

# CHANGING FIRMS:

## ETHICAL RESPONSIBILITIES FOR LAWYERS AND LAW FIRMS

“In summary, clients do not in any sense belong to a firm, and each client has the right to decide for themselves which lawyer or lawyers they wish to handle their affairs.”

RI-245



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Lawyers starting their career and remaining at one firm until retirement have become the exception rather than the rule. Mobility is the norm. This movement leads to numerous ethical and practical issues.

This guide seeks to help lawyers and law firms navigate those issues, with the primary goal of protecting affected clients. In addition to this guide, the [Ethics Helpline](#) is a confidential resource regarding a lawyer's and/or a law firm's ethical obligations when a lawyer is changing firms.

The overarching focus of a transition is protecting clients' interests. A lawyer's departure from a firm is fraught with potential undue delay, increased costs, pressure to choose between the law firm and the departing lawyer, disputes between the law firm and departing lawyer over fees or access to client files, and other negative fallout when yesterday's ally becomes tomorrow's competitor.

## **WHEN THE DEPARTING LAWYER DECIDES TO LEAVE**

A good first step after making the decision to leave a law firm is to assess the current relationship between the departing lawyer and the firm's management. If the departing lawyer and firm are on good terms, then the transition should be a smooth one. However, a contentious relationship can stand in the way of protecting clients and their interests.

A departing lawyer should first notify firm management of their intention to depart the firm. This must be done before notifying clients or staff to ensure compliance with the lawyer's fiduciary duties to the firm. [ABA Op. 19-489](#). While there is some authority suggesting that a lawyer can communicate to clients an intention to leave the firm before announcing that intention to the firm that strategy can expose the lawyer to potential civil liability to the firm for breach of fiduciary duty.

Typically, a partnership, operating, or employment agreement will specify minimum advance notice of the lawyer's departure. This minimum period should afford the time needed to notify affected clients, obtain and implement clients' choice of counsel, update files, arrange for appropriate staffing, and otherwise administer an orderly transition. The minimum duration must not be so long, however, that it substantially interferes with the representation of clients who wish to move on from the firm with the departing lawyer. See MRPC 5.6.

Notification to firm management can be nerve-racking under the best of circumstances and worse otherwise. Separating personal feelings from the message can be extremely difficult, and it may be advantageous to ask a neutral lawyer to assist in preparing the notification.

## **WHEN THE LAW FIRM LEARNS OF THE IMPENDING DEPARTURE**

The firm should also assess its current relationship with the departing lawyer. The firm should collaborate with the departing lawyer in a professional manner that ensures clients are notified properly and the clients' interests are protected. If the departure is less than amicable, the firm should consider working through intermediaries to protect the clients first and the firm and its remaining members second.

It is natural to have concerns regarding disparagement, "stealing" or taking clients and client files, espousing a false narrative regarding the move, abandoning clients, leaving clients with the firm in a practice area in which remaining members are not competent, and similar considerations.

The responsibility of the lawyer and the firm to ensure as seamless a transition as possible involves many duties, including protecting clients' interests upon withdrawal, protecting clients' files and property, maintaining confi-

dentiality, identifying and resolving conflicts of interest in the departing lawyer's new firm, and "avoiding conduct that involves dishonesty, fraud, deceit, or misrepresentation in connection with [the] planned withdrawal."

## CLIENTS

"In summary, clients do not in any sense belong to a firm, and each client has the right to decide for themselves which lawyer or lawyers they wish to handle their affairs." RI-245.

