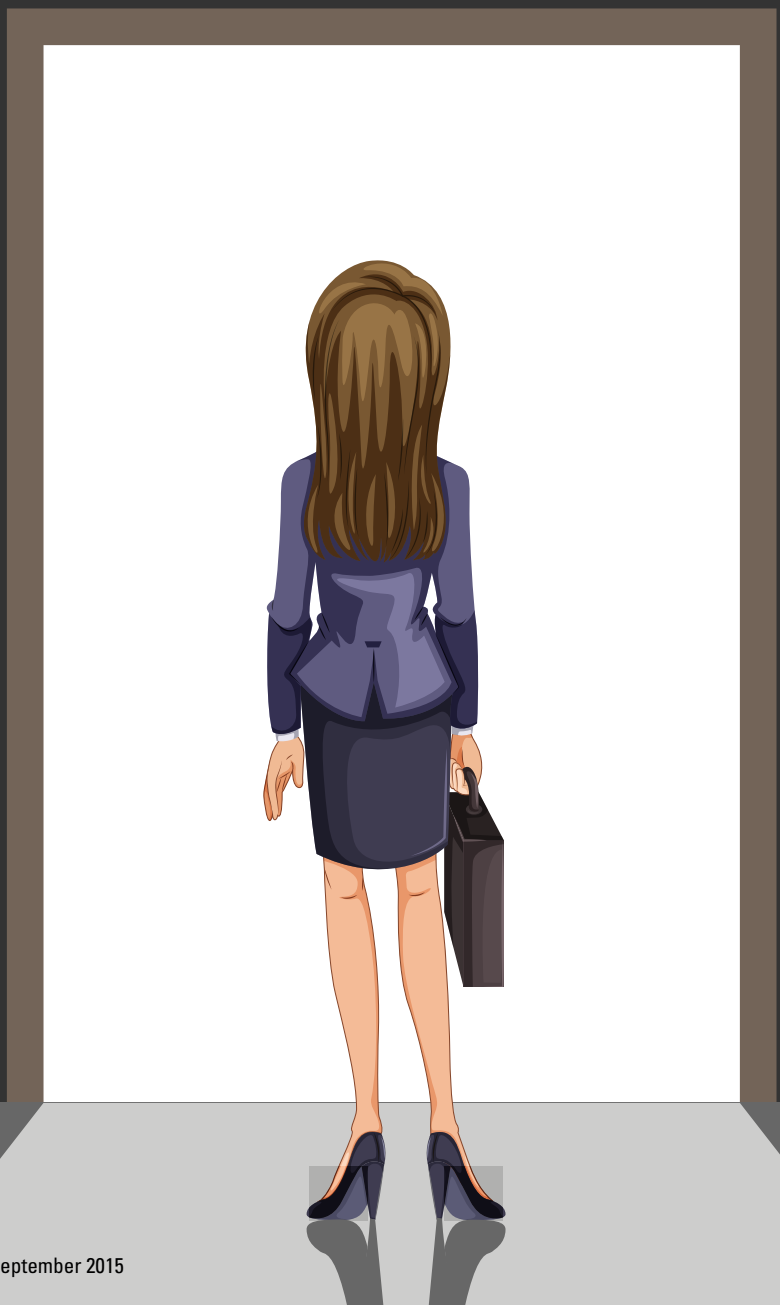
HOW TO
LEAVE YOUR LAW FIRM
and Live to Tell the Tale

Lawyer mobility is a commonplace in the modern legal economy. And while some partings are bound to be emotionally fraught, careful adherence to best practices can minimize any legal or ethical jeopardy. Here's how.

By Charles E. Lundberg and Aram V. Desteian



In today's legal market, the idea of an associate or a partner leaving their firm to join another has become almost routine. Largely gone are the days when an attorney spent her entire career with a single law firm. But the mere fact that something has become routine does not mean it is not potentially dangerous. A lawyer's decision to leave her firm to join another, often termed "lawyer mobility," is fraught with potential legal and ethical pitfalls.

Whether you are the "leaving lawyer," the "departed firm," or the lawyer's "new firm," there are legal and ethical ramifications for the decisions you make in this situation. Accordingly, this article seeks to provide a background of the issues that arise from an attorney's decision to change firms, as well as a summary of "best practices" that minimize the potential problems arising from this situation.

