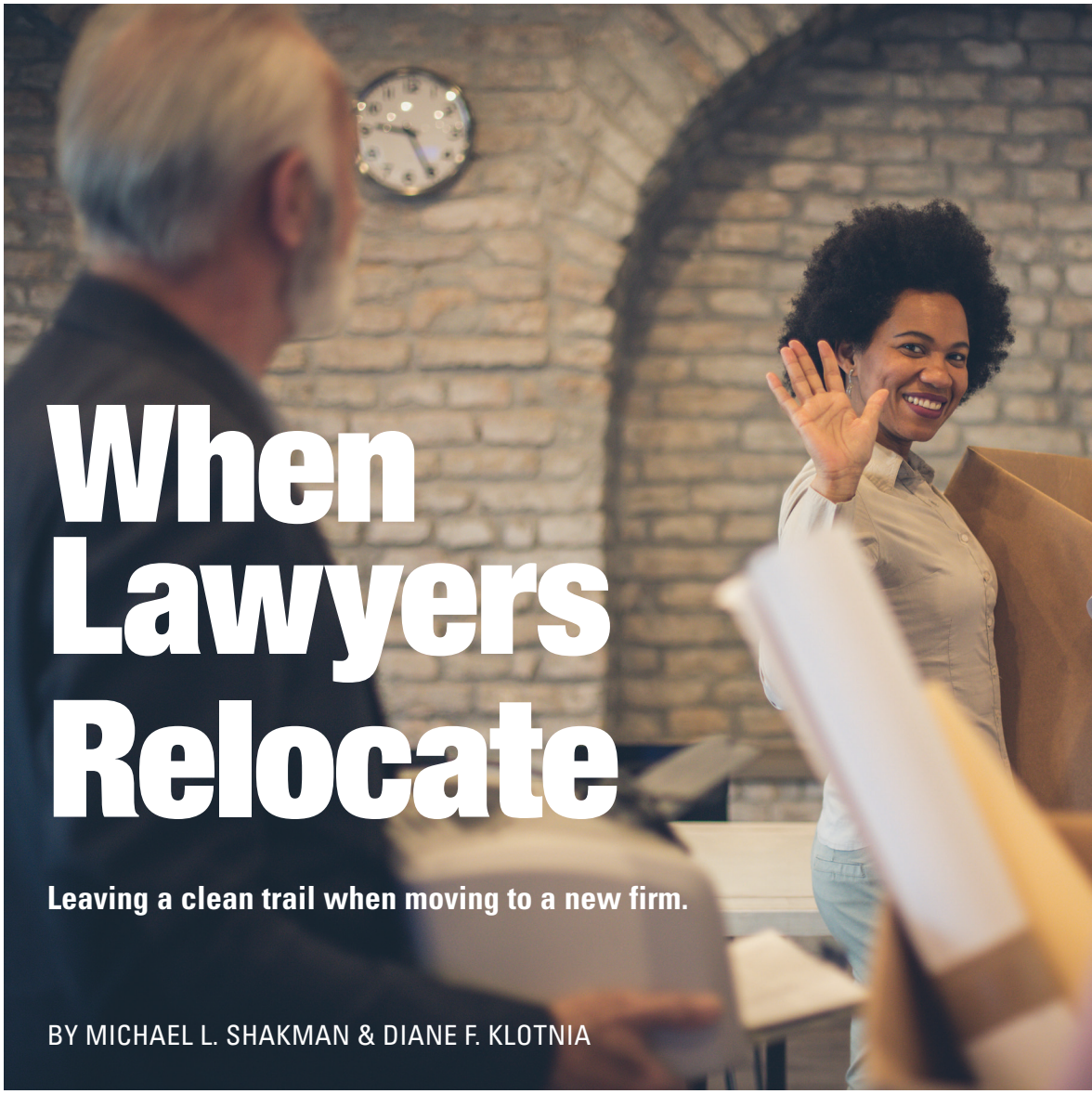

When Lawyers Relocate

Leaving a clean trail when moving to a new firm.

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LAWYERS FREQUENTLY RELOCATE FROM ONE FIRM TO ANOTHER. Issues arise from the competing interests of the relocating lawyer, the old firm, the new firm, and the clients involved. The Illinois Rules of Professional Conduct (IRPC or Rule) give controlling weight to client interests.

