Wisconsin Ethics Opinion EF-25-02
Lawyer Mobility: Ethical Responsibilities of the Departing Lawyer and the Firm

April 17, 2025

Synopsis: *Lawyers may change law firms several times over the course of their careers, and increased lawyer mobility has led to increased questions about the ethical duties of both the departing lawyer and their firm to their clients. When a lawyer leaves a law firm to take a position at another law firm, or for any other reason, both the lawyer and the law firm have responsibilities under Wisconsin's Rules of Professional Conduct for Attorneys. The primary responsibility for both the departing lawyer and the firm is protecting the rights of affected clients, which includes respecting the client's right to choose their own counsel and to receive competent and diligent representation. While the Rules of Professional Conduct do not address the situation specifically, the rules governing a lawyer's duties to clients continue to apply when a lawyer is changing employers.*[1] *Wisconsin Ethics Opinion E-97-02 is hereby withdrawn.*

Introduction

Generally, both the individual lawyer and the firm that employs the lawyer have a lawyer-client relationship with the clients the lawyer is actively representing.[2] Therefore, when a lawyer leaves a firm, both the departing lawyer and the firm owe certain duties to affected clients under Wisconsin's Rules of Professional Conduct for Attorneys (the "rules"). All lawyers involved also owe certain obligations to the other lawyers involved in the departure. In this opinion, the State Bar's Standing Committee on Professional Ethics (the "committee") discusses the respective and joint responsibilities of the firm, the departing lawyer and, to the extent applicable, the firm the departing lawyer joins. There are certain general principles embodied in the rules that apply to all lawyers that bear mentioning before discussing respective responsibilities in detail.

First, no lawyer "owns" a client and no lawyer has a right to the future legal work of any client. Clients have a right to counsel of their choice and may discharge their lawyer or firm at any time,

[1] Some states have promulgated rules regarding the proper procedures to follow when a lawyer is leaving a firm. *See* FL R.4-5.8. and VA R. Sup. Ct. 5.8. Wisconsin's disciplinary rules do not contain a singular rule that directly addresses firm departures.

[2] Comment (h) to §14 of the Restatement (Third) of the Law Governing Lawyers and ABA comment [2] to SCR 20:1.10. State Public defender and Guardian ad Litem appointments are generally specific to individual lawyers rather than firms.

with or without cause. Thus, it is not meaningful to think of clients "belonging" to either a firm or a departing lawyer. A lawyer who fails to respect a client's right to counsel of their choice and withdraw when the client elects to choose new counsel violates Supreme Court Rule ("SCR") 20:1.16(a).

Second, as a consequence of the first principle, the client is entitled to the file and lawyers must respect the client's decision to have their file stay with the former firm, transferred to the departing lawyer's new firm, or to new counsel altogether. For a full discussion of a lawyer's responsibilities with respect to client requests for files, see Wisconsin Formal Ethics Opinion EF-16-03 (2016).

Also, as a consequence of the first principle, lawyers may not restrict other lawyers' right to practice – see SCR 20:5.6(a). This means that there are no non-competes for lawyers and a law firm may not prevent or impair a lawyer's right to join a competing law firm or impair the right of the lawyer to inform affected clients of their right to join the lawyer at the new firm.

As discussed herein, the rules obligate both departing lawyers and firms to respect the decisions of affected clients and work to protect the interests of those clients. This is best accomplished by cooperating throughout the process.

This opinion is also limited to a discussion of lawyer departures from private law firms. Lawyers who work in government or in-house legal departments have different considerations.[3]

Finally, other bodies of law, such as employment law, the law of partnerships, and business torts, may affect a lawyer's departure from a firm. While reference is made to these considerations, this opinion is limited to a discussion of lawyers' responsibilities under Wisconsin's Rules of Professional Conduct for Attorneys. Lawyers should remain aware that they may need to consider other bodies of law in certain circumstances.

Discussion

For the sake of clarity, discussion of obligations is organized into discreet topics.

A. Pre-departure job search: Lawyers are generally free to search for new employment and nothing in the rules require lawyers to notify their current employer or their current clients that they are searching for new employment. If, however, the lawyer agrees to engage in

[3] The primary distinction is that government and in-house lawyers normally have one client, and there is no question of that client following the lawyer to a new firm. Nonetheless, such lawyers do have obligations such as giving reasonable notice and taking steps to protect the interest of the entity client. For a discussion of job switching between prosecutor's offices and defense firms, see Wisconsin Formal Ethics Opinion EF-22-01 (2022).

substantive discussions about possible employment with an opposing law firm,[4] the lawyer has a conflict of interest under SCR 20:1.7(a)(2) which must be addressed. Wisconsin Formal Ethics Opinion EF-19-01 (2019) discusses conflicts arising from a job search in detail and Wisconsin Formal Ethics Opinion EF-22-01 (2022) discusses special issues which may arise when a criminal defense lawyer or prosecutor seeks employment with an opposing law firm.