CHALLENGES FOR THE LEAVING LAWYER AND THE DEPARTED FIRM

Each of the parties involved in a lawyer's decision to leave a law firm is faced with potential challenges. And as one can imagine, the unique professional and emotional issues conjured by this inherently uncomfortable situation can lead to questionable decision-making. It's a lot like going through a divorce.

Whose Clients Are They?

Characteristically, a lawyer is hired by a new firm with the belief that the attorney has a "book of business" that will follow the attorney to the new firm. In reality, that phrase is misleading. To be sure, lawyers have clients. But it is entirely up to those clients to decide whether they will follow the attorney to her new firm or continue to be represented by attorneys at the departed firm. And lawyers who seek to ensure their clients will "stick with them" at their new firm by discussing their planned departure prior to informing their current firm do so at their own peril.

Significantly, the Minnesota Rules of Professional Conduct (MRPC) do not recognize the concept of "firm clients" or "institutional clients." Rather, the MRPC recognize only a lawyer-client relationship. In any event, it is essential that the leaving lawyer and the departed firm both recognize that it is ultimately the clients' choice as to who will continue to represent them, and that the process of informing those clients of the lawyer's departure and discussing future representation must be carefully considered in order to avoid potential pitfalls.

Notifying Current Clients: How and When?

The process of informing the client of the lawyer's departure can implicate numerous ethical rules and legal considerations relating to solicitation of clients, fiduciary duties, conflicts of interest, and unfair competition. It is universally recognized that at some point after an attorney has made the decision to join a new law firm, the lawyer is under an ethical obligation to inform her current clients of the departure. Under the MRPC, this obligation is derived from Rule 1.4, which requires a lawyer to communicate information to the client that may affect the status of that client's matter. Similarly, ABA Formal Opinion No. 99-414, which was published to provide guidance on the ethical issues raised by lawyer mobility, states that "notification of current clients is required." The key questions involve how and when the leaving lawyer's clients should be informed of the lawyer's departure.

Best practice: Joint communication to affected clients. The ABA, the Minnesota Office of Lawyers Professional Responsibility, and virtually every other applicable authority on lawyer mobility recommend that the leaving lawyer and the departed firm should issue a joint communication informing the affected clients of the departure.[1] Under these circumstances, the leaving lawyer and the departed firm can work together to craft a communication to the affected clients informing them of the lawyer's impending departure, informing the clients that it is their choice as to who will continue the representation, and providing an election form for each client to complete and return indicating its preference of counsel. Moreover, the leaving lawyer and the departed firm can agree as to which clients to inform, avoiding a battle over who exactly to designate as a "client" of the leaving lawyer.

Option two: Individual communication to affected clients. The level of cooperation required for a joint communication may be difficult or impossible under certain circumstances. Moreover, it is possible that informing the firm of the lawyer's intention to leave may result in immediate termination.[2] If a joint communication is not possible, the leaving lawyer is still under an ethical obligation to provide notice to those clients for whom the lawyer is primarily responsible. The departed firm will frequently also issue an independent communication to the affected client in an attempt to maintain the client's business. If such individual communications are required, the form and contents of the communication are critically important.

The first question is, who is a "client" of the leaving lawyer? ABA Formal Opinion 99-414 provides some guidance for determining who the leaving lawyer is ethically obligated to inform. The formal opinion indicates that the lawyer must provide notice to "those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services," and makes clear that for the leaving lawyer to contact current clients regarding her departure does not constitute impermissible solicitation.[3]

Under MRPC 7.3, the parties are also limited in *how* they communicate with the affected clients. Rule 7.3 allows the leaving lawyer to contact her current or former clients in person or by telephone without fear of violating the standard of conduct relating to solicitation. Under MRPC 7.3(a)(2), a lawyer may solicit any individual with whom the lawyer has a "family, close personal, or prior professional relationship."

