Lawyers In Transition

Employer Checklist

A resource guide from the Indianapolis Bar Association
Standing Committee on Professionalism

LAWYERS IN TRANSITION

CHECKLIST FOR EMPLOYERS

If your firm has made the decision to relieve an attorney of his/her position, the following general suggestions should assist your firm and that lawyer in their respective transitions. This list is not exhaustive, but is designed to prompt you to think of several of the main issues that arise when lawyers depart a firm.

A. Before You Notify The Lawyer:

___ Talk first to an employment lawyer to determine if there are any employment law issues. If there are, address them up front – age discrimination, sex discrimination, disability discrimination, retaliation, etc.

____ Review any employment agreement or partnership agreement. If it is a partner, what does the partnership agreement provide about severance?

____ Try to end well, and make their landing easy. Recommend them to a client for an in house position if you can. Determine what the firm can do, and more importantly, what it should do.

____ Depending on the person and situation, and maybe even during the severance meeting, you must decide whether the departure is going to be friendly or hostile, and you can then choose between two paths:

1) Offer to let them stay employed with an office and phone for two or three months while they look for another job. During this time they have no hours expectation, and they can tell whomever they wish, whatever they wish, whenever they wish. In the perfect severance, the first general communication will be an announcement that they have taken another job, and they will be leaving on a certain date. Give them the names of headhunters who may be able to help them. Let them have access to Lexis/Westlaw.

2) OR have them leave immediately and return over the weekend under supervision to get their personal property. Their computer access, and building access cards are disabled immediately.

____ Before the severance meeting, step back and do a final sit down and gut check with someone less close to the situation who is objective in order to be sure your firm wants to proceed with the termination.

____ Before you meet with the lawyer, consider whether you have the need for the lawyer in a contract-lawyer capacity (and keep them in mind for future assignments).

B. Handling The Severance Meeting

____ Decide whether the discharge is for cause or to downsize or a mixture of both. If is a mixture of both, decide how you will handle the conversation and be sure that all involved from top down are on the same page. Discharges can become complicated if the person receives two versions of the reason for the termination.

____ Consider the impact of the basis of your termination decision (e.g., for cause vs. downsizing) on COBRA, unemployment benefits, and other benefit issues. Consult with your employment lawyer on this subject.

____ If termination "for cause" issues are going to be any part of the conversation, be sure you have had many prior communications, preferably written, on the subject leading up to the termination so there are no surprises and the person knows that the particular conduct has been an issue and that he or she has had a chance to address it.

____ Go to their office for the severance conversation. You can leave when it is finished, and they can stay and gather themselves privately in familiar space.

____ Keep the conversation short.

1) We have talked about your performance issues. The firm has made a decision. We don't think it is getting better. This is not the right place for you.

   OR

2) We do not have enough work for you to do. We don't see it getting better soon. We cannot wait any longer.

____ Go over any proposed severance agreement, but give them time to review it and get it back to you. See below regarding discussion on severance agreements.

____ Go over file and client ground rules with lawyer. Remind the lawyer that they must leave the client files, and must maintain client confidentiality. Never allow client files to leave the firm without written authorization from the client.

____ If appropriate, talk about how to handle communications within the firm, with clients and to the community at large.

____ Give the departing lawyer a memo that addresses when they will receive their last check, the last day of their health insurance coverage, COBRA rights, cafeteria plan flex accounts, long term disability insurance and life insurance, retirement plan distributions, parking, any special deductions that will be taken from their last check. Do not expect them to remember the information you provide orally during the severance conversation. No one can.

____ Pay attention to express or implied claims that the firm has acted improperly in connection with the severance. Discuss with the appropriate persons afterward.

____ Your IT personnel can generally tell whether the lawyer has emailed or downloaded substantial documents in connection with their departure. Make this a condition of the severance agreement (see below).

____ You need to be sure that someone involved can be objective and is looking at the situation objectively, even though emotions may be running high. Have that person review the severance agreement and the plan for termination notice, etc.

____ If emotions are running high, remind the lawyers remaining at the firm that they should not send emails internally or externally, disparaging the departing lawyer and listing in their email all the errors the departing lawyer committed while at the firm. These are <u>not</u> privileged communications. There is no rule of privilege that says that anything said within the walls of the firm, by email or voicemail or conversation, is privileged.

____ Consider entering into an independent contractor agreement with the lawyer and presenting it at the meeting.

____ Consider what property the departing lawyer can take with him/her:

1) Blackberry
2) Contact lists from Blackberry/computer
3) Form documents they created/other
4) Their general research files
5) Copies of legal publications/journals purchased by the firm

____ Will the Firm continue to pay professional dues for a period of time?

C. Severance Package

____ Always try to get a severance agreement and release.

____ Be consistent in the severance package you offer as to money, outplacement services, references, etc. Try not to get into individual negotiations, but stick with your policy.

____ Don’t be unnecessarily restrictive about the lawyer taking with them personal correspondence, photos, CLE materials, outlines of the law, etc. that are on firm computers. You may even want to permit them to take documents and forms so long as they delete client names.

____ Make sure you have an employment lawyer review the severance agreement. There are certain notice requirements that may be required to make your severance agreement enforceable.

____ Give the lawyer time to review and digest the severance agreement before signing it.

D. Client Issues - Getting the Work Done (Be Prepared in Advance)

____ Determine quickly what the lawyer was working on so you can make sure the work is covered. Review file lists if they are available.