Relevant duties include those arising under IRPC 1.4, requiring the lawyer to keep clients informed of information relevant to their representation; Rules 1.1 and 1.3, requiring competence and diligence; Rule 1.6, requiring the lawyer to maintain the client's confidences; Rule 1.16, requiring the lawyer to avoid client prejudice in terminating a representation; Rule 5.6, prohibiting agreements that restrict the lawyer's ability to practice after termination of the relationship with a law firm; Rules 7.1-7.5, addressing solicitation of and communications with clients; and Rule 8.4, prohibiting dishonesty, misrepresentation, etc. Also relevant are the conflict principles of Rules 1.7 (current client conflicts), 1.9 (former client conflicts), and 1.10 (imputation of conflicts).

What does the agreement say?

Relevant to many relocation disputes are provisions of partnership, membership, or shareholder agreements that directly or indirectly affect the lawyer's ability to relocate. Rule 5.6 prohibits any agreement that "restricts the right of a lawyer to practice after termination of the relationship,

except an agreement concerning the benefits upon retirement ….”[1] That same rule and relevant caselaw also bar provisions that expressly limit the ability of the relocating lawyer to compete with the old firm. Sophisticated provisions that do not expressly prohibit competition generate issues that are sometimes litigated.

The most obvious violation of Rule 5.6 is a term that would penalize the relocating lawyer in some way if the lawyer engages in competition. For example, in *Jacob v. Norris, McLaughlin & Marcus*, the partnership agreement provided that in a competitive departure, “the Law Firm shall have no obligation to pay and the Member shall have no right to receive any termination compensation.”[2] The provision was held unenforceable.

A competition-neutral provision that nonetheless impacts a lawyer who relocates is more likely to be upheld. For example, in *Pochopien v. Marshall*, the court enforced a provision of a partnership agreement requiring that a withdrawing partner remain liable for lease payments for one year, regardless of whether the partner competed with the old firm after departure.[3]

More sophisticated provisions fall into a grey area. A partnership agreement may limit payment of a withdrawing partners’ capital account or share of income if more than a certain number of lawyers leave to practice at another firm within a specified period, such as one year. Enforceability will likely depend on whether the firm can justify the restriction on the basis of a competition-neutral rationale.

A recent American Bar Association (ABA) opinion casts serious doubt on the enforceability of common contractual requirements that a lawyer remain at the old firm for a fixed period after giving notice of his or her intention to relocate.[4] The opinion concludes that such periods “cannot be fixed or rigidly applied without regard to client direction, or used to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client.”[5] It adds: “A lawyer who wishes to depart may not be held to a pre-established notice period particularly where, for example, the files are updated [by the lawyer], client elections [concerning continuing representation] have been received, and the departing lawyer has agreed to cooperate post-departure in final billing.”[6]

Enforcement of restrictive provisions on competitive departures may result in discipline. In *People v. Wilson*, the Colorado Supreme Court disciplined a lawyer for trying to enforce an employment agreement that prohibited relocating lawyers from soliciting clients; it required forfeiture of fees earned by relocating lawyers through such solicitation.[7]

Competing duties

Lawyers may be subject to liability for taking steps that violate fiduciary or other duties to the old firm or its members. This topic is closely related to the ethical limitations that apply to lawyer relocation. The same actions that the old firm may claim violate the lawyer’s fiduciary duties to it may be actions that the relocating lawyer claims are permitted, or even required, under the IRPC.

For example, the old firm may claim that a relocating lawyer has breached fiduciary duties if the lawyer informs a client or other colleagues that the lawyer is considering relocating before the lawyer has told the firm. On the other hand, the lawyer may claim the same conduct fulfills that lawyer’s ethical duties under Rule 1.4 to keep a client reasonably informed of an event relevant to the client’s representation and to have sufficient resources to provide the representation.

Dowd & Dowd Ltd. v. Gleason[8] remains the leading Illinois case on this issue. The Illinois Supreme Court held that relocating lawyers may take some steps to relocate before notifying the old firm. But fiduciary

1. Ill. R. Prof’l Conduct 5.6.
2. *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 145 (N.J. 1992); see also *Stevens vs. Rooks Pitts & Poust*, 289 Ill. App. 3d 991, 996 (1st Dist. 1997) (applying majority principle “that the objective of these [versions of Rule 5.6] … is protecting counsel accessibility, courts have overwhelmingly refused to enforce provisions in partnership agreements that restrict the practice of law through financial disincentives to the withdrawing attorney.”).
3. *Pochopien v. Marshall*, 315 Ill. App. 3d 329 (1st Dist. 2000).
4. ABA Formal Op. 489.
5. *Id.*
6. *Id.*
7. *People v. Wilson*, 953 P.2d 1292 (Colo. 1998).
8. *Dowd & Dowd Ltd. v. Gleason*, 181 Ill. 2d 460 (1998).

