**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**
**COMMITTEE ON PROFESSIONAL ETHICS**

# FORMAL OPINION 2023-1: ETHICAL OBLIGATIONS OF LAWYERS AND LAW FIRMS RELATING TO ATTORNEY DEPARTURES

**TOPIC:** Attorney departing from a law firm

**DIGEST:** A number of ethics rules govern a lawyer's and a law firm or law department's ethical obligations to each other and to clients when a lawyer departs from a law firm or law department. The applicable New York Rules of Professional Conduct include Rule 1.4 (the obligation to communicate material developments to the client), Rules 1.6 and 1.9 (confidentiality of client information), Rule 1.16 (duties upon withdrawal from representation), Rule 5.6 (prohibitions on restricting a lawyer's right to practice), and 8.4(c) (prohibition on lawyer deceit). The guiding and underlying ethical principles seek to protect the client's right to choice of counsel and a lawyer's right to change firms, and to ensure a smooth transition during which the client continues to be fully and competently represented. This opinion provides guidance as to how these rules and underlying fundamental precepts impact the key events that arise during an attorney departure, including the substance and timing of communications with clients, notice requirements, issues and obligations pertaining to the notice and transition period, and the transfer of files.

**RULES:** **1.4, 1.6, 1.9, 1.16, 5.1, 5.6, 8.4(c)**

**QUESTION:** What are a lawyer's and a law firm's ethical obligations to each other and to clients when a lawyer plans to depart from a law firm?

**OPINION:**

## I. Introduction

A lawyer's departure from a law firm,[1] voluntarily or involuntarily, can be fraught with competing interests – those of the departing lawyer, those of the law firm and those of the clients both are serving. How those competing interests should be navigated is governed not only by the ethics rules but also by fiduciary obligations, contractual commitments, and other law. This Committee's jurisdiction is limited to interpretating the New York Rules of Professional Conduct (the "Rules"), so we do not opine on obligations based on sources outside the Rules.

The ethical balances that must be struck with respect to those competing interests differ depending upon the stage of the departure. A typical attorney departure has three stages: (i) when the attorney is contemplating departure or is affirmatively in negotiations with other firms about a lateral move, but before the attorney has notified his or her current firm (the "Pre-Notice Period"); (ii) after the attorney has notified the firm that he or she has decided to depart, but before he or she

[1] While this opinion refers to law firms, the same rules generally apply to other entities providing legal services, such as in-house law departments and government law offices. *See* Rule 1.0 (h).

has actually departed (the "Notice Period"); and (iii) after the lawyer has departed from the firm (the "Post-Departure Period"). The Rules applicable to the Post-Departure Period are well established, but there is relatively little guidance in New York regarding the Pre-Notice and Notice Periods.

The American Bar Association ("ABA") has provided guidance regarding a lawyer's ethical obligations when changing firms, including those related to disclosing plans to depart, protecting client interests, maintaining confidentiality, and avoiding conflict of interests. *See* ABA Formal Op. 99-414 (1999); ABA Formal Opinion 489 (2019) ("ABA 489"). However, the ABA recognized that the "laws, court rules regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling." ABA 489 at 1. At least two states have adopted specific ethics rules that address the issues that arise in connection with attorney departures. *See* Florida Rule 4-5.8; and Virginia Rule 5.8. New York has not.[2]

This Committee believes that more assistance would be useful for New York lawyers and law firms about how to handle the ethical questions that repeatedly arise in departure situations during the Pre-Notice and Notice Periods. Such guidance will help to reduce disputes over whether specific firm rules and policies on notice, solicitation and other conduct relating to a departure comply with the Rules and will help ensure that client interests are protected. In setting forth such guidance, this opinion addresses solely the ethics obligations set forth in the Rules. It does not address any legal, fiduciary, or contractual obligations that apply to both lawyers and law firms during these periods.

## II. The Principles Underlying the Ethics Rules Governing Attorney Departures

ABA 489 sets forth the well-established principles underlying the ethics rules governing attorney departures:

> Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to approval of a tribunal, when applicable (and conflicts of interest). … Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm.

ABA 489, at 7.