A common question when a lawyer is leaving a firm is, "Who gets the clients?" However, that is not the correct question. Ethics opinion [RI-245](#)<sup>1</sup> provides that clients have the right to decide which lawyer(s) will represent them. Clients are not the property of the firm or any individual lawyer. The client has the right to choose counsel, and interference with that right violates MRPC 1.16 (please see [RI-86](#)).<sup>2</sup> In litigated matters, the tribunal has the ultimate discretion on whether a lawyer may withdraw from a pending matter. MRPC 1.16©.<sup>3</sup>

## DUTIES TO CLIENTS

A lawyer's and, in turn, a law firm's ethical obligations stem from the irrefutable principles that the clients' interests must be protected and that each client has the right to choose the lawyer who will represent them in current or future matters.<sup>4</sup> Protecting clients' interests can be challenging when disputes arise, but it is the lawyer's and the firm's obligation to disclose the impending departure to clients in a timely manner so that the clients are in the best position to make informed decisions about current and future representation. Lawyers have a duty to communicate with clients regarding their representation under Michigan Rule of Professional Conduct (MRPC) 1.4. This duty includes prompt notification to clients that "their lawyer" is changing firms.

## NOTIFICATION

When lawyers decide to leave their firms, the departing lawyer and the law firm have ethical obligations towards the clients of the departing lawyer. These include the duty of communication and timely notification under MRPC 1.4, which generally requires lawyers to relay relevant information to clients.

## WHICH CLIENTS MUST BE NOTIFIED?

Any current client for whom the departing lawyer serves as the lead lawyer in a matter or has personally provided significant legal service should be notified.<sup>5</sup> Significant legal service may include meeting with the client on a regular basis, performing frequent research for their case, drafting documents, appearing in court, participating in arbitration or mediation, or other meaningful interactions with the client. The best practice is to notify those clients who, if asked, "Which lawyer at the firm represents you?" would name the departing lawyer.<sup>6</sup> Ask yourself, from the client's perspective, is the departing lawyer the client's lawyer? If the answer is yes, then notify that client.

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1. This opinion has been questioned and modified in ethics opinion [R-19](#) as to retention of files.

2. This opinion is limited, in part, by [R-19](#) as to the retention of files.

3. [RI-98](#), MCR 2.117(c), and court-ordered continued representation [RI-287](#).

4. ABA Formal Opinion, No. 99-414 (1999), at 1. See also [Shely](#), *Law Firms Changes: The Ethical Obligations When Lawyers Switch Firms*, American Bar Association Professional Responsibility Publications (Nov. 2020).

5. Angus G. Goetz Jr., *Break Away Lawyers*, State Bar of Michigan (Oct. 1998).

6. [Shely](#), *Law Firms Changes: The Ethical Obligations When Lawyers Switch Firms*, American Bar Association Professional Responsibility Publications (Nov. 2020).

## WHEN SHOULD THE NOTIFICATION TO CLIENTS BE PROVIDED?

Clients should be notified in writing of the lawyer's upcoming departure as soon as practicable and early enough not to negatively impact their legal matters. There are no specific rules that prescribe a time in which to notify clients or how notification must be completed. The best practice is to notify the client promptly after the departing lawyer's notification to the firm's management of the lawyer's intended departure.<sup>7</sup>

## WHAT SHOULD BE DONE BEFORE CLIENTS ARE NOTIFIED?

The departing lawyer and the firm should discuss mutually acceptable notification and messaging, either together or through third-party intermediaries. The notification and its contents will vary based upon the departing lawyer's plans after leaving the firm. Additionally, if possible, both the lawyer and the firm should create a plan for transition that can be explained to the clients in the initial communication. If that is not possible at the outset, the firm and/or lawyer should advise clients that the departing lawyer and firm are working to create a seamless transition and that, if necessary, additional information will be provided to address any client concerns.

## HOW SHOULD CLIENTS BE NOTIFIED, AND WHAT INFORMATION SHOULD BE PROVIDED?

If possible, the departing lawyer and the law firm should send a joint written communication to clients sufficiently in advance of<sup>8</sup> the lawyer's actual departure date to allow clients to express their choice of counsel and their wishes for transfer of files and client property. Some suggested elements of the communication include:

- That the lawyer is leaving the firm and the effective end date with the firm.
- Where the lawyer will be practicing next, if the lawyer intends to continue practicing.
- Options for the client to remain with the firm, transition with the lawyer, or seek other counsel.<sup>9</sup>
- A way for the client to confirm their selection of counsel.<sup>10</sup>
- Directions on how to obtain information from their file(s).
- Information regarding any funds held in trust, including how to manage any funds held in trust if the client does not choose to remain with the firm, *i.e.*, return to client or transfer to new counsel.