TAKEAWAYS >>

- When a lawyer relocates to a new firm, timing and content are important when determining ethical responsibilities and what information may be shared with clients, colleagues, and the new and old firm.
- Various opinions written by the Illinois State Bar Association and the American Bar Association as well as rules of professional conduct provide much guidance on avoiding conflicts of interest for the relocating lawyer and his or her old and new firm.
- Illinois lawyers face subtle differences in professional conduct rules regarding relocating. In certain relocation-based matters, state law is not settled.

ILLINOIS LAW IS NOT SETTLED ON WHETHER THE OLD FIRM'S RETAINING LIEN TRUMPS THE CLIENT'S RIGHT TO DIRECT THAT ITS FILES GO WITH THE RELOCATING LAWYER.

duties to the old firm impose limits on the relocating lawyers and the court found that the relocating lawyers breached those duties and held that the departing lawyers were liable because they had used confidential information of the old firm to arrange financing for their new firm and induced a major client to relocate without telling the old firm. The relocating lawyers were assessed large actual and punitive damages. They would likely have avoided all liability if they had not acted in secret and had notified the old firm's management before contacting clients.

Such cases raise questions, to which professional conduct rules provide guidance:

- May a relocating lawyer talk to a client about the expected relocation? Does the lawyer have a duty to do so? When?
- May the relocating lawyer communicate with the client before telling the old firm about relocating?
- May the relocating lawyer recruit coworkers away from the old firm?
- What may the lawyer say to a new firm about his or her clients, their billings, or about colleagues who might relocate?
- How should the relocating lawyer deal with possible conflicts between the old and new firms if they represent clients with opposing interests?
- What may the relocating lawyer take from the old firm and use at the new firm?
- Is the old firm obligated to cooperate with the relocating lawyer?

ABA Formal Opinion 99-414[9] is a leading source on many of these issues. For Illinois lawyers, Mary Andreoni of the Illinois Attorney Registration & Disciplinary Commission (ARDC) published a very useful guide that applies ABA Opinion 99-414 and other sources.[10]

ABA Opinion 99-414 rejects the idea that a lawyer may not communicate with clients about relocation before informing the old firm. But the Opinion also recommends that the relocating lawyer and old firm provide joint notice to the client whenever possible. Practical and legal considerations come into play in deciding when to talk to the client and when to inform the old firm of the lawyer's intent to relocate. The lawyer has an ethical obligation to the client to keep the client informed about the client's matter. If the lawyer is thinking about relocating and doing so may affect the client, the client is entitled to notice.

If the lawyer is planning to relocate and if the client prefers to continue the relationship with the lawyer, both have an interest in whether any new firm can handle the client's work. This creates competing interests. The duty to keep the client informed and the duty to provide competent representation are possibly implicated by a relocation. But the lawyer also has duties to his or her colleagues not to take unfair advantage, as *Dowd* holds.

The safest course for the relocating lawyer would be to defer discussions with clients or other firms until the lawyer has notified the old firm. For various reasons, that may not be practical and may explain why ABA Opinion 99-414 does not flatly prohibit talking to the client before telling the old firm. However, if a lawyer elects to communicate with clients or with other colleagues before telling the old firm, the lawyer should be prepared to explain why that was appropriate. Among reasons that make sense:

- to ask clients that may want to relocate with the lawyer if they would have objections should the lawyer relocate;
- the lawyer may be obligated to communicate to the client about a possible change of law firms if the change may impact the outcome of a hotly contested lawsuit or a transaction in progress; or
- notice to the old firm might trigger expulsion and hurt the client's interests if there is bad blood between the lawyer and the old firm.

ABA Opinion 99-414 suggests a safe harbor for giving notice: The notice should say that the client is free to stay at the old firm, go to the new firm, or chose lawyers from other firms. The notice must fairly describe the client's alternatives (although, in reality, there may only be one practical answer). Any initial in-person or written notice informing clients of the relocating lawyer's anticipated new affiliation that is sent before the lawyer resigns from the old firm generally should be limited to clients for whom the lawyer has direct professional responsibility at the time of the notice. Absent reasonable justification, relocating lawyers who are junior members should not contact even current clients prior to notifying the old firm.