Based on these precepts and the applicable Model Rules and court opinions, the ABA reached the following conclusion with respect to advance notice, solicitation, and certain other transition matters:

[2] In July 2021 and February 2022, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") proposed a new Rule 5.9 that would have set out specific procedures for lawyers leaving law firms and procedures for dissolving law firms. After public comment, COSAC withdrew the proposal and instead proposed new Comments to Rule 1.4 and 5.6 to provide guidance regarding communications with clients by departing lawyers and their law firms, as well as limitations on law firm conduct during the Notice Period. Those Comments were adopted by the NYSBA House of Delegates on June 18, 2022.

> Firms may require some period of advance notice of an intended departure to provide sufficient time to notify clients to select who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be fixed or pre-determined in every instance, cannot restrict or interfere with a client's choice of counsel, and cannot hinder or unreasonably delay the diligent representation of a client. Firms also cannot restrict a lawyer's ability to represent a client competently during any pre-departure notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. Firms should not displace departing lawyers before departure by assigning new lawyers to a client's matter, absent client direction or exigent circumstances requiring protection of clients' interests. A firm's reliance on a fixed notice period set forth in an agreement either to attempt to require the lawyer to stay at the firm for that period or to impose a financial penalty for an early departure must be justified by particular circumstances related to the orderly transition of client matters and must account for the departing lawyer's offer to cooperate post-departure in these and other matters. Otherwise, a firm's imposition of a fixed notice period may be inconsistent with Rule 5.6(a).

*Id.*

This Committee believes that the conclusions set forth in ABA 489 are, in large part, consistent with New York's Rules and can serve as a starting point for guidance for New York lawyers. In particular, the underlying principles of the clients' right to choice of counsel, the lawyer's right to move and the prohibition against punishing a departing lawyer for leaving are solidly engrained in Rule 5.6.[3] However, because the Rules (and their interpretation by New York courts) address these issues differently in some instances than does the ABA, as well as raise issues not considered in the ABA opinions, this opinion offers analysis and guidance specifically for New York lawyers.

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[3] *See, e.g.*, *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 98 (1989) ("The purpose of the rule [5.6] is to ensure that the public has the choice of counsel"); *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 380 (1993) ("restrictions on the practice of law, which include 'financial disincentives' against competition as well as outright prohibitions, are objectionable primarily because they interfere with the client's choice of counsel"); *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 390 (1999) (noting that "[o]ur decisions [in *Cohen* and *Denburg*] invalidating anti-competitive clauses in such agreements were not based on application of the common-law rule, but upon enforcement of the public policy reflected in DR 2–108(A) of the Code of Professional Responsibility"); *Nixon Peabody LLP v. de Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher Associes*, 20 Misc. 3d 1145(A), at *7 (Monroe Cnty. Sup. Ct. 2008) (quoting Charles W. Wolfrom, *Modern Legal Ethics* § 16.2.3, at 885 n. 45 (1986) and N.Y.C. Bar Comm. on Prof'l Responsibility, *Ethical Limitations on Restricting a Practice of a Departing Lawyer*, at 10 (1993), reprinted as *Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice*, 20 FORD. URBAN L.J. 897, 903 (1993)) ("'The rationale for [Rule 5.6] is to protect the autonomy of lawyers and the ability of clients to freely choose counsel.'…An important aspect of attorney autonomy is the 'promotion of attorney mobility [that] is the unstated—but real—purpose of the rule.'").

## III. Rules Relating to the Pre-Notice Period

The key issues that typically arise during the Pre-Notice Period involve what steps an attorney may ethically take in considering or effectuating a departure and what information the attorney must or may convey to an acquiring firm (or an acquiring firm may request) when the departing lawyer and the acquiring firm are evaluating a prospective move.

### A. Communicating With and About Clients

The issue of communication with clients typically arises in two contexts: communications about clients to the acquiring firm and communications with clients directly.

The disclosure of client information to an acquiring firm in the context of a lateral move is specifically covered under Rule 1.6 and Comments [18A] through [18F]. The primary focus of the rule is the balance between the need to address potential conflicts of interest and client confidentiality and it provides substantial guidance on that issue.