But ABA Formal Opinion 99-414 provides that a lawyer does *not* have a "prior professional relationship" "solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client." Rather, the lawyer must have had some form of significant, substantive client interaction to establish a "prior professional relationship" that permits in-person or telephone solicitation. The ABA Opinion's treatment of this issue might be criticized as overly restrictive and potentially even as an unconstitutional restriction on speech. But just because the leaving lawyer may contact the affected clients in person or via telephone, that does not mean that the lawyer has free rein to say whatever she pleases. If the leaving lawyer is still employed by the firm at the time of the communication with the client, she still has fiduciary obligations to that firm. Moreover, the leaving lawyer and the departed firm must both be careful not to run afoul of the ethical rules regarding client communication and solicitation.

Under MRPC 7.1, a lawyer is restricted in what she can say to her clients regarding the departure, and how. Rule 7.1 states that the communication cannot be "false or misleading." Accordingly, the leaving lawyer may not inflate or otherwise misrepresent her involvement in working on the client's matter. Similarly, MRPC 7.1 precludes the lawyer from misrepresenting the role that other attorneys who will remain at the departed firm had in the representation. These same obligations apply to the lawyers at the departed firm, meaning they

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cannot downplay or otherwise minimize the leaving lawyer's involvement in a case in an attempt to induce the client to stay with the departed firm. It is also impermissible for the leaving lawyer or the departed firm to unfairly denigrate or disparage their former colleague(s).[4]

When to Inform Affected Clients: Options and Best Practices

The question of when to inform the leaving lawyer's clients is of primary importance to all parties. The big issues arise when the leaving lawyer's notification to the client becomes a solicitation, especially when the leaving lawyer has not yet notified her firm of her intent to leave. Thus, while the issues of notification and solicitation are conceptually separate, they often overlap. Practically speaking, a leaving lawyer is unlikely to notify her client of her intent to leave her firm to join another without, at a minimum, informing the client of where she is going and that she would like to continue the representation. As a result, the timing of the leaving lawyer's communication with clients implicates significant tensions between her interests and the interests of the departed firm in competing to retain the affected clients.

Actually soliciting the client prior to informing the law firm exposes the leaving lawyer to potential claims for unfair competition, tortious interference with contract, breach of fiduciary duty or violation of the duty of loyalty owed by a partner or employee.[5] Accordingly, a leaving lawyer should normally give notice of the departure to her firm before contacting clients in order to avoid accusations of impermissible solicitation.

Notification and solicitation prior to notifying the current firm. While ABA Formal Opinion 99-414 suggests that the leaving lawyer *may* ethically inform her clients of the departure before giving notice to her employer, scholars and practitioners in this area have noted that the ABA Opinion "offers a very specific point on the timing and solicitation under ethics standards and without regard to fiduciary duties owed to firms or colleagues."[6] Informing a client of the leaving lawyer's departure before providing notice to the firm may comply with ethical rules, but it is likely to open a Pandora's box of potential problems relating to fiduciary duties and any number of other legal (rather than ethical) issues.

If the leaving lawyer decides to ignore this authority and notify her clients before resigning from the firm, that communication must, at a minimum, conform with the standard set forth in ABA Formal Opinion 99-414. The Opinion provides the applicable ethical standard whenever the leaving lawyer makes her initial in-person or written notice informing a client of her upcoming departure. The standard is applicable regardless of when that communication is made. To comply with the ethical rules, the ABA Formal Opinion provides that the notice should conform to the following:

> (1) The notice should be limited to clients whose active matters the lawyer has direct professional responsibility for at the time of the notice;
> (2) The departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
> (3) The departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
> (4) The departing lawyer must not disparage the lawyer's former firm.

It would be wise to keep detailed notes of this communication to ensure a clear and accurate record of what was communicated to the client, as protection in the event of a claim of impropriety by the departed firm. And although conforming to these recommendations will minimize the leaving lawyer's risk of breaching the applicable ethical rules, it does not eliminate the risk of litigation.

Notification and solicitation after giving notice but prior to departure. Most authorities recognize that an attorney may solicit clients after her resignation from the law firm but prior to departure, although there is conflicting authority. The Restatement (Third) of the Law Governing Lawyers, Section 9(3) provides that:

> absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients: (a) prior to leaving the firm: (i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and (ii) only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose…..