ISBA RESOURCES >>

- ISBA Professional Conduct Advisory Opinions, *Law Firm Partnership and Employment Agreements*, law.isba.org/3eomHLC.
- ISBA Professional Conduct Advisory Opinions, *Screening*, law.isba.org/3egExNG.
- John W. Olmstead, *Best Practice Tips: Partner Withdrawal From a Law Firm*, The Bar News (Feb. 2018), law.isba.org/2ZGWtx0.

9. ABA Formal Op. 99-414.
10. Mary F. Andreoni, Leaving a Law Firm: A Guide to the Ethical Obligations in Law Firm Departure (Jan. 2020), *available at* iardc.org/Leaving_a_Law_Firm.pdf.

The lawyer should not urge the client to sever its relationship with the old firm, but may indicate the lawyer's willingness and ability to continue responsibility for the matters on which the lawyer currently is working. The lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters and must not disparage the old firm. Following this guidance should reduce liability for improperly inducing a client to relocate.

ABA Opinion 489 states that when "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."[11] But timing matters. It adds: "[D]eparting lawyers need not wait to inform clients … of their impending departure, provided that the firm is informed contemporaneously."[12]

ABA Opinion 489 also allows the relocating lawyer to continue representing a client in the period between announcing the relocation and implementing it: "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."[13] Nor may the old firm require the relocating lawyer to work from home or deprive him or her of the resources needed to represent the client.

In addition, ABA Opinion 489 states that the old firm should have, and the relocating lawyer should comply with, "policies that require [in the case of clients who do not relocate with the lawyer] the deletion or return of all electronic and paper client data in a departing lawyer's possession …."[14] An exception applies to permit the relocating lawyer to "retain names and contact information for clients for whom the departing lawyer worked while at the firm … to determine conflicts of interest at the departing lawyer's new firm and comply with … ethical or legal requirements."[15]

ABA Opinion 489 is noteworthy because it imposes duties on a firm's management to create policies dealing with lawyer relocation. Building on Rule 5.1, which requires reasonable efforts to ensure that lawyers will comply with the Rules of Professional Responsibility, it states that "[l]aw 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."[16]

Communications with the new firm

What may a relocating lawyer say to potential new firms about his or her clients? Rule 1.6 recognizes an exception to the no-disclosure rule for conflict clearances and permits a lawyer to disclose client information to "detect and resolve conflicts of interest … if the revealed information would not prejudice the client."[17] This is not an open-ended authorization to tell a new firm everything about the client. Permitted disclosures are limited to information that is reasonably necessary to allow the lawyer and new firm to identify conflicts; disclosures that would prejudice the client are prohibited without informed client consent. The information necessary to detect conflicts likely does not include (absent some identifiable relevance for conflict-review purposes) the amount the client has paid for services or how long the client's matter could continue. If the client consents, billing and other client information may be disclosed.

Dealing with conflicts

Suppose that the relocating lawyer would create a conflict for a new firm's existing clients. Is the move foreclosed? As ABA Formal Opinion 96-400 makes clear, the devil is in the details. If the relocating lawyer has a conflict, that conflict is imputed to all lawyers in the new firm (unless the relocating lawyer can be screened, discussed below).

In identifying clients and options, is the client staying at the old firm or relocating to the new firm? Does the conflict arise because the new firm is opposing a client for whom the lawyer is doing work at the old firm or for whom the lawyer did work in the past? Does the old firm have an active matter for a client in opposition to a client of the new firm, but the relocating lawyer has done no work on the matter at the old firm, has no information about it, and the client is not relocating to the new firm? Is the new firm handling a matter for a major business competitor of a client who proposes to relocate with the lawyer? A detailed discussion of each scenario is beyond the scope of this article, but some guidance is offered.

IF THE LAWYER IS PLANNING TO RELOCATE AND IF THE CLIENT PREFERS TO CONTINUE THE RELATIONSHIP WITH THE LAWYER, BOTH HAVE AN INTEREST IN WHETHER ANY NEW FIRM CAN HANDLE THE CLIENT'S WORK. THIS CREATES COMPETING INTERESTS. THE DUTY TO KEEP THE CLIENT INFORMED AND THE DUTY TO PROVIDE COMPETENT REPRESENTATION ARE POSSIBLY IMPLICATED BY A RELOCATION.