While the rule does not address fiduciary obligations, the Comments caution that those should be taken into account. Although no specific ethics rule addresses what an attorney may communicate to clients during the Pre-Notice Period, the basic principles applicable in New York were set forth by the New York Court of Appeals in *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 120–21 (1995). Citing a combination of ethics principles and fiduciary obligations, the court said:

> At one end of the spectrum, where an attorney is dissatisfied with the existing association, taking steps to locate alternative space and affiliations would not violate a partner's fiduciary duties. …. As a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice.[4] *Ideally*, such approaches would take place only after notice to the firm of the partner's plans to leave.
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> At the other end of the spectrum, secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties.

*Id.* (emphasis added) (citations omitted).

[4] The *Graubard* court cited three sources for this proposition: NYCLA Op. 679 (1991); N.Y. City Op. 80–65 (1982); and Vincent Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary and Disciplinary Liability,* 50 U. PITT. L. REV. 1 at 99–106 (1988).

N.Y. City Ethics Op. 80–65 (1982), cited by the *Graubard* court, confirmed that attorneys have an ethical obligation to advise clients with whom they have had a professional relationship of their impending departure. However, the question posed in that ethics opinion related to the period *after* notice of departure was tendered to the firm. The Committee expressly cautioned that "there are potential legal issues associated with contacting clients served while employed by the former firm, which are outside the jurisdiction of the Committee, but which should be considered in connection with any communications."

The *Graubard* court said that "ideally" lawyers would not approach clients until after giving notice to the firm of the lawyer's plans to leave the firm. The *Graubard* court thus seemed to leave open the possibility that pre-notice solicitation of clients would be ethically and legally permissible in some situations, but it did not identify what those situations might be. Rather, it left open a gray area between the two ends of the spectrum and concluded that the situation in *Graubard* based on the facts then developed fell in that gray area.[5]

The most relevant rule relating to communication with clients regarding a proposed departure is Rule 1.4, which requires a lawyer to "promptly inform the client" of any "material developments in the matter." From an ethics standpoint, the reason for doing so is to permit the clients to decide who they want to continue the representation. *See* Rule 1.4(a)(1)(iii) and (b); N.Y. City 80–65 (1982). It is likely, however, that the lawyer's ethical client notification obligations can fully be fulfilled after notice to the firm of an impending departure. Indeed, Comment [7A] added to Rule 1.4 in June 2022 specifically states that "after a departing lawyer has informed a responsible member or members of the current firm of a concrete decision to move to another firm, the departing lawyer must give prompt notice of that decision to any potentially affected clients of the current firm."[6] Comment [7B] imposes a corresponding duty on the law firm, unless it knows adequate notice was provided by the departing lawyer.

While the Comments to Rule 1.4 address when notice is *required*, another key question that arises is when a departing lawyer is *permitted* to advise a client about a contemplated departure and/or whether or to what extent that communication can include an inquiry or request regarding whether the client will follow the lawyer. While the New York ethics rules do not directly address this question, the principles as applied and discussed under Rules 1.4 and 5.6 and others referred to herein must be taken into account here as well.[7] Indeed, to the extent the New York Court of

[5] Sometimes the impetus to leave may come from a request or suggestion of a client. In such a situation, we note that the balance of the considerations underlying the timing and propriety of client communications may differ, but we do not opine on the issue.

[6] Not all clients for whom a departing lawyer has preformed legal services will be "affected" by the lawyer's departure such that client notification is required prior to the departure. To the extent that the departure will materially affect the firm's delivery of future legal services to the client by, for example, leaving a material gap in the remaining firm lawyers' knowledge of relevant facts or law, decrease the likelihood that the matter will be successfully and timely concluded, or cause the client to incur increased future legal costs, notice to the client of the pending departure should be given.

[7] In Formal Opinion 99-414, the ABA did view this issue as an ethical one and opined that pre-notice solicitation was not an ethical violation:

Appeals discussed these issues in *Graubard*, it cited to both legal and ethics sources. While this Committee has no jurisdiction to render opinions to the extent these issues involve fiduciary or contractual duties, we believe that it is settled New York law that, absent unique circumstances, lawyers contemplating a departure should not – prior to giving notice to their firms – inform clients of their intention to change firms. Nor may departing lawyers ask whether clients of the current firm will follow them to the new firm or waive conflicts of interest that might arise upon joining the new firm.[8] It is the Committee's view that there is nothing in the ethics rules that is inconsistent with this settled law.