Accordingly, under the Restatement approach, the leaving lawyer may inform and solicit clients after giving notice to the departed firm but before leaving.[7] But there is case law to the contrary.[8] This conflicting authority demonstrates the inherent tension between the parties competing to maintain the client relationship. In some cases, the departed firm will not want to keep the leaving lawyer at the firm while she seeks to solicit affected clients. The leaving lawyer's solicitation of clients while still employed with the firm also raises a risk of breach of fiduciary duty, especially when the lawyer utilizes the departed firm's resources to solicit affected clients. Some authorities, including the estimable Robert Hillman, the author of the treatise *Hillman on Lawyer Mobility*, suggests that the departing lawyer may solicit a client after resignation so long as the solicitation occurs to permit the departed firm time to compete, the solicitation is not done in secret, and the client is advised that it is free to choose counsel.[9] Although there is still debate on the question of the timing of solicitation, the best practice is to have an open conversation between the leaving lawyer and the departed firm about the transition process and how to notify affected clients.

Other Non-Ethical Principles Implicated

In addition to the ethical considerations noted above, a leaving lawyer must also consider the legal and fiduciary issues

that arise from her decision to leave her law firm. If not, the leaving lawyer may be faced with litigation against her former colleagues. Such litigation is almost always ugly. The departed firm may assert claims against the leaving lawyer (and often the new law firm) for breach of fiduciary duty, misappropriation of trade secrets, breach of contract, unjust enrichment, or tortious interference with contract (or prospective economic relations), among others. Many of these claims are especially likely to be implicated where the leaving lawyer solicits her clients before informing the firm. But regardless of what conduct led to the asserted claims, a leaving lawyer and new law firm should be cognizant of potential liability.

Fiduciary duty claims. Claims for breach of fiduciary duty can arise in several contexts. First, an employee owes a duty of loyalty to her employer. Accordingly, an attorney may breach her fiduciary duties to her employer by competing with the employer through improper solicitation of clients or misappropriation of confidential or proprietary information possessed by the employer. Second, a partner owes fiduciary duties to her partners.[10] Among these fiduciary duties is a requirement to disclose material facts relating to the partnership.[11] Courts outside Minnesota have held that a leaving lawyer's conduct, such as concealing the intention to resign, surreptitiously meeting with another firm to offer to transfer clients in exchange for partnership, or inducing other employees to leave with the lawyer, is a breach of fiduciary duty.[12] In these cases, damages may include the departed firm's lost profits or recoupment of compensation paid to the leaving lawyer during the period in which she was in breach.[13]

Tortious interference claims. A leaving lawyer and the new firm may also be faced with claims for tortious interference with contract or tortious interference with prospective economic relations.[14] These claims arise from either the leaving lawyer's or new law firm's successful solicitation of clients to terminate their retainer agreements with the departed firm. As with claims for breach of fiduciary duty, Minnesota courts have not yet applied these claims in the context of lawyer mobility, but courts in other jurisdictions have done so.[15] In Minnesota, the remedy for tortious interference may include damages reasonably equivalent to the revenue lost by the tortious conduct.[16]

Misappropriation of trade secrets. When a leaving lawyer departs her former firm and brings with her the client lists of her former firm, has she misappropriated her former firm's trade secrets? This was a hotly debated issue in recent litigation between two well-known Minnesota law firms.[17] (*Disclosure:* The authors' firm advised the leaving attorney and new firm in this matter.) In that case, the law firm alleged that a departing partner violated Minnesota Uniform Trade Secrets Act (MUTSA), Minn. Stat. §325C.01 *et seq.,* by taking the firm client list with her to her new firm. Courts in other jurisdictions have held that a law firm's client list may be a trade secret.[18] The Hennepin County District Court denied a request for a Temporary Restraining Order, in part because it did not believe the departed firm had a likelihood of success in establishing its claim for misappropriation. Accordingly, it is unclear whether a Minnesota court would recognize a law firm's client list as a trade secret. At the margins, it seems clear that a leaving lawyer may take with her the contact information for those clients with whom she has a prior professional relationship, and that a leaving lawyer should not take with her lists of other clients represented by the departed firm with whom she had no substantial professional relationship.