B. Preparations to depart: The rules do not prohibit a lawyer who intends to leave a firm from making logistical preparations to depart prior to leaving a firm and taking steps such as obtaining leases and financing are not generally considered a breach of duty to the firm.[5] Additionally, nothing in the rules prohibits a lawyer from planning a departure with other lawyers in a firm prior to notifying the firm.[6] A departing lawyer, however, should exercise caution in actively recruiting other lawyers and non-lawyer staff before notifying the firm, as such actions may give rise to civil liability if they violate employment agreements or fiduciary duties, resulting in harm to the firm.[7]

C. Notification of the firm: Once a lawyer has decided to accept employment with another firm, the lawyer must notify their current employer. Nothing in the rules directly addresses the timing or the content of a departing lawyers notice to the firm. Ideally, the departing lawyer should inform their firm of their possible or intended departure during the job search.[8] If the departing lawyer reasonably believes that circumstances preclude them from notifying their firm of their job search, for example if the departing lawyer believes the firm might attempt to interfere with the departing lawyer's relationships with their clients or their job search, the departing lawyer should inform the firm of their intended departure as soon as the offer is accepted and prior to informing their clients. The departing lawyer may, in fact, have a duty to inform their firm of their intended departure so that the firm can fulfill its ethical duties to the departing lawyer's clients.[9] The Restatement (Third) of the Law Governing Lawyers, §9, takes the position that a departing lawyer may not "solicit" clients until providing adequate and timely notice to the firm. That said, the rules do not explicitly

[4] Note that the definition of "firm" as set forth in SCR 20:1.0 includes legal services organizations, corporate law departments and government law offices.

[5] See e.g. Restatement of the Law Governing Lawyers sec. 9, comment I; "Departing a firm or planning to do so consistently with valid provisions of the firm agreement is not itself a breach of duty to remaining firm members. Thus, a lawyer planning a departure to set up a competing law practice may make such predeparture arrangements as leasing space, printing a new letterhead, and obtaining financing." See also *Kopka, Landau & Pinkus v. Hansen,* 874 N.E.2d 1065 (Ind. Ct. App. 2007).

[6] *Id.*

[7] See e.g. *Gibbs v. Breed, Abbott &Morgan,* 710 N.Y.S.2d 578 (N.Y. App. Div. 2000); *Reeves v. Hanlon,* 17 Cal. Rptr. 3d 289 (Ca. 2004).

[8] Comm. on Legal Ethics & Prof'l Responsibility of the Pa. Bar Ass'n, Joint Formal Op. 2007-300 (2007).

[9] *Id*.

require that the departing lawyer notify the firm before "notifying"[10] clients despite that being the preferred option.[11]

Other bodies of law may pose hazards for the departing lawyer if the lawyer actively solicits clients prior to notifying the firm. There is case law from other jurisdictions finding viable civil causes of action against departing lawyers for soliciting firm clients before notifying the firm of the lawyer's departure. These cases are based upon bodies of law other than legal ethics, such as agency, partnership, contracts, business torts and property, and usually deal with fairly egregious facts and tend to draw a distinction between "notice" and "solicitation."[12] SCR 20:8.4(f) states that it is professional misconduct to violate a supreme court decision regulating the conduct of lawyers, and the Wisconsin supreme court has stated that lawyers owe a fiduciary duty of honesty to their firms.[13] While none of the disciplinary cases applying this standard have held that it requires notice to a firm before notifying clients, the standard clearly requires honesty in lawyers' dealings with their firms.

Considering this, the committee believes that lawyers should inform their firms of their intent to depart before informing clients. This applies even if the lawyer anticipates a hostile response from the firm and possible immediate termination.[14] Informing a firm of an intended departure allows for joint notification to the clients of the departure and lessens the chance of either the departing lawyer or the firm attempting to unduly influence the client's decision as to continued representation. If, however, the firm is unreasonably delaying notification of clients, the departing lawyer may need to unilaterally inform their clients to ensure compliance with their duties to their clients.

The firm may also have a notice requirement for lawyers, employees and others associated with the firm in partnership or employment agreements. The departing lawyer should

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[10] SCR 20:7.3, ABA Comment [1] states "[A] solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services." In the context of firm departure, "notice" should be understood to mean informing a client of the fact that a lawyer will be leaving one firm for another, while a "solicitation" is a request that the client follow the lawyer to the new firm.

[11] See e.g ABA Formal Ethics Op. 99-414 (1999); "The lawyer does not violate any Model Rule in notifying the current clients of her impending departure . . . *before advising the firm of her intentions to resign,* so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation."