It is possible for the lawyer and the new firm to manage conflicts. For example, two clients who are competitors may or may not be a conflict according to the Rules. Whether representing both would create a conflict may depend on what the old and new firms are doing for each of the clients at the time of the relocation. But even disclosing that information may present issues under Rule 1.6 if that disclosure may prejudice one of the clients.

Many jurisdictions, including Illinois,

11. ABA Formal Op. 489.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Ill. R. Prof'l Conduct 1.6.

permit screening as a method to address relocation-based conflicts. But there are limitations. Screening is only permitted where the client does not relocate to the new firm and thus is a "former client" of the relocating lawyer under Rule 1.9. Under those circumstances, Rule 1.10(e) provides:

> 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 Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.[18]

Rule 1.0(k) states that "'screened' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect …."[19]

A screen under the Illinois Rules permits the new firm to resolve a former client conflict caused by a relocating lawyer without requiring notice to the former client or its consent. However, the relocating lawyer may not receive compensation directly from the screened matter. As Comment 9 to Rule 1.10 explains:

> This paragraph does not prohibit a lawyer from receiving a salary or partnership share established by independent agreement, *but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified*. Nonconsensual screening in such cases adequately balances the interests of the former client in protecting its confidential information, the interests of the current client in hiring the counsel of its choice (including a law firm that may have represented the client in similar matters for many years), and the interests of lawyers in career mobility, particularly when they are moving involuntarily.[20]

An added wrinkle in Illinois is timing. Unlike the ABA Model Rule, which permits a screen to be implemented "while" lawyers are associated, Illinois Rule 1.10(e) only permits screens to be used "when" a lawyer becomes associated with the new firm. Based on that differing language, the ISBA recently issued an opinion (ISBA Opinion 18-02) that concludes that a screen must be put in place immediately upon relocation and cannot be implemented to resolve a conflict that may arise after the lawyer joins the new firm.[21] Although it seems counterintuitive to apply such a rule for conflicts that only arise or become known after a relocation, we are not aware of any Illinois authority or caselaw directly addressing the issue. Not surprisingly, courts focus on the clients and their risks when determining whether screening will be deemed timely and effective.

Talking to colleagues about relocating

Another issue that often arises is what the relocating lawyer may say to old-firm personnel before informing the firm's management about the relocation. Whether communications with colleagues about relocating will be viewed as breaching duties to the old firm is likely to be a fact-intensive inquiry. The outcome may depend upon whether the relocating lawyer arranged jobs for associates and paralegals with the new firm before leaving the old firm. If the relocating lawyer said only that anyone interested in following him or her after relocation should contact the new firm, that would likely not violate a duty to the old firm.

The leading case on this issue is *Gibbs v. Breed, Abbott & Morgan*.[22] One partner, Gibbs, became dissatisfied with the firm. He approached the only other active partner in the same department, Sheehan, and successfully persuaded Sheehan to join him. A five-judge New York appellate panel unanimously rejected the trial court's finding that Gibbs had breached duties to his former firm "by discussing with Sheehan a joint move to another firm."[23] Apparently, talking is OK and may be necessary to protect client interests.

But even talking has limits in terms of timing and content. The majority opinion in *Gibbs* stated that "[p]re-withdrawal recruitment of firm employees is generally allowed only after the firm has been given notice of the lawyer's intention to withdraw."[24] The majority also held that the prenotice compilation and sharing with prospective law firms a list of department employees whom Gibbs and Sheehan wanted the new firm to recruit, which included "confidential" compensation figures, was a breach of fiduciary duty. The court remanded for a finding on damages. Thus, whether the relocating lawyer may provide information about salaries and other data to the new firm may depend on whether the information was confidential or general knowledge.

Ownership of files & other materials

Relocating lawyers often wish to take files, model pleadings and forms, and client records. They may also claim ownership of work products generated at the old firm.

Ethics opinions generally view files as controlled by the client and accessible for normal purposes by lawyers who formerly represented the client, with client direction. Thus, if a client directs the old firm to transfer files to a relocating lawyer or the new firm, the old firm should comply. But this is subject to several caveats.