Withdrawal and File Transfer

Once the client has made its decision as to who will continue the representation—the leaving lawyer, the departed firm, or another attorney—the affected parties have ethical obligations to protect the client's interests. MRPC 1.16 generally provides the applicable standard of conduct for terminating a representation. If the client has selected the leaving lawyer to continue the representation, MRPC 1.16(a)(3) requires the departed firm to withdraw.[19] From that point forward, under MRPC 1.16(d), the departed firm is ethically obligated to "take steps to the extent reasonably practicable to protect a client's interests," including "surrendering the papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has been incurred or earned."

MRPC 1.16(e) lists the "papers and property" the client is entitled to, including: (1) the papers and property delivered to the lawyer by or on behalf of the client; (2) the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs; (3) all pleadings, motions, discovery, memoranda, correspondence, and other litigation materials in pending claims or litigation matters; and (4) all items for which the lawyer has agreed to advance costs regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions, business records, witness statements, and other materials that may have evidentiary value. In other words, the client is entitled to receive much of what the terminated attorney has produced.

However, the terminated attorney does not need to return everything, especially if the attorney has not been paid in full. In matters with pending claims or in litigation, a nonpaying client is not entitled to documents in the lawyer's file that have not been filed or served, including: lawyer notes, internal memoranda, and documents obtained by third parties.[20] In non-litigation matters, a nonpaying client is not entitled to drafted but unexecuted documents.[21]

The terminated attorney also may not condition the return of client papers and property on payment of the lawyer's fee.[22] Similarly, a terminated attorney may not charge a client for the costs of duplicating or retrieving the client's file or property unless the client has agreed to such a charge, in writing, prior to the termination of the lawyer's services.[23] Regardless of whether the leaving lawyer or the departed firm is chosen by the client to continue the representation, both parties have an ethical obligation under MRPC 1.16 to protect the client's interests following termination and promptly forward the client file to the client or the lawyer of the client's choice.

What Can the Leaving Lawyer Take With Her?

A leaving lawyer's decision to take certain information, such as client lists, following her departure from the firm may have serious consequences. But what can a leaving lawyer take with her to the new firm?

Client files generally follow the client. But what if the client is not following the leaving lawyer to the new firm? ABA Formal Opinion 99-414 provides that the "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." While that seems correct, it may be too broad. Many sophisticated clients now require as a condition of retaining a law firm that client documents will not leave the firm, or will be subject to destruction after a certain period, or both. Similarly, a nondisclosure agreement or protective order would govern where applicable, making it impermissible for the leaving lawyer to take documents that she created or that would normally be in the public domain, such as pleadings and briefs. In any event, leaving lawyers should be careful to avoid taking other documents such as fee schedules and other business information from their former firms.

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CHALLENGES FOR THE INCOMING LAW FIRM

Lawyer mobility presents its own set of issues for those firms looking to absorb a leaving lawyer. Among the most pressing issues for the incoming law firm is the process by which it identifies potential conflicts of interest and, to the extent a possible conflict is uncovered, how the incoming firm proceeds to ensure compliance with the ethical rules in managing that conflict of interest.

Clearing Potential Conflicts: ABA Formal Opinion 09-455 and the MRPC

"[B]efore a moving lawyer joins a new firm, the Model Rules and the common law require the lawyer and the firm to detect and resolve conflicts of interest to protect their clients and former clients, even if only one party to the move undertakes that actual conflicts analysis."[24] But how does the leaving lawyer comply with her ethical obligation to detect and resolve conflicts while also abiding by the ethical obligation established under MRPC 1.6(a) to "not knowingly reveal information relating to the representation of a client"? Both the ABA and the MRPC recognize this inherent conflict and provide guidance to permit the parties to ethically detect and clear conflicts.

ABA Formal Opinion 09-455 and MRPC 1.6 (and the comments thereto) recognize that "lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest….."[25] MRPC 1.6(b)(11) permits a lawyer to disclose information if the "lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment….." But what does that mean the leaving lawyer and the incoming firm can ethically disclose? And when should the parties provide such information?