If the departing lawyer or law firm is unwilling to send a joint communication, or if the parties cannot agree on the content of a joint communication, the departing lawyer and/or the firm each may unilaterally inform clients of the lawyer's departure from the firm and provide the necessary information to the client to make an informed decision regarding representation. See MRPC 1.4 and Ethics Opinion [RI-49](#).<sup>11</sup> The letter should not disparage the lawyer or the firm in violation of MRPC 7.1 or 7.3. When sending a letter unilaterally, the departing lawyer or firm should be copied on the communication so that each side is fully advised of the information provided to the clients and to provide notification that a communication has been sent.

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7. If the law firm is being sold, then the lawyer must notify clients 90 days in advance of the sale. MRPC 1.17.

8. It is best practice for the departing lawyer to provide enough notice of their departure to provide adequate time for this communication.

9. All three options may not be appropriate. For example, if the law firm will not retain the clients as there are no other lawyers who practice in that area of law, then that must be explained, and the client will need to transfer with the departing lawyer or find new counsel.

Alternatively, if the departing lawyer does not plan to remain in private practice or continue to practice in the area of law, transitioning with the lawyer would not be an option.

10. *Reasonable Notice Periods Cannot Restrict Client's Choice of Counsel or the Right of Lawyers to Change Firms*, ABA Formal Ethics Opinion 19-489, at 5 (2019).

11. Solicitation does not include truthful, nondeceptive letters to potential clients. MRPC 7.3.

## WHEN MAY THE DEPARTING LAWYER CONTACT CLIENTS?

The lawyer may communicate to clients the lawyer's intention to depart the firm at any time after the lawyer has announced that intention to the firm. Once that intention is declared, "[b]oth the departing lawyer and the law firm are entitled to advise clients that they are willing to continue the representation, as long as it is clear that the client may choose the law firm, the departing lawyer, or any other lawyer of the client's choosing." [RI-86](#).

Further, [RI-49](#) provides, "It appears that under MRPC 7.1 and 7.3, a departing lawyer, whether associate or partner, may advise a client by phone, in-person, or in writing, that the lawyer is leaving a firm, if there is no solicitation." Therefore, if the departing lawyer does not violate MRPC 7.1 or 7.3, they may contact clients following their announcement of departure. The departing lawyer should be careful not to disparage the soon-to-be former firm, compare the lawyer's services to the firm's, offer discounts to remain with the departing lawyer, or take any other action that may violate the rules of professional conduct.<sup>12</sup> If the client has decided to remain with the firm or chosen new counsel in a given matter, the departing lawyer should cease communication with the client as to that matter.

## WHO ELSE SHOULD BE NOTIFIED?

The law firm or departing lawyer should notify courts, opposing counsel, arbitrators, membership organizations, malpractice carriers, accountants, payroll providers, postal office, bankers, and the State Bar of Michigan of the lawyer's departure and new contact information.<sup>13</sup> Additionally, if the lawyer is designated as the resident agent of an entity client, the lawyer should either update the lawyer's contact information or resign as the agent, in accordance with client wishes.

## WHEN THE CLIENT STAYS WITH THE FIRM

Whether the client chooses to remain with the firm, or the departing lawyer is unable or unwilling to transition clients due to the acceptance of a position with a governmental agency, corporation, or other institutional opportunity, the clients must still be notified and given the option to stay with the firm or choose another lawyer.

Similar issues may arise when the remaining members of the firm do not practice the same type of law as the departing lawyer and the client(s) do not elect to transition with the departing lawyer. In this scenario, either a member of the firm should become competent in that area of law as provided by MRPC 1.1, or the firm should decline the continued representation. The firm may also refer the client to attorneys that may be able to provide competent representation. The firm should inform the client that the client is not obligated to choose the attorney to whom the client is referred.