ISBA Opinion 95-02 states the basic rule:

> The law firm [requesting the opinion] … is taking the position that closed files 'belong' to the firm, since the client has received the services bargained for. However, there are a number of circumstances which may arise after a file is closed, when a departed lawyer would need access to a closed file without client consent …. Either or both the client and the lawyer involved may need access to the file. Even if the lawyer is no longer associated with the firm, that lawyer should be able to have access to that file …. [But] … the firm is entitled to compensation for the reasonable expense of retrieving the files … and providing copies of materials.[25]

18. Ill. R. Prof'l Conduct 1.10(e).
19. Ill. R. Prof'l Conduct 1.10(k).
20. Ill. R. Prof'l Conduct 1.10, comment 9.
21. ISBA Formal Op. 18-02.
22. *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578 (N.Y. App. Div. 2000).
23. *Id.* at 582.
24. *Id.* at 583.
25. ISBA Formal Op. 95-02.

Illinois law is not settled on whether the old firm's retaining lien trumps the client's right to direct that its files go with the relocating lawyer.

The retaining lien is a common-law creation. The lawyer cannot file suit to enforce it but may assert the lien to secure payment of unpaid fees if the client directs that the lawyer send the file to a new lawyer. This common-law lien differs from the lawyer's statutory lien. That lien only applies to recover fees due the lawyer for representing a client who recovers funds on a claim handled by the lawyer.

ISBA Opinion 12-11 addresses the retaining lien in the context of Rule 1.16(d): The Rule states that even though a lawyer may retain papers relating to the client "to the extent permitted by other law," the "difficult question is whether the client, or the successor attorney, may arguably need the client's file or his [or her] papers to protect the client's interest."[26]

The competing interests are the lawyer's right to fees earned and the client's right to property and files. ISBA Opinion 12-11 agrees with the following admonition of another commentator: "[J]ust because a retaining lien may be available to encourage clients to pay their fees doesn't mean you should use it in any given case."[27] Andreoni from the ARDC takes a more extreme position, arguing that the client's interest always trumps the retaining lien if keeping the file will adversely affect the client's pending matter.[28] However, no Illinois caselaw supports that conclusion.

Does the relocating lawyer own his or her model pleadings and forms? ABA Opinion 99-414 views the issue as one of property law:

> [T]he lawyer does not violate any Model Rule by taking with her copies of documents that she herself has created for general use in her practice. However, as with the use of client lists, the question of whether a lawyer may take with her continuing legal education materials, practice forms, or computer files she has created turns on principles of property law and trade secret law. For example, the outcome might depend on who prepared the material and the measures employed by the law firm to retain title or otherwise to protect it from external use or from taking by departing lawyers.[29]

While some partnership- and associate-employment agreements attempt to resolve the issue in the old firm's favor by providing that all such materials belong to the old firm, this is more often a "nuisance issue" and not a real controversy unless there is considerable ill will between the relocating lawyer and the old firm.

ABA Opinion 489 states that once the lawyer has left, "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 [old] firm for inquiries."[30] It should also "promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer."[31]

Who owns a lawyer's work product after relocation?

In *Tucker Ellis LLP v. Superior Court of San Francisco*,[32] a lawyer sued his old firm for damages when the firm produced his emails in response to a third-party subpoena. The old firm countered that it solely owned the former associate's work product.

The Fifth District of the California Court of Appeals found for the firm, reasoning that "… the purpose of the attorney work product privilege will be better served by allowing the firm itself—with current knowledge of ongoing litigation and client issues and in the context of the firm's on-going attorney-client relationships—to speak with one voice regarding the assertion of the privilege. ... [This ruling] also avoid[s] undue intrusion into the equally sacrosanct duty of a law firm to zealously represent the interests of its clients with undivided loyalty."[33] *Tucker* can be read to base ownership of work product on the client's needs, a consistent finding in the law.

Conclusion

When lawyers relocate, consider principles underlying conduct rules, analyze any agreements of the parties to the extent they do not run afoul of the rules, and resolve disputes that prejudice clients. IBJ

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26. ISBA Formal Op. 12-11.
27. See Patrick Sean Ginty, *When Can You Retain Files for Failure to Pay Fees*?, 92 Ill. B.J. 97 (Feb. 2004), *available at* law.isba.org/2T76AkN.
28. Andreoni, *supra* note 10, at 16-17 ("the lawyer's duty under Rule 1.16(d) to avoid prejudice to the client upon termination of the representation trumps the lawyer's right to assert a retaining lien.").
29. ABA Formal Op. 99-414.
30. ABA Formal Op. 489.
31. *Id.*
32. *Tucker Ellis LLP v. Superior Court of San Francisco*, 12 Cal. App. 5th 1233 (Cal. Ct. App. 2017).
33. *Id.*