What to disclose. The comments to MRPC 1.6 provide that a lawyer's disclosure should "ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated."[26] But even this limited information should be disclosed "only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise…."[27]

These provisions will provide sufficient guidance in most situations, but what about client matters of particular sensitivity? Under those circumstances, any form of limited disclosure "is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client."[28] The comments to MRPC 1.6 and ABA Formal Opinion 09-455 provide similar examples of such situations, such as "the fact that corporate client is seeking advice on a corporate takeover that has not been publicly announced" or "that a person has consulted a lawyer about the possibility of a divorce before the person's intentions are known to the person's spouse….."

When such circumstances are present, or when significantly more information is required to fully clear a conflict, client consent is required. If the client refuses to give consent to provide information to the other firm, the ABA Formal Opinion suggests utilizing an independent, third-party attorney to serve as intermediary to receive and analyze conflicts information in confidence.[29] The intermediary may advise the parties generally without disclosing any facts to the other. The ABA Formal Opinion provides that utilizing an independent intermediary attorney "should not compromise any privilege nor frustrate the reasonable expectations of a client."

Under any circumstance, the information disclosed in detecting and clearing conflicts can be used or disclosed only to the extent necessary to comply with the ethical obligations regarding conflicts. Accordingly, neither the leaving lawyer nor the incoming firm should utilize this information for any other purpose.

When to share conflicts information. Having ascertained what information may be exchanged to detect and clear conflicts, the question remains when that information should be exchanged. ABA Formal Opinion 09-455 provides that "conflicts information should not be disclosed until reasonably necessary…." According to the opinion, conflicts information should be shared when negotiations between the parties "have moved beyond the initial phase" such that "substantive discussions have taken place." When hiring lateral associates, this may mean that conflicts information may not need to be shared until an offer of employment has been made contingent upon clearing conflicts.[30] Conversely, when hiring a lateral shareholder, conflicts information likely must be shared much earlier, but not before the discussions have progressed to the point where the parties are reasonably committed to proceeding with the negotiations.

Interestingly, the guidance provided by the ABA Opinion is more restrictive than necessary for lawyers practicing in Minnesota. The ABA Model Rules lack a counterpart to MRPC 1.6(b)(2), which permits a lawyer to disclose non-privileged information relating to the representation of a client when "the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client" and where the client has not requested that the information be kept confidential. Thus, under the MRPC, a lawyer may disclose information to clear a conflict so long as it is not detrimental to the client, regardless of the stage of the recruitment process.

Conflicts of Interest, Imputation of Conflicts, and Screening

There are a number of questions that arise if a conflict is identified during the screening process. These include the nature of the conflict, whether screening is sufficient, and disqualification. Given the complexity and importance of these issues, this article can only provide a brief summary of each in relation to the question of lawyer mobility. However, there is significant scholarship that can provide a more in-depth analysis on these subjects.[31] If a conflict of interest is identified, the incoming law firm must analyze the nature of the conflict and whether the conflict may be managed by effective screening of the leaving lawyer or by the consent of the affected clients.

MRPC 1.7 to 1.11 govern conflicts of interest and imputation. Under MRPC 1.10(a), "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any of them

practicing alone would be prohibited from doing so by Rule 1.7 or 1.9….." The rule continues to exempt certain "personal interest conflicts" (such as the political beliefs of a lawyer that prevent her from representing a client in a particular matter).[32] Otherwise, whenever a leaving lawyer joins the incoming firm, her conflicts of interest are imputed to all of her new colleagues.

The mere fact that an imputed conflict of interest exists does not, on its own, require the incoming firm to be disqualified from continuing the conflicted representation. Rather, MRPC 1.10(b) provides that even if a particular lawyer would be prohibited from representing a client due to a conflict, the firm may continue the representation if: (1) the lawyer's information is unlikely to be significant; (2) the lawyer is subject to adequate screening measures to prevent disclosure and involvement of the new lawyer; *and* (3) notice of the screening is given to all affected clients.[33]

Screening is used "to prevent the disclosure of the confidential information and to prevent involvement by that lawyer in the representation."[34] The Minnesota Supreme Court's decision in *Lennartson v. Anoka-Hennepin Sch. Dist. No. 11*, 662 N.W.2d 125 (Minn. 2003), provides the standard for determining whether a conflict requires disqualification. In that case, the Court held that under MRPC 1.10(b), an imputed conflict will result in disqualification "unless the information communicated to the lawyer [while at the prior firm] is unlikely to be significant in the same or a substantially related matter, appropriate screening is implemented, and notice is given to all affected clients."[35] The Court's ruling in *Lennartson* interpreted the requirements of MRPC 1.10(b) conjunctively, meaning the information possessed by the conflicted lawyer must be "unlikely to be significant in the same or a substantially related matter" and the new firm must be able to implement "appropriate screening" measures.