## TRANSFERRING FILES AND RETAINING LIENS

When a client elects to transition away from the firm and there are no potential disputes, it may seem expedient for the firm simply to relinquish the file to the client or the client's new counsel, with the law firm making copies of and retaining only select portions of the file. However, the firm need not relinquish the original file. In Michigan, a client has a right of access as needed to protect the client's rights, but not ownership. [R-19](#).<sup>14</sup> MRPC 1.16 provides

12. MRPC 4.4, 7.1(c), 7.2(c), and 8.4.

13. SBR 2.

14. In Michigan Formal Ethics Opinion R-19, the committee opined: "There is no legal support in Michigan for the proposition that the files are the property of the client. The applicable legal precedent involving other professionals closely analogous to lawyers demonstrates that the courts have recognized that such professionals provide services, not goods. The client pays for the professional's skill and expertise, not a physical product. The rules are not designed to change what is essentially the lawyer's work product into something belonging to the client." This opinion has been construed as meaning the lawyer has an ownership interest in the files maintained by the lawyer, rather than the client. Michigan is in the minority of jurisdictions in this respect. See ABA Formal Ethics Opinion 471 (July 1, 2015), comparing jurisdictions that require surrender of the "entire file" with very limited exceptions and "end product" jurisdictions that give different treatment to documents representing the "end product" of a lawyer's service—which must be surrendered—versus documents that may have led to the creation of that "end product," which need not be automatically surrendered. Under the end product approach, the

that a lawyer “shall take reasonable steps to protect a client’s interests,” including “surrendering any papers and property to which the client is entitled ...” The law firm may not deny a client access to their file, even if the client owes money to the firm if access is needed to protect the client’s interests. A lawyer may charge for the reasonable cost of giving access to the client’s files, and for duplicating file materials. R-19. It is advisable for the lawyer to include the right to charge for copying and retrieval costs in the lawyer’s engagement letter. In furtherance of satisfying MRPC 1.4, lawyers are encouraged to send clients copies of important papers as developments occur during their representation. See ABA Formal Opinion 471, *supra*. Copies of file materials may be provided in electronic format, and paper copies are not required. R-12.

In contrast to the client file owned by the law firm, any original documents supplied by the client must be returned to the client upon termination of the attorney–client relationship, subject to the firm’s right to assert a retaining lien as security for payment of amounts owed to the firm.

In “[Ethics Article: Break Away Lawyers](#),”<sup>15</sup> Mr. Angus Goetz states the following regarding retaining liens and client files:

The lawyer’s right to exercise a retaining lien for the payment of cost advances and unpaid attorney fees is a question of law. MRPC 1.8(j)(1) and *Kysor Industrial Corporation VDM Liquidating Co*, 11 Mich. App. 438 (1968).

...

Once the client has transferred the representation from the former firm to an attorney of the former firm, the firm is obligated to surrender the client’s papers and may assert a [charging] lien that it may have against the proceeds of pending litigation. MRPC 1.16(d), 1.8(j)(1).

However, ethics opinions unanimously hold that a lawyer may not exercise a retaining lien on any client property to pursue files or otherwise if the client or successor counsel needs the property to pursue the client’s rights or when a refusal to turn over would prejudice the client’s matter. [CI-623](#) and [RI-203](#).

## LAWYER PREPARING TO LEAVE THE LAW FIRM

When lawyers prepare to leave a law firm, there may be ethical obligations that are difficult to navigate. The following provides information as to some of the ethical responsibilities the departing lawyer should consider.

### WHAT MAY THE DEPARTING LAWYER TAKE FROM THE FIRM?

In general, a lawyer should not take the firm’s resources, records, or data without permission. As noted by Mr. Goetz in “[Break Away Lawyers](#),” *supra*:

It should be clear that unauthorized removal of client files by departing lawyers is a breach of the lawyer’s fiduciary duty to the firm and/or employer. Fear that the former firm will refuse to turn over the files at the client’s request does not make removal proper. Rather, unconsented removal is uniformly condemned as ethically improper.