### B. Communicating With Attorneys or Staff of the Current Firm

The issue as to whether a departing attorney may inform or solicit other attorneys or staff during the Pre-Notice Period raises these same questions and many of the same ethics principles are relevant: the prohibition against restricting an attorney's practice of law after departure, the right of clients to choice of counsel, and the right and potential obligation of departing lawyers to continue to serve their clients in a new affiliation. However, the two situations are generally addressed separately due to the presence in the client context of competing fiduciary and ethical obligations. In *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 188 (1st Dep't 2000), the court addressed the propriety of pre-departure solicitation of partners (which it found permissible) and associates and staff (which it found impermissible prior to notice) – but it addressed these issues under the law of fiduciary obligations among partners, not under the Code of Professional Responsibility that was then in force. Opining on fiduciary obligations among partners or legal obligations of associates and staff to their employers is beyond our jurisdiction. However, a concurring and dissenting opinion in *Gibbs* emphasized that the ethics principles of client choice of counsel and the ethical prohibitions against restricting an attorney's practice of law should be considered in determining whether any violation of law occurred. 271 A.D.2d at 194. As noted below, new Comments to Rule 5.6 state that prohibitions or limitations that preclude a departed lawyer from contacting or recruiting law firm employees *after* the lawyer has departed from the firm are ordinarily impermissible. Accordingly, it is the Committee's view that these ethics principles need to be taken into account in determining the propriety of any restrictions on recruiting of attorneys or staff during the period after notice and prior to departure. While we

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> The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact 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.

However, in so stating, the ABA cautioned that it was merely commenting on the Model Rules and that applicable law relating to the "law of fiduciaries, property and unfair competition" could also apply. Given that the New York Court of Appeals cited the Disciplinary Rules in rejecting the argument in *Graubard* that pre-resignation solicitation was permitted, New York courts might not accept the ABA's conclusion that pre-notice *solicitation* as opposed to notification is permitted. This is an issue of law on which we do not opine.

[8] While Rule 1.6 permits disclosure of client information to an acquiring law firm for conflicts-checking purposes during the Pre-Notice Period, it does not authorize either the departing lawyer or the acquiring firm to contact those clients to inquire about conflict waivers should a conflict be found. That question is beyond the scope of this opinion and primarily involves legal issues, not ethical ones. We do note, however, that a departing attorney cannot circumvent his or her own obligations through a third party, such as the acquiring law firm.

cannot comment on the legal issues involved, any restrictions should be judged from an ethics standpoint by whether they are protecting legitimate interests of the firm and/or the departing lawyer or whether they impermissibly restrict the client's right to counsel, and the attorney's right to move and compete.

Given that recruiting is ordinarily permissible following departure, the key issue that needs to be considered in this regard is how these interests or restrictions are impacted by recruiting prior to departure. From an ethics standpoint (as well as from a legal one) the answer may be significantly different depending on whether the question is Pre-Notice solicitation or solicitation during the Notice Period (which is discussed below). During the Pre-Notice period, only the departing lawyer is aware of the impending departure and therefore would have an unfair advantage if recruiting were permitted prior to notice. Thus, from an ethics standpoint, unless a departing attorney can point to some aspect of client choice or attorney movement justifying a pre-emptive approach, the validity of prohibitions on Pre-Notice solicitations is more likely to generally tilt in favor of serving the firm's legitimate interests.

Another issue that arises in the Pre-Notice Period is a departing lawyer's removal or copying of firm information, sometimes followed by transmission of that information to the acquiring firm. Neither the Comments to New York Rule 8.4 nor any prior New York ethics opinion have addressed this issue. However, in *Gibbs*, which held that the departing lawyer's removal of certain materials violated his fiduciary obligations, the court also noted that removing or copying firm materials could violate Rule 8.4, quoting from D.C. Ethics Op. 273:

> [A] lawyer's removal or copying, without the firm's consent, of materials from a law firm that do not belong to the lawyer, that are the property of the law firm, and that are intended by the lawyer to be used in his new affiliation, could constitute dishonesty, which is professional misconduct under Rule 8.4(c).

