MOVIN' ON—ETHICAL CONSIDERATIONS RELATING TO ATTORNEY MOBILITY[1]

By David B. Parker and Justin D. Denlinger

Attorney mobility has only intensified since the pandemic leading to an increased number of law firm mergers, closures, and attorney retirements. In this era, attorneys (in particular, litigators that are sole practitioners or small firm attorneys) who are retiring or closing their doors and joining other firms must be mindful of their ethical obligations, both to current and former clients. For example, in the context of either retiring *or* closing up shop and moving to another firm without the client: (a) What are an attorney's ethical obligations in communicating with their current clients? (b) How must the attorney handle delivery/preservation of client files? (c) And, finally, how does the attorney deal with the tricky aspect of handling the client trust account?

Notice to Clients/Duty to Communicate

The California Rules of Professional Conduct ("CRPC") Rule[2] 1.4 expressly provides that an attorney's duty to communicate to their clients includes, but is not limited to: (1) promptly informing the client of any decision or circumstance for which disclosure is required under the CRPC or State Bar Act (Rule 1.4(a)(1)); and (2) keeping the client reasonably informed about "significant developments" regarding the subject matter of the representation (Rule 1.4(a)(3); Business & Professions Code ("B&P") §6068(m).) An attorney's retirement/closing of a law firm and moving to another is critical information which must be reported promptly in order to minimize the risk of prejudice.

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[1] The views expressed here are those of the authors and not necessarily those of the Professional Responsibility and Ethics Committee (PREC) or the Los Angeles County Bar Association (LACBA).

[2] All references to "Rule(s)" shall be to the CRPC.

Where termination of representation is contemplated as a result of the attorney's move, the attorney must take "reasonable steps to avoid reasonably foreseeable prejudice" to the client's rights. (Rule 1.16(d); Cal. State Bar Form. Opn. ("Cal. Bar Opn.") 2014-190 (decided under former rule and determined that such a rule applies when an attorney withdrew upon dissolution of a law firm).) At a minimum, notice to the client in such a situation should include: (a) advising the client concerning upcoming dates and deadlines in the client's matter; (b) ensuring return or consensual destruction of the client's files and papers; and (c) providing the attorney's new contact information. (Rule 1.16(d).) Best practices suggest that the attorney should also advise the client of the implications of termination and assist the client in obtaining new counsel. (See Rest.3d Law Governing Lawyers §33, Comment "b".) In the case of *former* clients where the client file has not yet been delivered, it would include notice as to the intended disposition of the files (e.g., giving a deadline to retrieve the files or else they will be shredded, inquiring where the files should be sent, or (if applicable) providing assurance the files will continue to be stored by the attorney's new firm).

Litigators who are retiring/closing down their firms and moving to another firm should be mindful of their continuing duties after withdrawal but before a substitution of attorney is filed with the Court. Indeed, until a substitution is filed (or the Court otherwise orders), the attorney remains obligated to act competently to protect the client's interests in the matter notwithstanding discharge. (Cal. Bar Opn. 1994-134; *In re Jackson* (1985) 170 Cal.App.3d 773, 780.) This, of course, is in addition to the attorney's continuing duty of confidentiality—*which survives the termination of the relationship*.[3] "[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal.564, 573-574; see also Rule 1.9(c).)

Client Files

Regardless of whether an attorney retires or is closing up shop to join another firm, there remains the issue of what to do with the client files. The "client file" conceivably includes the contents of

[3] It is the duty of every attorney, "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, or his or her client." (B&P §6068(e)(1).) The duty of confidentiality is broader than attorney-client privilege and is not limited to communications protected by the latter. (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, fn. 5.)

the physical file[4], e-mails, and electronically stored information. Rule 1.16(e)(1) recognizes this by requiring release of "materials and property…whether in tangible, electronic or other form." Whether retiring or moving to another firm, upon termination of employment, an attorney must promptly release at the client's request, all the client's "materials and property." (Rule 1.16(e)(1); Los Angles Bar Ass'n Form. ("LACBA") Opn. 362 (1976); State Bar Opns. 1994-134, fn. 1 and 2007-174.) Unreasonable delay in releasing the client file can be grounds for discipline. (See Rules 1.16 & 1.15(d)(7); LACBA Opns. 48, 103, 197, 253 & 330 (1972) (decided under former rule).)

When it comes to ***storing*** a former client's files, the CRPC and State Bar Act do not specify how long an attorney should keep them. Many attorneys are under the mistaken belief that the CRPC requires that attorney maintain a client's files for 5 years. (See, Rule 1.15(d)(5) (5-year requirement for client *trust accounting records*); *Ramirez v. Fuselier* (9th Cir. BAP 1995) 183 BR 583, 587 & fn. 3 (applying 5-year rule to client files.) Ethics opinions disagree wither the rule is intended to deal with client files. (See Cal. Bar Opn. 2001-157 (opining that former Rule 4-100 was not intended to address file retention (5-year retention not required in all cases)); cf., LACBA Opn. 475 (1994)—recommended 5-year retention period for client files "by analogy" to former Rule 4-100(b)(3) (now Rule 1.15(d)(5)).)