Departing lawyers sometimes mistakenly view client files as their own because they did the bulk of the legal work.

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lawyer’s personal notes, drafts, internal memoranda, and legal research are considered materials generated for the lawyer’s own purpose and are not included among the documents that must be surrendered. In Michigan, the types of documents to which access must be provided depend on what is reasonably necessary to protect the client’s interests.

15. Angus G. Goetz Jr., [Break Away Lawyers](#), State Bar of Michigan (Oct. 1998).



However, as with any other employer and per the conditions of the employer–employee contract, the law firm may have property rights in those materials. For example, an engineer working for Boeing may not own the research they conducted. The person who designed the logo for Nike may not own the design or benefit from the proceeds of the company using the logo.

The departing lawyer should not take the firm’s only copy of documents or delete any files without the firm’s knowledge and consent.<sup>16</sup> Departing lawyers have been successfully sued and disciplined in other jurisdictions for improperly taking firm property, including but not limited to templates and copies of client files.<sup>17</sup>

Departing lawyers often ask whether they can take documents they drafted and the notes they took. There is no definitive answer to this legal question. A departing lawyer should review applicable partnership or employment agreements and firm policies for guidance. Most authorities suggest that, in general, forms and seminar materials created by the departing lawyer for generic use may be copied, unless they include proprietary information belonging to the firm or client information protected by MRPC 1.6. See ABA Op. 99-414, at 7. On the other hand, it is settled that the departing lawyer should avoid taking client lists and other client information without authorization. Similarly, the departing lawyer should not remove or alter client files unilaterally; once a client has expressed their choice of counsel, files may be transferred in an orderly fashion in accordance with the client’s wishes.

The best practice is for the departing lawyer to agree in advance with firm management as to what property the lawyer may take and when and how it may be taken.

## WHAT DUTIES DOES THE DEPARTING LAWYER OWE TO THE FORMER FIRM?

Lawyers owe fiduciary duties to their current and former firms. These duties may implicate legal concepts such as contracts, property rights, agency, partnership, and unfair competition. The departing lawyer should research these concepts diligently before leaving the firm. Among other things, before leaving the firm, the departing lawyer should refrain from taking or destroying firm property, soliciting firm employees to leave with the departing lawyer, and using firm resources to compete with the firm.

Ethical rules impose requirements on departing lawyers that incidentally affect the departed firm. In accordance with the duties of competence and diligence under MRPC 1.1 and 1.3, departing lawyers should ensure that all client files are organized, up to date, and summarized with the latest events to ensure a seamless transition, and that all billing is completed before departure. Lawyers should further ensure that they safeguard client property pursuant to MRPC 1.15 and properly apply funds that belong to the former firm.<sup>18</sup>

## UPDATE STATE BAR OF MICHIGAN MEMBER DIRECTORY PROFILE

All lawyers have an obligation under SBR 2 to provide the State Bar of Michigan with a current legal name, address, phone number, and email address.

16. ABA/BNA Lawyers’ Manual on Professional Conduct, § 91:716 (2015).

17. See, e.g., *In the Matter of Cupples*, 979 SW2d 932, 935 (Mo 1998) and *In re Cupples*, 952 SW2d 226, 236-37 (Mo 1997) (the lawyer’s conduct in departing two firms, including taking client files without client consent, amounted to “dishonesty, fraud, deceit, or misrepresentation” under Missouri Rule 8.4); *In re Smith*, 853 P2d 449, 453 (Or 1992) (before leaving the law firm, the lawyer took client files, met with new clients in his office, and had clients sign retainer agreements with him, resulting in a four-month suspension for conduct deemed to be dishonesty, fraud, deceit, or misrepresentation).

18. *GA v. Shawn P Davis*, Case No. 13-21-GA (Oct. 7, 2014); *GA v. Mark J. Tyslenko*, Case No. 12-17-GA (May 1, 2013).