271 A.D.2d at 185.

We generally agree with D.C. Op. 273 on this point. Unauthorized removal or copying of materials or information from the departing lawyer's firm that do not belong to the lawyer may constitute dishonesty in violation of New York Rule 8.4(c).

## IV. Rules Relating to the Notice Period

Integral to an analysis of the conduct that is ethically permitted or prohibited during the Notice Period are the well-defined rules that pertain to the Post-Departure period. The key rule in this context is Rule 5.6 (a)(1), which provides that "a lawyer shall not participate in offering or making . . . 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." Rule 5.6(a)(1) is intended to prohibit any partnership or employment agreement (or the like) that "limits the freedom of clients to choose a lawyer and limits the professional autonomy of lawyers." Rule 5.6, Cmt. [1]. In particular, Rule 5.6(a)(1) prohibits restrictions upon the ability of a departing lawyer to continue to serve clients who choose to follow the attorney to the new affiliation.

Based on this Rule (and its Code predecessors), New York courts have struck down contractual restrictions that, directly or indirectly, prevent or financially discourage a lawyer from moving to and practicing at a competing firm, or impede a client's ability to continue to be represented by the departing lawyer. The seminal case is *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989), which held that former DR 2-108(A) in the Code of Professional Responsibility – which is almost identical to today's Rule 5.6(a)(1) − went beyond just banning restrictive covenants and equally precluded economic disincentives to competition. The *Cohen* court held that a provision in the firm's partnership agreement that required forfeiture of earned but uncollected departure compensation if a partner continued to practice law after his departure in competition with the firm violated the Rule. Another form such improper restriction may take is a law firm partnership agreement provision requiring partners who join a competing firm to make specified payments to the firm "in amounts directly proportional to the success of the departing partner's competitive efforts." *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 378 (1993). In *Denburg*, the Court of Appeals said such a provision violated DR 2-108 because the effect of the provision was "to improperly deter competition and thus impinge upon clients' choice of counsel." 82 N.Y.2d at 381.

*Gibbs*, *Graubard*, *Cohen*, and *Denberg* establish that the language of Rule 5.6(a)(1) prohibits contractual provisions that have the effect of deterring competition, impeding lawyer mobility, and hampering client choice in the Post-Departure Period. But those cases did not identify other types of provisions or limitations that would be prohibited under that Rule. Recognizing the need for further clarity in this area, The New York State Bar Association adopted new Comments to Rule 5.6, effective October 30, 2021, and further amended the Comments on June 30, 2022, to specifically address the types of agreements prohibited and permitted under Rule 5.6(a)(1). The new Comments provide:

> [1D] … In every type of law firm, the departed lawyer and the law firm must balance their rights and obligations to each other in a manner consistent with the Rules of Professional Conduct and the law governing contracts, partnerships, and fiduciary obligations, all while recognizing the primacy of client interests and client autonomy. With this in mind, Comment [1E] addresses restrictions that ordinarily violate the Rule, and Comments [1F], [1G], and [1H] addresses restrictions that ordinarily do not violate the Rule.

These new Comments are currently the most definitive guidance regarding the permissible and prohibited restrictions from an ethical perspective during the post-departure period for New York lawyers. In general, the agreements that the Comments provide ordinarily violate the Rule are those that prohibit or limit departing lawyers, post-departure, from (i) contacting or representing some or all current, former, or prospective clients of the firm, (ii) practicing law for any period of time following his or her departure, (iii) contacting or soliciting law firm employees after the lawyer departs, or (iv) imposing more severe financial penalties on departed lawyers for competition.