The comments to MRPC 1.0 provide guidance as to proper screening measures. The comments state that: (1) the personally disqualified lawyer should acknowledge the obligation not to communicate with any other lawyers in the firm with respect to the matter; (2) the other lawyers in the firm are instructed regarding the screening and not to discuss the matter with the disqualified lawyer; (3) the disqualified lawyer should be denied access to firm files or other information relating to the matter; and (4) these screening procedures are implemented as soon as practical after the lawyer or firm knows or reasonably should know of the need for screening.

An affected client can also give written consent to the representation.[36] Of course, this general rule has exceptions. MRPC 1.7 and the comments thereto provide the standard for when a client may give informed consent. A client may not consent to the conflicted representation where "the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal." Thus, a leaving lawyer may not switch sides in the same litigation and obtain informed consent from the former client to permit continued representation. If informed consent cannot be obtained, and screening is not permitted, the conflicted attorney and her firm may be disqualified from continuing the representation.[37]

POLICIES REGARDING LAWYER MOBILITY

Given the many challenges that arise from an attorney's lateral move to another law firm, firms should take steps to incorporate policies relating to lawyer mobility in their partnership or employment agreements. In particular, law firms should incorporate into their partnership or employment agreements that the firm and the lawyer agree to abide by the standard established in ABA Formal Opinion 99-414 if the lawyer departs the firm. By agreeing to abide by Opinion 99-414, the law firm and the attorney agree to issue a joint communication to all affected clients, informing the clients that it is their choice as to who will continue the representation, and providing an election form for each client to complete and return indicating its preference of counsel. In so agreeing, the parties can preemptively address some of the most significant issues that arise from independent communications to clients.

Law firms may also consider policies dealing with use of firm documents or client lists, although these policies are ineffective to the extent they conflict with the MRPC. For instance, a law firm may institute a policy against a lawyer's copying of firm documents for outside use, thus requiring the leaving lawyer to request permission to copy and take documents with her when she leaves.[38] On the other hand, if the client chooses the leaving lawyer and the new firm to continue the representation, the leaving lawyer may take the client file for use in representing the client. Similarly, a law firm may consider instituting confidentiality policies regarding the use of client lists in its agreements, handbooks, or manuals. When utilized, these policies should state that client information is a trade secret and restrict its use, so long as the firm's own conduct treats such information as proprietary and confidential.[39]

It is important to note that all policies must comply with the provisions of MRPC 5.6, which renders impermissible (and therefore unenforceable) any agreement restricting the right of a lawyer to practice after leaving a law firm.[40] Law firms must be careful to craft their internal policies to reflect that the firm cannot restrict the leaving lawyer's use of client information for clients they represented while at the firm.[41]

Conclusion

Although the issue of lawyer mobility in modern legal practice presents numerous challenges, a lawyer's lateral move to another law firm can be (and often is) accomplished without serious conflict. To do so often requires cooperation, transparency, and communication, conduct that can be difficult in an often-emotional parting of ways. There are numerous reasons—financial, reputational, personal—for all parties to ensure a lawyer's smooth transition from one firm to another. But ultimately, as lawyers it is our obligation to act in the best interests of our clients, and ultimately our clients benefit when the leaving lawyer is able to transition from one firm to another without any (apparent) conflict. ▲