## CONFLICT CHECKS<sup>19</sup>

To ensure that any potential conflicts of interest are addressed at the departing lawyer's new firm, the departing lawyer should obtain enough information from the departed firm to ensure an appropriate evaluation of any potential conflicts. ABA Op. 09-455 provides that certain limited information may be ethically provided to the new firm for the purpose of checking for potential conflicts. If possible, this should be done as soon as practicable to ensure effective communication to clients about their options to choose counsel.

MRPC 1.10 addresses conflicts that are imputed to the new firm and the required screening procedures to avoid imputation. Generally, if any member of a firm is prohibited from representing a client, the conflict is imputed to the entire firm. However, when a lawyer joins the firm, that lawyer may be screened from the matter, MRPC 1.10(b), and other lawyers in the new firm are insulated from the transferring attorney's conflicts in the screened matter. Ethics Opinion [R-004](#) provides guidance on proper screening procedures.

Alternatively, under MRPC 1.10(d), "[a] disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."

In some instances, the departing lawyer may represent clients at the new firm adverse to clients at the prior firm. Ethics Opinion [RI-8](#) states, "A lawyer who has changed firms may represent an adversary of a client of the lawyer's former firm in connection with a matter handled by the former firm, if the lawyer did not acquire any confidential or secret information about the client of the former firm or the matter at issue while working for the former firm."

## OTHER CONSIDERATIONS

A lawyer's departure from a law firm can implicate an array of obligations on the part of the departing lawyer and the firm the lawyer is leaving. In addition to the Rules of Professional Conduct prescribing lawyers' duties vis-à-vis clients, legal concepts such as fiduciary duties, employment law, unfair competition, defamation, and trade secrets may govern the departing lawyer's relationship with the departed firm and should be carefully considered by the lawyer.<sup>20</sup>

## LAWYER'S FORMER FIRM

There are several ethical considerations that the law firm must consider following the lawyer's departure such as the law firm name if the departing lawyer is a named partner or shareholder, website and letterhead information, fee agreements, and communications.

### FIRM NAME

If the departing lawyer's name is part of the firm name<sup>21</sup> or domain name,<sup>22</sup> the firm is obligated to make appropriate changes.<sup>23</sup> RI-45 specifically provides that "[i]t is misleading and impermissible to use the name of a lawyer in the firm name where the lawyer is no longer associated with the firm."<sup>24</sup>

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19. MRPC 1.7, 1.8, 1.9, 1.10, and Michigan Formal Ethics Opinion [R-4](#).

20. For further reading on this subject, see ABA Formal Opinion No. 99-414 (1999); ABA Op. 19-489 (2019); *Leaving a Law Firm: A Guide to the Ethical Obligations in Law Firm Departure*, Illinois Attorney Registration & Disciplinary Commission (2020).

21. Michigan Ethics Opinions RI-59, RI-45, [RI-221](#), and [RI-246](#).

22. Michigan Ethics Opinion [RI-369](#).

23. A change may also be required if the firm's name insinuated more than one lawyer in the firm, but it is now a solo practice. [RI-246](#).

24. Chandler, *Ethical Considerations of Naming a Firm*, 100 Mich. B. J. 5, 48 (May 2021).

## WEBSITE AND LETTERHEAD

When the departing lawyer leaves, the firm should update its website as soon as practicable so that it is not false or misleading.<sup>25</sup> It is essential that the firm does not retain the departing lawyer's name or image on the website, firm letterhead, or any other marketing materials any longer than necessary.

## FEE AGREEMENTS

The firm should review its fee agreements for the clients who decide to remain with the firm to determine if the agreements should be revised.