[12] *See e.g. Shein v. Myers,* 394 Pa. Super. 549, 576 A.2d 985 (Pa. 1990); *Siegel v. Arter & Hadden,* 85 Ohio St. 3d 171, 707 N.E. 853 (Ohio Sup. Ct. 1999); *Dowd & Dowd v. Gleason,* 181 Ill.2d 460, 693 N.E.2d 358 (Ill. 1998); *Meehan v. Shaughnessy,* 404 Mass 419, 535 N.E.2d 1255 (1989)*; Graubard, Mollen, Dannett & Horowitz v. Moskovitz,* 653 N.E.2d 1179 (N.Y. 1995). As this opinion discusses lawyers' responsibilities under the rules, these cases from other jurisdictions will not be discussed further.

[13] See *Disciplinary Proceedings against Shea,* 190 Wis. 2d 560, 527 N.W.2d 314 (1995); *Disciplinary Proceedings against Wiensch,* 2018 WI 98, 918 N.W.2d 423, and *Disciplinary proceedings against Rosin,* 2024 WI 19, 412 Wis.2d. 448.

[14] If the lawyer anticipates such a response, there is nothing in the rules that prohibits a lawyer from preparations, such as assembling a list of currently represented clients and their contact information, so that the lawyer may contact those clients immediately post-termination.

comply with such notice provisions, but any notice provision may not be so onerous or be enforced so as to function as a restriction on the departing lawyers right to communicate effectively with affected clients or restrict the departing lawyers right to practice in violation of SCR 20:5.6(a).[15] This is discussed further below.

D. Notification of clients: SCR 20:1.4(b) requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. After all, one of the most important decisions a client makes is choice of counsel. Thus, when a lawyer who has primary or substantial responsibility for the representation of a client chooses to leave a firm, SCR 20:1.4(b) requires that the affected client be informed of the fact and consequences of the departure. Both the departing lawyer and the firm have a duty to inform the client of the fact of the lawyer's departure and to provide sufficient information to allow the client to make an informed decision about the continuation of the representation.

Notice of the lawyer's departure should be given to all clients whose matters will be substantially affected by the lawyer's departure or for whom the departing lawyer serves as the primary contact.[16] Practically speaking, this means the notice must go to all clients who would reasonably consider the departing lawyer as "their" lawyer and look to that lawyer for communication and legal services.[17] To comply with SCR 20:1.16(d), the timing of the notice should be reasonable so as to afford the client time to effectuate the client's choice of counsel. While it is not mandated that notice be made by any particular manner of communication, for record keeping purposes it is advisable that the communication be in writing.

The committee generally recommends that the notice to clients be done in the form of a joint communication from the firm and the departing lawyer.[18] This is because such a joint communication facilitates cooperation between the firm and departing lawyer and allows each to approve the content of the communication. The rules, however, do not require either the firm or the departing lawyer to agree to such a joint communication and both are free to send unilateral communications. Regardless of whether the communication is sent jointly or unilaterally, it should not disparage the departing lawyer or the firm, must not contain any misrepresentations, and should not urge the client to choose one course of action over another. Both the firm and the departing lawyer may state that they desire to

[15] See ABA Formal Ethics Opinion 489 (2019).

[16] See e.g ABA Formal 99-414 (1999); Comm. on Legal Ethics & Prof'l Responsibility of the Pa. Bar Ass'n, Joint Formal Op. 2007-300 (2007).

[17] In some circumstances, multiple lawyers within a firm may have responsibility for a client matter and it may be the case that the departing lawyer is not the most senior lawyer on the matter. If the departing lawyer has client contact and their departure will substantially affect the legal services to be provided on the matter, notice should ordinarily be given to that client. If the departing lawyer has had no client contact and provided only minor services in connection with the matter, notice need not be given.

[18] See e.g ABA Formal 99-414 (1999); Comm. on Legal Ethics & Prof'l Responsibility of the Pa. Bar Ass'n, Joint Formal Op. 2007-300 (2007).

keep the client's business and that they believe they have the expertise and capacity to provide competent and diligent representation.

If a departing lawyer knows that the firm refuses to provide joint or unilateral notice to the lawyer's clients, then the lawyer must give a timely, accurate, and adequate notice to the client, regardless of contrary instructions from the law firm.[19] Likewise, in the event that the departing lawyer refuses to provide the required notice, the firm must do so.

To fulfill the duty of communication under SCR 20:1.4(b), the communication to clients should include the following information:

1) The fact and timing of the departing lawyer's departure.

2) The client's options for continued representation and the fact that the client alone has the right to make this decision. Generally, there will be three options; the client may stay with the firm, go with the departing lawyer, or hire new counsel. If a law firm believes it will not be able to provide diligent and competent representation as required by SCR 20:1.1 and SCR 20:1.3 because, for example, the departing lawyer is the firm's only criminal defense lawyer, then the firm must inform the client of that fact. Similarly, if the departing lawyer believes their new firm doesn't have the resources or expertise to continue to provide competent and diligent representation, that fact should be communicated to the client. If the departing lawyer will no longer be practicing law, and another lawyer in the firm cannot assume responsibility for the matter, the client must be told of the need to obtain new counsel.

3) If the client wishes to hire new counsel, how the client can obtain their client file and any funds belonging to the client in the possession of the firm.