Rule 5.6, by its terms, applies only to restrictions imposed on a departing attorney *after the termination of the relationship*, not to the Pre-Notice or Notice Period. However, rules or

restrictions imposed by a law firm during the Notice Period can have a similar impermissible effect of deterring competition and impinging on choice of counsel. Thus, if rules, contractual provisions or other restrictions that are imposed during the Notice Period deter or unreasonably delay the lawyer's departure, interfere with a departing lawyer's ability to communicate with clients, or impede a departing lawyer's ability to continue to handle client matters, then those restrictions will, in the Committee's view, similarly violate Rule 5.6 because they interfere with a client's choice of counsel and/or punish the departing lawyer for leaving. At the same time, rules and requirements necessary to ensure a smooth transition, meet imminent deadlines, protect client interests, and ascertain client's desires for continued representation would not violate Rule 5.6, and may even be required by the other Rules depending on the circumstances of the lawyer's departure and how urgent the clients' needs for legal services are. *See, e.g.*, Rule 1.1 (duty of competence) and Rule 1.4 (duty to communicate material developments to clients). Thus, a determination as to whether any particular requirement or rule imposed during the Notice Period is ethically permissible depends upon whether it is being imposed or applied for legitimate reasons related to a smooth transition and in furtherance of client interests or is instead being used to improperly interfere with a departing lawyer's ability to compete or to punish the departing lawyer.

We apply these principles below to issues that typically arise during the Notice Period.

**A. Minimum Notice Provisions**

ABA 489 recognized the potential impermissible impact that a fixed notice period may have and opined that "[c]ase law interpreting Rule 5.6 supports the conclusion that lawyers cannot be held to a fixed notice period and required to work at a firm through the termination of that period." ABA 489 at 5. At the same time, ABA 489 also recognized that the ethical obligations may require a transition period prior to departure for reasons unrelated to competition. ABA 489 balanced those concerns as follows:

> Firms have an ethical obligation to assure that client matters transition smoothly and therefore, firm partnership/shareholder/member/employment agreements may request a reasonable notification period, necessary to assure that files are organized or updated, and staffing is adjusted to meet client needs. In practice, these notification periods cannot be fixed or rigidly applied without regard to client direction, or used to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client. *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.* A lawyer who wishes to depart may not be held to a pre-established notice period particularly where, for example, the files are updated, client elections have been received, and the departing lawyer has agreed to cooperate post-departure in final billing. …
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> (Emphasis added.)

No New York court has ruled on the enforceability of minimum notice requirements in the context of attorney departures; however, the recent Comments to New York Rule 5.6 do address this issue. Although the Comments recognize the same concerns as those identified by ABA 489, they do not conclude, as does ABA 489, that such concerns prohibit all pre-established notice

periods. Rather, new Comment [1F] to Rule 5.6 states that agreements "prescribing a minimum period between a departing lawyer's notice to the firm and the lawyer's departure," are permissible "*as long as the notice period is reasonable*" (emphasis added). In so stating, however, the Comment cautions that "[n]otice periods should be applied flexibly and should not unduly restrict lawyer mobility, because a notice period that is unreasonably long or inflexibly applied impairs client choice and lawyer autonomy." It then explains:

> Whether the minimum period after notice is reasonable in this context will depend on the facts and circumstances, but the length of the notice period should balance three broad factors:
>
> > (i) the firm's need for the departing lawyer to complete administrative tasks connected to departure, such as notifying clients, sending invoices, and transitioning files;
> >
> > (ii) the client's right to the lawyer of the client's choice; and
> >
> > (iii) the lawyer's right to autonomy and mobility.

Rule 5.6 cmt. [1F].

Typical considerations subsumed within the criteria set forth in Comment [1F] include:

- the time reasonably necessary for the attorney to properly file all documents in firm databases or file rooms as per the firm rules, to identify upcoming deadlines, to properly communicate information related to the representation to clients and to relevant lawyers and staff within the firm;

- the time required to obtain client decisions regarding continuing representation and the time required to ascertain whether other lawyers in the firm are competent to continue representing the client if the client elects to remain with the firm after the departing lawyer leaves; and

- the time required to ensure that timekeeping and billing is up-to-date.