## COMMUNICATION WITH OTHERS

If requested, the law firm should provide updated contact information for the departing lawyer, as it is unethical for anyone from the firm to inform inquiring callers that they do not know where the former lawyer relocated.<sup>26</sup> Albeit rarely, the helpline does receive calls where the departing lawyer refused to provide updated contact information to the former firm. In this scenario, an appropriate response would be: "At this time, we do not have forwarding information for attorney X, but the State Bar of Michigan directory may have updated contact information. May the firm assist you with your legal needs?" If the situation is more complicated, please consider calling the Ethics Helpline for confidential guidance on appropriate responses.

As soon as the departing lawyer leaves the firm, automated voicemail messages and email responses should be established for the departed lawyer's office phone and email for a set period of time to notify inquirers of the departure. The automated messages should inform the caller that any messages left will be reviewed periodically by the firm, and that any disclosure of confidential information should be made to the client's new contact at the firm or await formal retention establishing an attorney-client relationship.

## COMMUNICATION FROM OTHERS

Incoming correspondence should be reviewed by a remaining member of the firm to determine if it involves a client that remained with the firm. If it is correspondence for the departing lawyer, it should be promptly forwarded to the departing lawyer. Some items may not need to be opened. For example, if no one else in the firm practices immigration law and mail came from USCIS, that mail should be promptly forwarded directly to the departing lawyer without being opened. If the former firm continues to receive mailings addressed to the departing lawyer after a reasonable period of time after their departure, the former firm should remind the departing lawyer to update their mailing address so that mail is timely received.

## RESPONSIBILITIES OF BOTH PARTIES TO THE DEPARTURE

While the departing lawyer and the law firm have their own ethical responsibilities they must individually handle, they also have shared ethical responsibilities that they must ensure are done effectively and efficiently while factoring the clients' interests.

## DURING THE TRANSITION

ABA Op. 19-489 provides that the soon-to-be former firm must allow the departing lawyer adequate access to firm resources needed to represent the client in the transitional period. Moreover, the firm should not "prohibit or restrict access to email, voicemail, files, and electronic court filing systems where such systems are necessary for the departing attorney to represent clients competently and diligently during the notice period."<sup>27</sup>

25. MRPC 7.1.

26. MRPCs 1.4, 4.1.

27. ABA Op. 19-489, at 7.

Regardless of the stage of transition, no lawyer should delay performing legal services or defer recording billable time in order for the services to be charged to the firm chosen by the client. Similarly, the former firm should not delay performing services in order for the departing lawyer to lose rights to any contracted income. Any delay by either the lawyer or the firm may violate MRPC 1.3 and/or 8.4.

## SUBSTITUTION OF COUNSEL

Each affected client file should be reviewed to determine if a substitution of counsel is appropriate. Lawyers must not delay executing the substitution for any reason, as this may impede the client's ability to proceed with their case and violate MRPC 1.16.

## NON-DISPARAGEMENT AMONGST ATTORNEYS/FIRMS

All parties involved should refrain from disparaging each other, as doing so may violate MRPC 7.1(c) and 8.4.

## REPORTING OBLIGATIONS

Lawyers and firms may find themselves in a position where they question their obligations under MRPC 8.3(a) to report another lawyer for unethical behavior. Lawyers have a duty to report to the Attorney Grievance Commission if they *know* "that another lawyer has committed a *significant* violation of the Rules of Professional Conduct that raises a *substantial* question as to that lawyer's *honesty, trustworthiness, or fitness as a lawyer*" [emphasis added].

To understand the lawyer's reporting duty, it is helpful to break it down:

- "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MRPC 1.0, Comment under Terminology.
- "Significant" violation as defined by Merriam-Webster: "having or likely to have [influence](#) or effect."<sup>28</sup>
- "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." MRPC 8.3 Comment.
- Generally, the phrase "honesty, trustworthiness, or fitness as a lawyer" applies to the lawyer's ability to ethically practice law, not to conduct wholly unrelated to the practice of law unless it also violates the law or one of the other provisions of the rules of professional conduct.