4) Any other information necessary for the client to make an informed decision regarding the representation, such as information about the departing lawyer's new firm. If practicable, this letter may also contain information about any changes to the terms of engagement at the new firm and any outstanding liability the client may have to the current firm for fees and costs already incurred.

If the client does not respond to the notice of the lawyer's departure, the client remains a client of the firm.[20] If the firm believes they will not be able to provide diligent and competent representation to the client, the firm must withdraw pursuant to SCR

[19] State Bar of Texas, Opinion No. 699 (2024).
[20] *Hillman on Lawyer Mobility*, §2.4.2. Engagement agreements are generally between the firm and the client, so the firm retains responsibility for the matter until the client directs otherwise or the firm permissibly withdraws.

20:1.16(a)(1) and must take the steps necessary to effectuate their withdrawal from the matter. In all situations, a lawyer or a law firm must continue the representation if ordered to do so by a tribunal. SCR 20:1.16(c).

If neither the departing lawyer nor the firm wish, despite the ability to competently do so, to continue to represent an affected client, they must determine whether SCR 20:1.16 permits withdrawal under the specific circumstances. That rule may permit termination of the representation if the withdrawal "can be accomplished without material adverse effect on the interests of the client," [SCR 20:1.16(b)(1)], if the client has rendered the representation "unreasonably difficult." [SCR 20:1.16(b)(6)], or if a client has failed to "substantially" fulfill their obligations under a fee agreement, including not timely paying outstanding balances, [SCR 20:1.16(b)(5)]. Notification of the need to hire new counsel should be promptly communicated to the client and pursuant to SCR 20:1.16(c), the lawyer or firm must follow any applicable rules of a tribunal regarding withdrawal. The departing lawyer and law firm each have a duty under SCR 20:1.16(d) to take the steps "to the extent reasonably practicable" to protect the client's interest while the client is transitioning to new representation.

E. Duties After Initial Client Communication: After the initial notice has been sent to the affected clients, both the firm and the departing lawyer should provide, when asked, additional information regarding the lawyer's departure to allow the affected clients to make an informed decision about their choice of counsel.[21] Again, these communications should not be disparaging, contain any misrepresentations, or urge the client to make a particular decision.

If a client chooses to follow a departing lawyer, the departing lawyer may not delay work on the matter to generate fees for the new firm.[22] To comply with their duties under SCR 20:1.3 and SCR 20:1.4, the departing lawyer must take reasonable measures to ensure that clients who have followed the departed lawyer and third parties, including courts and opposing parties, are notified of the departed lawyer's new contact information. For those clients who opt to follow the departing lawyer or find new counsel entirely, the firm or departing lawyer should file the appropriate motion to withdraw as counsel, or for substitution of counsel if required by the rules of the tribunal.[23]

During the period between when notice has been provided to affected clients and the departing lawyer leaves the firm, SCR 20:5.1 prohibits firms from imposing restrictions on a

[21] *Id*.

[22] See SCRs 20:1.1, 20:1.3 and 20:3.2.

[23] SCR 20:1.16(c) requires lawyers to abide by any applicable rules of a tribunal when withdrawing, but the rules are not procedural rules. Therefore, whether a withdrawal motion or substitution of counsel or any other motion to the court is required when a client is following a lawyer to a new firm is determined exclusively by statute, local court rule or the expectations of the tribunal.

departing lawyer's access to files, support staff or other resources of the firm such that it would delay the diligent representation of the client or unnecessarily interfere with a lawyer's departure.[24] This includes not limiting or cutting off access to e-mail and the firm's computer system.

F. File Transfer and client information: In Wisconsin, the file, whether in physical or electronic form, is considered the property of the client and therefore all lawyers are required to promptly surrender the file upon termination of the representation when requested by the client or successor counsel acting on behalf of the client. The firm, however, remains responsible for the representation of the client until the client follows the lawyer to the new firm or otherwise discharges the firm. Therefore, the departing lawyer may not remove client files, whether in physical or electronic format, from the old firm unless and until the client so directs, notice is given to the old firm and the new firm or lawyer assumes responsibility for the representation.[25]

Subsequent to the lawyer's departure, SCR 20:1.16(d) requires the firm to surrender the file at the request of the client or the departed attorney if the client chosen to follow the departed lawyer. Wisconsin Formal Ethics Opinion EF-16-03 (2016) provides a thorough discussion of the ethical obligations of a firm to surrender a client's file upon termination of the representation, as well as a discussion of what constitutes a client file. For purposes of this opinion, the following are important to keep in mind:

1) Though maintained by the firm, the client's file is the client's property.
2) If the firm wishes to retain a copy of the file, it may do so but must bear the cost of copying the file.
3) Regardless of whether documents contained in the file have been previously provided to the client, the firm has a duty to provide a complete copy of the file to the client when the client terminates the firm's representation.
4) The firm cannot make delivery of the file contingent on the payment of fees or costs owed to the firm.