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Notes

1 *See, e.g.,* ABA Formal Opin. No. 99-414; Martin C. Cole, "Update on Law Firm Departures," Bench & Bar of Minnesota, June, 2010.
2 *See* ABA Formal Opin. No. 99-414 at 5.
3 *Id* ("a departing lawyer does not violate Model Rule 7.3(a) by notifying those clients that she is leaving….")
4 *See, e.g.,* Joint Formal Opinion 99-100 of the Pennsylvania and Philadelphia Bar Assoc., at 2 (the former firm "should refrain from disparaging remarks and comparisons. . . ."); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 98-5, 4/3/1998 ("The law firm should not unfairly disparage the departing lawyer to the client."); State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1985-86 ("lawyers must act professionally by subliming their own feelings for the benefit of the client.")
5 *See Brown & Bins v. Lehman*, C5-93-415, 1993 Minn. App. LEXIS 961, *8 (Minn. Ct. App. 9/22/1993); see also *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179 (N.Y. 1995) (departing firm suing for breach of fiduciary duty arising from solicitation of clients prior to resigning from firm); *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358 (Ill. 1998) (a departing lawyer's contact with clients may breach fiduciary duties owed to partners).
6 Allison D. Rhodes & Robert W. Hillman, *Client Files and Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility*, U.C. Davis Legal Studies Research Paper Series No. 236 (December 2010)
7 *Accord* Joint Formal Opinion 99-100 of the Pennsylvania and Philadelphia Bar Assoc.
8 See, e.g., *Meehan v. Shaughnessy*, 533 N.E.2d 1255 (Mass. 1989).
9 *See* §4.8.3.2.
10 *Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 893 (Minn. Ct. App. 1996)
11 *Id.* ("Parties in a fiduciary relationship must disclose material facts to each other.")
12 *See, e.g., Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d (Ill. Ct. App. 2004) and *Kantor v. Bernstein*, 225 A.2d 500 (N.Y. App. Div. 1996).
13 *Id.*
14 *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998) (tortious interference with contract) and *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014) for the standards to establish these claims.
15 *See, e.g., Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978); *Feldman & Pinto, P.C. v. Seithel*, Civ. Act. No. 11-5400, 2011 U.S. Dist. LEXIS 147655 (E.D. Pa. 12/22/2011).
16 *Storage Tech., Corp. v. Sysco Sys., Inc.*, 395 F3d 921 (8th Cir. 2005).
17 *Zimmerman Reed v. Genevieve Zimmerman and Meshbesher & Spence*, No. 27-CV-14-14988 (Henn. Cnty. Dist. Ct. 12/8/2014).
18 *See e.g., Reeves v. Hanlon*, 95 P.3d 513 (Cal. 2004); *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 707 N.E.2d 853 (Ohio 1999).
19 *See also* Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 98-5, at 2 ("If a client discharges an attorney, the attorney must withdraw…."); Martin A. Cole, "At Odds With Your Client," Bench & Bar of Minn., Sept. 1997, at 16 ("Withdrawal from representation is mandatory if the client discharges the lawyer.")
20 William J. Wernz, *Minnesota Legal Ethics: A Treatise* (5th Ed. 2015) at 704.
21 *Id.*
22 MRPC 1.16(g).
23 MRPC 1.16(f).
24 ABA Formal Ethics Opinion 09-455.
25 Comments to MRPC 1.6, at ¶ 12.
26 *Id.*
27 *Id; see also* ABA Formal Ethics Opinion 09-455 (the disclosure of information "should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.")
28 MRPC 1.6, cmt. 12.
29 ABA Formal Ethics Opinion 09-455 at 6.
30 *Id.* at 7.
31 *See* William J. Wernz, *Minnesota Legal Ethics: A Treatise* (5th Ed. 2015), at 271-423.
32 *See* MRPC 1.10, cmt. 3.
33 *See* MPRC 1.10(b); *see also* Martin A. Cole, "Screening Conflicted Lawyers Under Rule 1.10," Minnesota Lawyer (5/28/2001).
34 MRPC 1.10(b)(2).
35 *Lennartson*, 662 N.W.2d at 131.
36 *See* MRPC 1.7, cmts. 19-22.
37 *See, e.g., State v. 3M*, 845 N.W.2d 808 (Minn. 2014); *Lennartson*, 662 N.W.2d at 135.
38 Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 N. Ill. U. L. Rev. 1, 25 (2009).
39 *Id.* at 16.
40 MRPC 5.6(a) provides that "[a] lawyer shall not participate in offering or making: (a) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."
41 Richmond at 17.