The decision to report can be challenging. However, if the conduct is a clear violation of the rules, for example, the lawyer knows that the other lawyer was stealing client funds or drafting fake pleadings to make clients believe dismissed cases were still pending, then there would likely be a duty to report under MRPC 8.3.<sup>29</sup> If you have a complex or unclear scenario and are not sure whether to report, please consider contacting the Helpline. Ethics Counsel cannot advise if you must report, but we will discuss the elements of the rule and assist you in making an informed decision.

## MONEY HELD IN TRUST

Money held in trust belongs to the client and must be handled pursuant to the client's wishes. If funds are in dispute, funds should be held until the dispute is resolved. See MRPC 1.15(c) and [RI-61](#).

## UNEARNED FEES

Trust amounts representing unearned fees and costs must be remitted to the client or subsequent counsel pursuant to the client's direction.<sup>30</sup>

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28. <https://www.merriam-webster.com/dictionary/significant>

29. On the contrary, if there is a disagreement over financial issues that does not involve either lawyer's ability to practice law, then reporting is not encouraged. The Attorney Discipline System will not assist in matters that are better left to civil courts.

30. MRPC 1.15, 1.16.

## FLAT OR FIXED FEES

Sums advanced for flat or fixed fees, unless identified as non-refundable in compliance with case law,<sup>31</sup> must be deposited into a lawyer trust account. If the representation ends before the work is completed, the client is entitled to a refund of the unearned portion of the flat or fixed fee. The portions earned/unearned are to be determined under MRPC 1.5(a).<sup>32</sup> As such, the law firm and client will need to determine how much of the fee should be remitted to subsequent counsel just as if the client had retained counsel who was not previously employed by the firm.

## CONTINGENT FEES

Apportionment of fees in contingent cases can be more complicated and may be based upon the quantum meruit value of the services provided.<sup>33</sup> Just as if the client selected subsequent counsel not previously affiliated with the firm, the total contingent fee must be fair. In a personal injury or wrongful death case, MCR 8.120 still applies.<sup>34</sup>

## RESTRICTIONS ON RIGHT TO PRACTICE PROHIBITED

MRPC 5.6(a) prohibits restrictions on the right to practice law, as such a limitation impinges on a lawyer's professional autonomy and, more importantly, "limits the freedom of clients to choose a lawyer."<sup>35</sup> Prohibited restrictions include financial penalties for servicing former clients of the firm and unreasonably long pre-departure notice periods. Ethics Opinions [RI-86](#) and [RI-245](#) analyze the application of the Rules of Professional Conduct to specific terms in an employment agreement.

These opinions are limited by [R-19](#), but only as they relate to client files. It is highly recommended that lawyers and firms review the three opinions in concert.

## DISCIPLINED LAWYER

If the departing lawyer is suspended, disbarred, or inactive, the following opinions may provide assistance as to next steps: [RI-030](#); [RI-019](#); [RI-270](#), and [Disqualified Lawyers – Frequently Asked Questions](#).

## WINDING UP AN "OF COUNSEL" RELATIONSHIP

"Of counsel" relationships have their own unique features,<sup>36</sup> but the ethical considerations surrounding their termination are similar. If the "of counsel" member of the firm was actively involved in the matters, notification regarding the plan moving forward is similar, and steps should be taken to assure a smooth transition for the client as provided in this guide.

## CONCLUSION

A lawyer's exit from a firm has many ethical and practical considerations. Exercising a high degree of professionalism and keeping the focus on fulfilling obligations to clients is the correct and most advantageous way to proceed for all parties.

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31. *Grievance Adm'r, Attorney Grievance Comm v. Cooper*, 482 Mich. 1079; 757 NW2d 867 (2008).

32. Michigan Informal Ethics Opinion [RI-069](#).

33. *See, e.g., Giarmarco, Mullins & Horton, PC v. Clark Hill, PLC*, 2009 WL 2767311 (Sept. 1, 2009).

34. Michigan Formal Ethics Opinion [R-011](#).

35. *See* MRPC 5.6, Comments.

36. "Of counsel" relationships are discussed in Michigan Informal Ethics Opinion [RI-102](#).