[24] Illinois Attorney Registration and Disciplinary Commission, *Leaving a Law Firm: A Guide to the Ethical Obligations in Law Firm Departure* (Rev. Jan. 2020). See also ABA Formal Op. 489 (2019) "After the firm knows that a lawyer intends to depart but such lawyer has not yet, in fact, left the firm, the lawyer must have access to adequate firm resources needed to competently represent the client during any interim period. For instance, the lawyer cannot be required to work from home or remotely, be deprived of appropriate and necessary assistance from support staff or other lawyers necessary to represent the clients competently, including access to research and drafting tools that the firm generally makes available to lawyers. A lawyer cannot be precluded from using associates or other lawyers, previously assigned to a client matter or otherwise normally available."

[25] Lawyers who surreptitiously remove or destroy client files at the firm may face professional discipline or civil liability. See e.g. *Maryland Atty. Grievance Commission v. Potter,* 844 A.2d 367 (Md. 2004); *In re Cupples,* 952 S.W.2d. 226 (Mo. 1997); *In re Smith,* 843 843 P.2d 449 (Or. 1992) and *Shein v. Myers,* 576 a.2d 985 (Pa. Super. Ct. 1990).

5) The firm must provide the file in a format that is usable by the client or successor counsel. For example, if the client file is stored electronically by the firm but the client does not have the ability to access, use, and reproduce the documents electronically, the firm must provide a paper copy. A firm is not required to convert a file from one format to another simply for the convenience of a client or successor counsel.

As discussed above, to the extent the departing lawyer has files or file materials of clients who are not following the lawyer, the lawyer must return these materials to the firm (or to a different lawyer if the client so directs). While the firm is obliged to comply with client wishes regarding file transfer, lawyers may retain at their own expense, copies of files that have been surrendered to former clients. Therefore, if a client elects to follow the departing lawyer, that lawyer should afford the firm a reasonable opportunity to make a copy of the file.[26]

All lawyers have an obligation pursuant to SCR 20:1.6 to protect all information relating to the representation of clients. Lawyers often have such information in locations outside of firm offices, such as a home workspace or a personal electronic device. In preparing to depart, the departing lawyer should return (or delete from electronic devices) any information relating to the representation of firm clients unless that client is going with the departing lawyer.[27] Firms will ideally have policies with respect to physical and electronic information in lawyers' possession that will take into account lawyer departures.

G. Firm Property: Certain materials outside of client files, such as CLE materials or policies and procedures prepared under the auspices of the firm, may be the property of the firm and consequently may not be removed without the consent of the firm. The rules, however, are silent as to the classification of such materials and therefore a departing lawyer who wishes to take such materials must look to outside sources, such as employment or partnership agreements and intellectual property and employment law, to determine whether or not such materials or information may be removed without the firm's consent. On one end of the spectrum there is a consensus that forms and templates that the lawyer developed for their own personal use (sometimes referred to as "desk files") may be considered as belonging to the individual lawyer whereas resources developed by the firm for use by the firm, such as master client lists, are the property of the firm.[28] The departing lawyer must

[26] *See* Wisconsin Formal Ethics Op. EF-16-03 (2016) and Colorado Ethics Op. 116 (2007). As discussed in EF-16-03, any expense associated with retaining a copy of the file must be borne by the former lawyer or firm who retains the copy.

[27] See ABA Formal Opinion 489 (2019).

[28] ABA Formal Op. 99-414 (1999) states that "…absent special circumstances, 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. 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."

tread carefully and be prepared to forthrightly explain the legal basis for any assertion that the departing lawyer is entitled to such materials. Deceptive conduct or misleading statements regarding such materials are likely to violate SCR 20:8.4(c). That said, because of the necessity of future conflicts checking, a departing lawyer may compile and take a list of clients and matters worked on at the former firm.

H. Clients remaining with the firm: As discussed above, generally law firms and not individual lawyers represent clients and firms have a responsibility under SCR 20:5.1(a) to have in place measures that assure ethical representation of clients. Individual lawyers, however, are often assigned responsibility for matters and a departing lawyer may have responsibility for matters of clients who elect to remain with the firm or will remain with the firm for other reasons. Until the lawyer leaves the firm, he or she continues to have all duties, including competence (SCR 20:1.1) and diligence (SCR 20:1.3), to such clients and may not neglect these matters. Additionally, the departing lawyer has an obligation under SCR 20:1.16(d) to take steps to the extent reasonably practicable to protect client interests upon termination of the representation. Therefore, both firms and departing lawyers have joint obligations to work together to ensure that client interests are protected and matters are transitioned smoothly.[29] To the extent possible, departing lawyers must ensure that client files are up to date and cooperate with the transition of matters to new counsel within the firm.[30] Likewise, as discussed above, the firm, during the transition period, cannot impair the lawyer's ability to competently represent a client for whom the lawyer continues to have responsibility, such as by cutting off access to e-mail or other firm resources.