____ Go through their time sheets for the last few months and determine what clients they have been working for. Talk with partners involved with those matters before the severance conversation to see if there are any deadlines that are sensitive and imminent that affect the timing of the conversation. For example, is there a hearing or deposition within a week, or a major pleading or drafting project due within a week?

____ If the severance is friendly, ask the attorney to make a list of the open matters that they are working on, or prepare a memo of the status of each matter. If the severance is not friendly, just ask the lawyer where their files are.

E. Client Issues - Whose Client Is It?

____ The client is always the firm's client, not the lawyer's client, until the client advises the firm that it is no longer a client.

____ When the firm knows a lawyer is leaving, it must quickly assess the likelihood of clients following the lawyer. In some cases, it is clear that certain clients will follow the lawyer. In this situation, cooperate with the departing lawyer and client and work for a smooth transition. In other cases, it may not be clear, and the firm may want to make a pitch to keep the client.

____ The lawyer, if a partner, cannot make a pitch to the client before leaving, because the lawyer owes a fiduciary duty of loyalty to the firm. The partnership agreement may include forfeiture clauses for communications with clients prior to leaving and/or for taking other lawyers along.

F. File Transfer Issues

____ If the severance is friendly and the firm expects that certain clients will follow the lawyer, try to coordinate a communication with the client before the lawyer leaves so that you do not end up with files in limbo, and there is work that needs to be done that does not get done. You might be able to send a joint letter to clients, advising them that the individual is leaving, that the firm would like to continue to work for the client, but that if the client wants to follow the lawyer, the firm wishes them well and thanks them for the opportunity to serve them in the past. Tell the client that it must instruct the firm in writing to transfer files. An email request is probably adequate. Do not require any particular form or language, and after the request is received, transfer the files quickly, so that work gets done on time. If you try to punish the lawyer by imposing technical procedural requirements on file transfers, you are also punishing the client, and exposing the firm to malpractice.

____ Although you may do so, it is generally not wise to withhold files in exchange for money owed to the firm. You must terminate the representation in a way that protects the client's interests. The only time withholding the files is effective in triggering payment is when there is a deadline, and that is also when the risk of hurting the client is substantial.

____ Have a procedure in place for handling file transfers. Have all outbound files go through one person who knows the policy. The firm may decide to copy an entire file if there are sensitive issues in it, or some of the file, or none of the file for more routine matters. Don't transfer conflict analyses or billing matters. As to attorney notes, the general rule is that they should be transferred as part of the file. However, if they are purely internal, the firm may not need to transfer them. Talk to ethics counsel if you are not going to transfer all of the attorney notes.

G. Administrative Issues

____ No later than on the day of the separation, notify payroll, IT, benefits, marketing, the receptionist, and those in charge of building access. After the meeting and after the lawyer leaves, revise the phone list and website, and cancel passwords to Lexis and Westlaw.

____ After the lawyer leaves, have someone monitor their inbound email and voicemail for a while. Decide on the message you are going to put on their email and voicemail.

H. Billing Issues

____ In the letter to clients, remind them that they still owe for work performed. A lawsuit to recover the fees invites a counter suit for malpractice. Was the work in question performed exclusively by the departing lawyer?

____ Troublesome situations include work that is billed when it is done, and it is half done when the lawyer leaves, and contingent fee work. The firm may want to enter into an agreement with the departing lawyer regarding the allocation of fees in these situations.

____ The firm may want to offer an incentive to the departing lawyer whereby some portion of fees collected is paid over to them. Be sure you review the professional responsibility rules regarding fee sharing.

I. Ethical Issues

____ The Indiana Rules of Professional Ethics require lawyers to keep clients reasonably informed of the status of their matters, including significant developments. As to matters over which the departing lawyer has had a significant role, this could include telling the client about the lawyer's departure. Both the attorney and the firm have an obligation to inform the client.

____ Be sure to check ABA ethical rules governing lawyer separation. For example, check ABA Formal Opinion 99-414, "Ethical Obligations When A Lawyer Changes Firms." See also, **ABA / BNA Lawyers' Manual on Professional Conduct, 91:701; GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3rd ed. 2009).**

____ What to do when you don't know? Call:

1) The Indiana State Bar Association Legal Ethics Committee has a telephone advice panel that is a great quick resource. You can find all counties there, but obviously can rely on the individuals listed regardless of your location.

   a) For Marion County: John Conlon 317-262-6581; Ted Waggoner 574-223-4292; Seth Lahn 812-855-0905 and Stephen B. Cohen 317-236-7000.

   b) For Hamilton, Hendricks, and Hancock County: Raeanna Moore 812- 535- 4155, Jack VanStone 812-426-2811.

   c) For Madison County: Patrick Olmstead 317-822-4400, Vicki Wright 317-238-6267.

   d) Johnson County: Jon Pactor 317-636-0686, Jack VanStone 812-426-2811.

6) The ISBA also has links to prior Ethics Committee opinions that may be searched by topic. http://www.inbar.org/PublicInformation/ISBALegalEthicsOpinions/tabid/81/Default.aspx.

7) Look it up! The ABA/BNA Lawyers Manual on Professional Conduct will reassure you that your problem is not unique, and that there is good guidance already developed.