the transfer of your file and any related trust funds to ensure a smooth transition. You will need to provide written consent for the release of your file and the transfer of any trust funds to [New Firm Name]. We will also provide an accounting of any fees and costs incurred up to the date of transfer. Please let us know how you wish to proceed by [Response Date], and we will assist you with the necessary steps.

Seek New Counsel: Should you decide that you would like to seek representation from a different attorney or firm, you are free to do so at any time. As with the transition to [Departing Lawyer's Name], you will need to provide written consent for the release of your file to your new counsel. If you choose this option, any trust funds related to your matter will remain with [Law Firm Name] until you decide how to handle them, and we will provide you with a detailed accounting of fees and costs incurred.

Handling of Client Files and Trust Funds

Please be assured that your client file will remain confidential and secure regardless of your decision. If you choose to transition to [Departing Lawyer's Name] and provide consent, we will ensure that your files and trust funds are transferred smoothly and ethically to [New Firm Name]. We will also provide you with a final status report on your case and an accounting of all fees and costs incurred.

If we do not receive a response from you by [Response Date], we will assume that you wish to continue your representation with [Law Firm Name], and your matters and files will remain with the firm. Any trust funds related to your case will also remain with [Law Firm Name] and be managed according to our standard procedures.

Client Liability for Fees and Costs

Please note that regardless of the option you choose, you will remain liable for any fees and costs incurred by [Current Law Firm Name] prior to my departure. This means that any outstanding balances for services rendered or costs incurred will still be your responsibility. Should you have any questions regarding these fees, or the services provided, please do not hesitate to reach out to [Current Law Firm Name].

Please know that your decision is entirely up to you, and we are here to support you in whatever choice you make. If you have any questions or would like to discuss your options further, please do not hesitate to reach out to us at [Law Firm Phone Number] or [Law Firm Email Address].

We appreciate your trust in us and in [Departing Lawyer's Name] during this transition, and we remain committed to ensuring your legal needs are met with the utmost care.

Thank you for your understanding, and we kindly ask for your response by [Response Date] by email or regular mail.

Your Choice

Please indicate your preferred option by marking the appropriate box below:

Continue with [Law Firm Name]

☐ I wish to continue my legal representation with [Law Firm Name].

Transition to [Departing Lawyer's Name]

☐ I would like to follow [Departing Lawyer's Name] to [New Firm Name].

Seek New Counsel

☐ I have decided to seek representation from a different attorney or firm.

Inquiry #7:

Is Departing Lawyer entitled to contact information for his current clients?

Opinion #7:

Yes. *See* Opinion # 3.

Inquiry #8:

Must law firm make reasonable efforts to provide Departing Lawyer with a list of all his former clients?

Opinion #8:

Yes. Both Law Firm and Departing Lawyer share an obligation to protect client interests. Therefore, the departing lawyer and the former firm should cooperate to ensure that all parties are aware of potential conflicts. The Rules of Professional Conduct require departing lawyers and law firms to adopt reasonable conflict-checking procedures to identify potential conflicts that could arise when lawyers bring in new clients or move between firms. *See, e.g.*, Rule 1.7, cmt. [3]. A necessary component of any conflict-checking procedure is a list of both current and former clients. Given this existing requirement, it is reasonable to require Law Firm to provide Departing Lawyer with the names of his former clients. Making a reasonable effort to provide Departing Lawyer with a list of his former clients is essential for both the law firm and the departing lawyer to meet their ethical duties.

Rule 1.6(b)(8) provides that a lawyer may reveal information protected from disclosure by Rule 1.6(a) to the extent the lawyer reasonably believes necessary “to detect and resolve conflicts of interest arising from the lawyer's change of employment . . . but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.” By providing Departing Lawyer with a list of his prior clients, Law Firm ensures that Departing Lawyer knows which matters he needs to avoid at his new firm. Providing the list will also ensure that Departing Lawyer's new firm is able to timely implement screening measures when conflicts arise in the future based on Departing Lawyer's former clients. Timely implementation is necessary to avoid the imputation of conflicts to the new firm pursuant to Rule 1.10. Under Rule 1.10, conflicts of interest are imputed to the entire firm unless certain steps, like screening, are implemented. For the new firm to create appropriate ethical screens (such as prohibiting the departing lawyer from accessing case files or working on certain matters), Departing Lawyer must know who his former clients were and whether those clients are involved in substantially related matters at the new firm.

The ultimate purpose of conflict-checking procedures is to protect client interests by preventing a lawyer from acting against his former clients in ways that could compromise confidential information or the lawyer's duties to those clients. Refusing to make reasonable efforts to provide a list of former clients to Departing Lawyer could potentially harm the interests of former clients. Without access to a list of former clients, Departing Lawyer might inadvertently represent a client in conflict with a former client from Departing Lawyer's former law firm in violation of Rule 1.9. Such a scenario could expose the new firm to potential conflict-related issues, which could lead to disqualification in certain cases. Accordingly, as permitted by Rule 1.6(b)(8), law firms can and should provide limited information to Departing Lawyer, such as client names and the general nature of the representation, without disclosing sensitive details. *See* Rule 1.6 cmt. [17], [18]. This allows Departing Lawyer to check for conflicts without Law Firm breaching confidentiality under Rule 1.6.

The Ethics Committee welcomes feedback on the proposed opinion; feedback should be sent to ethicscomments@ncbar.gov (<https://mail.google.com/mail/?view=cm&fs=1&tf=1&to=ethicscomments@ncbar.gov>).