I. Court appointed clients: A lawyer may form a lawyer-client relationship with certain clients by court appointment, as in the case of public defender or guardian ad litem ("GAL") appointments. In such cases, it is almost always the case that the appointment is specific to the individual lawyer and not to the firm. In these cases, these clients cannot be given the option of remaining with the firm because the court order did not appoint the firm, and the notice to such clients from the departing lawyer would simply consist of the date when the lawyer would begin work at the new firm and the new contact information. To the extent that lawyer is ceasing the practice of law or taking a position that precludes future representation, such as a defense lawyer becoming a prosecutor, the lawyer must notify the affected clients, the appointing authority and any tribunal in as timely a fashion as possible, and take whatever other reasonable steps necessary to protect the interests of affected clients.

J. Non-compete agreements: SCR 20:5.6(a) flatly prohibits any partnership or employment agreements that restricts a lawyer's right to practice after termination of the relationship.[31] Employment or partnership agreements may not prevent a lawyer from leaving for another

[29] See ABA Formal Opinion 489 (2019).

[30] This assumes that the lawyer continues to work at the firm during the transition period. The firm that immediately terminates a lawyer once notice is given cannot thereafter demand the lawyer return to the firm and work on transition files.

[31] There is a narrow exception with respect to benefits upon retirement – see ABA Formal Opinion 06-444 (2006).

firm and taking clients and similarly may not prevent the departing lawyer from informing affected clients of their right to counsel of their choice. Note that under SCR 20:5.6(a), it is misconduct to "offer" as wells as "make" such an agreement, so a firm which attempts to induce a lawyer to sign such an agreement violates the rule.[32] SCR 20:5.6(a) also prohibits agreements which financially penalize lawyers from leaving a firm to compete.[33] So for example, a law firm may not force a departing lawyer to pay liquidated damages,[34] pay a fixed amount for leaving and taking clients,[35] or pay a portion of fees earned after departure to the former firm.[36] Agreements that attempt to limit lawyers from soliciting other lawyers to leave the firm with them also violate the rule.[37]

Also, notice provisions which might functionally serve as non-competition clauses (i.e., the notice period operates to give the law firm a head start on client retention), may violate SCR 20:5.6(a). Such a notice period "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. If they would affect a client's choice of counsel or serve as a financial disincentive to a competitive departure, the notification period may violate Rule 5.6."[38] While law firms are certainly permitted to include notice provisions in partnership or employment agreements, such periods must be construed and operate so as to respect the firm's right to an orderly transition of matters, but not function to impair the right of lawyer to switch firms or the right of affected clients to their choice of counsel. A notice period in the range of 2-4 weeks is, subject to the caveats above, generally considered to be within reason.[39]

Law firms, therefore, may not seek to contractually prevent or penalize a lawyer from leaving the firm and taking clients, and any agreements addressing such departures should be structured to respect the client's right to choose their lawyer and the right of the lawyer to change firms. Departing lawyers should comply in good faith with such permissible agreements, not engage in deceptive conduct, and attempt to work in good faith with the firm after notice is given.

That said, law firms may have legitimate business reasons for wishing to protect certain proprietary information, internal processes, and relationships. As to proprietary information (e.g., law firm financial information, website metrics) and internal processes (e.g., a prospective marketing initiative or pricing program), the disciplinary rules are silent as to

[32] See also SCR 20:8.4(a).

[33] See e.g. *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995 (N.Y. 1993); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528 (Tenn. 1991); *Eisenstein, PC v. Conlin*, LLP, 827 N.E.2d 686 (Mass. 2005). There is a minority view that finds that some financial disincentives are permissible if "reasonable." See e.g. Nev. Formal Ethics Op. 56 (2019). The committee does not believe that SCR 20:5.6 permits such disincentives, even if "reasonable."

[34] See D.C. Ethics Opinion 368 (2015).

[35] See Ariz. Ethics Op. 19-0006 (2020).

[36] See Pa. Ethics Op. 2016-024 (2016).

[37] See ABA Formal Opinion 489 (2019).

[38] ABA Formal Opinion 489 (2019).

[39] State Bar of Texas, Opinion No. 699 (2024)

confidentiality agreements intended to protect such information as long as they do not function as a restriction on the right to practice.[40] Other bodies of law that are beyond the scope of this opinion may govern such agreements.