Relatedly, neither the CRPC nor the State Bar Act expressly prohibit (or encourage) the ***destruction*** of client files. Ethics opinions indicate destruction of client files may be appropriate provided certain precautions are taken. If diligent efforts to notify the former clients fail, the files may be destroyed except for "intrinsically valuable materials" (e.g., money orders, travelers' checks, stocks, bonds, wills, original deeds, original notes, etc.). (See LACBA Opn. 475 (1995); cf., LACBA Opn. 420 (1983) (files relating to criminal matters cannot be destroyed during the client's lifetime absent client's written instructions); see also Pen. Code §1054.9(g) (criminal trial counsel required to maintain copy of former client's files "for the term of that client's imprisonment" in cases where defendant is convicted of serious or violent felony and sentenced

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[4] (i.e., pleadings, correspondence, discovery, original client papers and property, investigation, and attorney work product.) As to the latter, it is not part of the definition of "client materials and property" and is often debated. Best practice is the Golden Rule: if the roles were reversed would the attorney find value in the work product for purposes of going-forward representation of the client? If so, include it as part of the released file. An attorney may have an ethical obligation to disclose work product to the client when transferring the file if the information is necessary to avoid reasonably foreseeable prejudice to the clients' rights. (See, LACBA Opns. 330 (1972) (work product for which client can be billed belongs to the client & 405 (1982)) ("virtually everything" in client file is client property).)

to 15 years or more).) Best practices suggest that before destroying the client file (even if the fee agreement expressly permits such destruction), the attorney should: (a) attempt to contact the former client advising of the existence of the file, the client's right to examine and retrieve the contents, and of their intended destruction [Cal. Bar Opn. 2001-157 (applying former rule); see also LACBA Opn. 475 (1995) (discussing closing client files of dissolving law firm under former rule)]; and (b) verify that such destruction will not violate state/federal document retention requirements. Regardless of retention or contemplated destruction, avoiding reasonably foreseeable prejudice to the client should always be at the forefront of the attorney's mind.

Client Trust Account[5]

Once the relationship terminates, the attorney must promptly refund to the client any part of a fee paid in advance that has not been earned. (Rule 1.16(e)(2); see *Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 912-914, 918 (attorney disciplined under former rule for failing to return unearned fees for 2.5 months).) To be clear, Rule 1.16(e)(2) does ***not*** apply to "true" or "classic" retainers. In other words, the rule does not apply where a retainer fee is paid solely for the purpose of ensuring the lawyer's availability for a matter. (Rule 1.16(e)(2).)

Finally, if a dispute arises over unearned fees where the client disputes the amount to be returned, the attorney must retain the disputed amount in their client trust account until the dispute is finally resolved. (Rule 1.15(c)(2)).) "Money held in a client trust bank account becomes yours and not the client's as soon as, in the words of rule 1.15(C)(2), your 'interest in that portion becomes fixed.' BUT—and this is a big but—you can't withdraw any fees that the client disputes. As far as you're concerned, from the moment a client disputes your fee, that money is frozen in the client trust bank account until the fee dispute is resolved. As soon as your interest becomes fixed and is not in dispute, you are obligated to withdraw that money promptly form the client trust bank account."' (Handbook p. 3.) In addition, "For at least five years after disbursement you have to keep complete records of all client money, securities or other properties that are entrusted to you." (*Ibid.*)

An attorney's retirement (or closing their firm to move to another firm) is rife with ethical traps for the unwary. Attorneys in such situations must be mindful of their ethical obligations relating

[5] A great resource for attorneys is the *Handbook on Client Trust Accounting for California Attorneys* (State Bar of California, 2018) ("Handbook"). (See, https://www.calbar.ca.gov/Portals/0/documents/ethics/Publications/CTA-Handbook.pdf)

to (among other things) communications with their clients; the storage, destruction and/or transfer of client files; and the careful handling of the client trust account. Being mindful of and avoiding reasonably foreseeable prejudice to the client should be the attorney's touchstone.

About the Authors:

David B. Parker, Founding Partner at Parker Mills LLP, concentrates his practice on professional liability and business litigation and legal ethics. He is a current member and former chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee and a former member of the State Bar's Committee on Professional Responsibility and Conduct.

Justin D. Denlinger is an Associate at Parker Mills LLP whose practice focuses on professional liability, entertainment, and legal ethics.

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