When a client chooses to keep a particular matter with the firm despite the departing lawyer's plans to leave, an important consideration as to the appropriate length of a notice period may include how much time is needed to transition the matter to other attorneys in the firm and whether the timing of the transition could negatively impact the client's interests. For example, if the departing lawyer has a significant role in a transaction that is about to close or a trial or crucial motion that is about to occur, proper representation of the client may require delay of the lawyer's departure date to accommodate the client's interest.

Thus, whether a minimum notice period meets these requirements – or can be applied to a particular departure – must be assessed on a case-by-case basis, taking into account all circumstances relevant to the departure at issue. Accordingly, even permissible notice periods

may not be automatically applied or deemed reasonable with respect to a particular departure if to do so unduly restricts lawyer mobility or client choice. The time needed to address all legitimate transition concerns should best be accomplished through an agreement between the parties after assessing the particular circumstances of the departure. We agree with ABA 489's observation that to the extent that such matters can be cooperatively, timely and fully addressed after departure, the departure date should not be delayed solely on account of such matters.

The same considerations are relevant to determining when and whether a firm can *require* a lawyer who has given notice to leave or how quickly a departing lawyer can leave. This is reflected in new Comment [1G] to Rule 5.6, which states that a firm "may not suspend, limit, or prohibit the departing lawyer from continuing to practice at the firm unless the firm has good cause," which is defined as a reasonable, good faith belief that the departing lawyer is acting improperly or illegally, or a belief that the departing lawyer has diminished capacity and will harm the firm or the client if he or she continues to practice at the firm. With respect to a hasty exit of a departing partner, the Court of Appeals in *Graubard,* held that "abandoning the firm on short notice (taking clients and files), would not be consistent with a partner's fiduciary duties." 86 N.Y.2d at 120-21. Thus, absent unusual circumstances, it would not be consistent with the goals of a smooth transition or the duties of competence, diligence, and communication both the firm and departing lawyer owe to clients for either (i) a firm to require the immediate departure of a lawyer or (ii) a departing lawyer to leave immediately upon giving notice.

**B. Communication with Clients**

As discussed above, under Rule 1.4, based upon a lawyer's level of involvement with a client on a matter, the lawyer's departure may be a "material development" that the lawyer and the law firm have an obligation to communicate to the client.[9] Moreover, if the client should be notified because the departure of the lawyer is a material development, the communication must be made promptly and provide the client with sufficient information to permit it to make an informed decision with respect to its continued representation.

In view of these obligations, contractual provisions or rules that purport to impose a blanket prohibition during the Notice Period on a departing attorney's communications with or solicitation of a decision from clients about continued representation by the departing lawyer would violate Rule 1.4. Moreover, to the extent that such a restriction interferes with client choice of counsel or imposes anti-competitive restrictions or financial disincentives, it would violate Rule 5.6 as well. Comment [7F] to Rule 1.4 expressly incorporates this prohibition:

> Because Rule 1.4 mandates prompt notice of a departing lawyer's decision to change firms, a law firm shall not include provisions in its partnership, shareholder, operating, employment, or other similar type of agreement, and shall not engage in conduct, that prohibits, unduly delays, or discourages the departing lawyer (through financial disincentives or otherwise) from providing the requisite notice to potentially affected clients. See Rule 5.6(a)(1).

[9] See footnote 6, *supra*.

While blanket prohibitions are prohibited, the issues that arise in the context of client notification generally relate to the manner, form, content and timing of the notice, and what, if any restrictions or limitations the law firm may impose with respect to those and other issues relating to communications with clients during the Notice Period consistent with the ethics rules.[10] As discussed below, some of these issues have been addressed in the 2022 amended Comments to New York's Rule 1.4.

*The manner of the notice (joint or separate):* In ABA Formal Opinion 99-414, the ABA opined that to protect client interests the preferred manner of giving notice is by a joint communication by the departing lawyer and the law firm advising the client of the anticipated departure. While Comment [7E] to New York's Rule 1.4 also indicates a preference for a joint notice, it expressly states that joint notice is not required. Thus, it is not a violation of any ethics rule on the part of the departing lawyer or the firm if either declines to participate in drafting or sending a joint notice.[11]

Some firms' partnership or employment agreements may seek to mandate joint notice. Whether a contractual agreement requiring joint notice in the event of departure is enforceable is subject to the same analysis as a notice provision. To the extent such a requirement is reasonable in terms of time (meaning whether the firm and lawyer can comply with Rule 1.4 by "promptly" notifying the client of the impending departure in a joint notice), furthers the clients' interests and addresses the firm's legitimate interest in effectuating a smooth transition, it would not be ethically objectionable. On the other hand, if a law firm is imposing a demand for a joint letter for anti-competitive purposes (*e.g.*, as a device to prevent the departing lawyer from contacting clients), or if it has an anti-competitive effect, then the joint notice requirement could well violate Rule 5.6.