K. Surrender of client funds: To facilitate the client's ability to hire the counsel of their choice, SCR 20:1.16(d) also requires the prompt refund to the client or successor counsel of any advance payment of fees or expenses that have not been earned or incurred. A firm may not withhold funds due to the client to use as leverage in a dispute with the client or departing lawyer.[41]

If the firm is holding advanced fees paid by the client and time spent on the client's case is yet unbilled, the firm may inquire as to whether the client consents to those funds being applied to the unbilled time. If the client declines to give consent, the firm must hold the disputed amount in trust, or if they are not in trust return the disputed amount to trust, pursuant to SCR 20:1.15(f).[42]

Conflicts that arise between the firm and the departing lawyer over the division of earned fees in a case are usually contract matters. SCR 20:1.5(e)(2) specifically permits the splitting of fees between lawyers who formerly practice together if the payment is made pursuant to a separation agreement. This rule gives lawyers and law firms substantial freedom to decide how fees earned by a lawyer during their association with the firm will be divided when that lawyer leaves the firm. However, separation agreements regarding fees may violate SCR 20:5.6(a) if they obligate departing lawyers to remit exorbitantly large portions of fees from cases they take with them and thus function as financial penalties on competition.[43]

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[40] SCRs 20:1.6, 20:1.8(b) and 20:1.9(c) give, for the most part, clients control over the disclosure and use of information relating to the representation of those clients, and partnership or employment agreements may not attempt to supersede or limit the rights of clients and the disciplinary obligations of lawyers.

[41] If a client's advanced payment of fees was placed in the firm's business account pursuant to SCR 20:1.5(g), the firm must provide the notices required by SCR 20:1.5(g)(2). Upon distribution of advanced fees and costs held in trust, a full written accounting must be provided to the client. SCR 20:1.15(e)(2). SCR 20:1.(ag) defines "advanced fee" as, "an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization.

[42] The Philadelphia Bar Association Professional Guidance Committee Opinion 2013-4 (September 2013)

[43] See, e.g., *Hackett v. Moore*, 939 N.E.2d 1321 (Ohio Ct. Com. Pl. 2010) (invalidating on public policy grounds contract that required departing lawyer to turn over 95 percent of fees from case he took with him and finding that agreement probably infringed on client's right to choose his own counsel and likely violated Rule 1.5(e) and Rule 5.6). But see *Ruby v. Abington Mem. Hosp.*, 50 A.3d 128 (Pa. Super. Ct. 2012) (employment agreement obligating lawyer to turn over 75 percent of all fees earned on cases he takes with him to another firm is enforceable).

Contingent fees matters can present special issues, and the division of a contingent fee between a firm and a departing lawyer is generally governed by statute and case law. Lawyers in such situations should inform themselves of the relevant law.[44]

L. Closed files: There is no obligation on the part of either the firm or the departing lawyer to notify former clients of the lawyer's departure. Consequently, closed files which represent work done under the auspices of the firm should remain with the firm, and should be retained by the firm consistent with the firm's file retention policy.[45] In some circumstances, it may be unclear whether a specific matter should be regarded as closed or still pending, and the firm and the departing lawyer should err on the side of notifying the affected client.[46] If a client is moving to the new firm with the departing lawyer, that client may request that their closed files be transferred to the new firm, and the firm must promptly comply with such requests.[47] The firm may retain copies of such files at its own expense.[48]

Because the firm bears responsibility for appropriate retention of closed files for work done by the firm's lawyers, the firm may not unilaterally attempt to require that a departing lawyer take closed files – as stated, the closed files should only be transferred at the direction of the current or former client. Departing lawyers also may not unilaterally remove closed files without the consent of the client. Notice to the firm must be given even if the client has directed the departing lawyer that the client's files be transferred.

M. Cooperation in conflict checking: SCR 20:1.6(c)(6) permits lawyers to reveal information relating to the representation of a client to the extent reasonably necessary to, "detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." Thus, the firm should provide (or make available to) the departing lawyer with a list of the lawyer's current and former clients, opposing parties, and any other information necessary for conflict-checking purposes as this does not violate SCR 20:1.6 and serves to protect the interests of clients who may be affected by future conflicts.[49] Such cooperation should extend to reasonable post departure requests from the departed lawyer for information reasonably necessary to perform conflicts checks.

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[44] See e.g. *Tonn v. Reuter*, 6 Wis.2d 498, 95 N.W.2d 261 (1959);*Tesch v. Laufenberg,* 2013 WI App. 103, 836 N.W.2d 849]. ;*McBride v. Wausau Ins. Co.,* 176 Wis.2d 382, 500 N.W.2d 387 (Ct App. 1993;*Lorge v. Rabl,* 2008 WI App. 141, 758 N.W.2d 798).

[45] Wisconsin Formal Ethics Opinion EF-17-01 (2017) provides guidelines for appropriate retention of closed client files.

[46] For example, some estate planning lawyers regard all files as being "open," and family law lawyers may anticipate imminent post judgment litigation in some matters.

[47] See Wisconsin Formal Ethics Opinion EF-16-03 (2016). Such a request may also be made on behalf of the client by the departing lawyer and the firm must honor such requests.

[48] Id.

[49] See ABA Formal Opinion 489. That opinion is based on Model Rule 1.6(b)(7), which is narrower in scope than SCR 20:1.6(c)(6), in that it limits disclosures to those necessary to resolve conflicts arising from a lawyer's change in employment or a change in the composition of a firm. See also State Bar of Ariz., Formal Op. 10-02 (2010) ("When a lawyer's employment with a firm is terminated, both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued

N. Post-departure communications: Former or current clients of the departed lawyer may contact to firm seeking to communicate with the lawyer. When such communications occur, the firm should not disparage the departed lawyer, must not make any misrepresentations regarding the departed lawyer, and should not urge the client to choose one course of action over another. The firm must also provide contact information for the departed lawyer to the client if it is requested.[50]

To protect client interests, a firm must establish a system for dealing with communications from clients of the departed lawyer, whether received by phone, mail, or e-mail. E-mail is often the primary means of communication between lawyer and client, and it is normal and appropriate that the firm stop the lawyer's access to firm e-mail once the lawyer is no longer associated with the firm. However, to protect client interests, the firm should not disable the lawyer's email with no provision to let senders know the lawyer is no longer associated with the firm.[51] Similarly, the firm should not disable the departed lawyer's voicemail and let calls to their number go unanswered. The firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones that provide notice of the lawyer's departure and offer an alternative contact at the firm for inquiries. The firm should regularly review the departed lawyer's firm emails, voicemails, and paper mail and promptly forward communications from clients to the departed lawyer.[52] Similar considerations apply to contacts from clients with firm staff or other lawyers remaining at the firm.

O. Special responsibilities if a lawyer is discharged or departs with little to no notice: If a firm discharges a lawyer with little to no notice, special care should be taken to ensure the client experiences no prejudice to its interests. The firm must not take steps that would impair the discharged lawyer's ability to competently represent clients, impede client attempts to contact the lawyer, make false or misleading statements and respect clients' right to counsel of their choice and their files.

The firm may need to provide access to client files to ensure the rights of the client are otherwise protected. The firm must provide access to SPD, GAL, and other files pertaining to court-appointed representations because the individual lawyer, not the firm, represents the client. The firm must promptly provide (or make available to) the departed lawyer with a list of the lawyer's current and former clients, and should attempt to coordinate with the

representation and avoid conflicts. These ethical obligations can best be satisfied through cooperation and planning for any departure.") State Bar of Texas, Opinion No. 699 (2024) ("A departing lawyer must be allowed to retain sufficient former client information to avoid conflicts of interests involving the lawyer's new practice (or subsequent practices with future firms or in various co-counsel arrangements) and, if no conflict exists, serve clients who have sought the lawyer's services.")

[50] See Philadelphia Ethics Opinion 94-30 (1994).

[51] Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups § 2.4 (Third Edition, 2023 Supp. 2017).

[52] ABA Formal Opinion 489 (2019).

departed lawyer to take all steps necessary to protect the interests of the clients.[53] If timely coordination is not possible, the firm must be prepared to provide coverage at hearings, ensure that all case deadlines are met, and promptly communicate with clients regarding the departure of the lawyer. While the firm might necessarily assume temporary representation of the client, the client must still be given the options of staying with the firm, following the departed lawyer, if appropriate, or hiring new counsel. As with any lawyer departure, the firm must provide contact information to clients who request it, must not disparage the departed lawyer, and must not provide misleading information to the clients of the departed lawyer.

If a lawyer leaves a firm with little or no notice, the lawyer must cooperate with the firm to protect the interests of affected clients. This includes providing appropriate notice to clients and courts, respecting the client's right to choose counsel,[54] returning any information relating to the representation of the firm's clients to the firm, and any other steps necessary to protect client interests.

In rare circumstances, a lawyer may be terminated because of misconduct, incapacity or both. When a lawyer associated with a firm may be incapacitated in some way, the firm is often placed in a difficult and complicated situation, and detailed discussion of such situations is beyond the scope of this opinion.[55] Similarly, this opinion does not address the obligations of a firm when a lawyer within the firm may have committed misconduct.[56]

Conclusion

Firm departures present a variety of issues for both the firm and the departing lawyer, and both the disciplinary rules and other bodies of law may be relevant. While this may sometimes present difficult issues, it is important for both sides to focus on their obligations to protect the interests of clients and respect the right of clients to choose their lawyer.

Wisconsin Ethics Opinion E-97-02 is withdrawn.

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[53] *Id*.

[54] As discussed in this opinion, simply leaving a firm is not good cause in itself for withdrawal, and a lawyer who suddenly departs a firm is obliged to offer clients the option to follow the lawyer unless not possible, such as when the lawyer is entering government service or the lawyer withdraws appropriately pursuant to SCR 20:1.16.

[55] See ABA Formal Ethics Opinion 03-429 (2003) for a discussion of the firm's obligations with respect to a mentally impaired firm lawyer and ABA Formal Ethics Opinion 03-431 (2003) for a discussion of the obligation to report potential misconduct of the impaired lawyer.

[56] Lawyers in such situations should remain aware of their duty under SCR 20:1.4(b) to provide clients with sufficient information to make informed decisions about the matter and SCR 20:8.3 to, in certain circumstances, report misconduct to the appropriate professional authority.