*The form of the notice (oral or written):* As set forth in Comment [7D] to Rule 1.4, New York permits initial notice of the departure to be given orally but instructs any oral notice should be followed by a writing.

*The content of the notice:* The written notice, whether joint or separate, should communicate to the client that it has the right to decide who will continue handling a matter, and must provide the information necessary for the client to make that decision. Comment [7D] to Rule 1.4 defines that information as follows:

(i) the departing lawyer's intention to leave the current law firm and the anticipated date of departure;
(ii) the departing lawyer's future contact information;

[10] Some limitations implicate not just ethical precepts but legal principles as well. For example, in *Graubard*, the court noted that "lying to clients about their rights with respect to the choice of counsel" would not be consistent with a partner's fiduciary duties." 86 N.Y.2d at 120-21. *See also* Rule 8.4(c) (prohibiting a lawyer or law firm from engaging or attempting to engage in "conduct involving dishonesty, fraud, deceit or misrepresentation").

[11] See footnote 1, *supra*. The COSAC proposal that was not adopted would have required in most circumstances that bona fide negotiations about a joint letter take place before unilateral letters could be sent.

(iii) with respect to each relevant matter, the fact that the client has the right to choose counsel, and thus has the option to be represented by the departing lawyer after departure, or to remain a client of the current firm, or to be represented by other lawyers or law firms; and

(iv) the fact that the current firm will need the client to inform the firm of its choice of counsel and, if the client wishes to transfer the client's files to the departing lawyer or to another lawyer or law firm, the firm will need the client to authorize the firm (preferably in writing) to transfer the client's files or other property accordingly (unless the client has already notified the firm or the departing lawyer of its choice or has already provided such authorization to transfer the client's files).

If either the departing lawyer or the current law firm will not be able to continue the representation, the client must be so informed and the notice modified accordingly.

While Comment [7D] sets forth the information that is required to be communicated to clients, it does not address whether limitations beyond those requirements are ethically permissible during the Notice Period. These may include contractual provisions or rules seeking to prohibit pre-departure communications with clients regarding the new affiliation, the reasons for the departure or active solicitation of clients to transfer their files. Because the client has the right to decide who will continue representing it, in the Committee's view, any effort during the Notice Period to prohibit "solicitation" (through the wording of the notice or otherwise) of clients to whom notice is required (*i.e.*, those for whom the lawyer had primary or substantial responsibility) or to prevent providing clients with information relevant to making that decision would violate both Rule 1.4 and Rule 5.6. However, any information conveyed must be truthful.[12] *See* Rule 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

*The timing of the notice:* Rule 1.4 requires that the notice be prompt. While Comment [7E] to Rule 1.4 notes that what is considered to be "prompt" "may depend on the circumstances," it emphasizes that "neither the departing lawyer nor the firm may delay the process longer than is necessary to ensure that accurate and meaningful notice is provided to clients in accordance with Comment [7D] to this Rule." What is necessary to ensure accurate and meaningful notice, in practice, may become the subject of dispute. This can occur, for example, if demands are made to negotiate a joint notice but those negotiations do not proceed or conclude promptly, or if disputes arise over the extent of information that must be provided to clients (including whether notice should be delayed until the firm makes a determination as to who would handle the case if the client were to elect to remain with the firm). Whether delays occasioned in such situations are "necessary" depends upon whether they seek to address legitimate interests and are not merely an effort to prevent a departing lawyer from contacting clients or to achieve other anti-competitive goals.

*The recipients of the notice:* Comment [7A] to Rule 1.4 requires notice to be sent to all current clients for whom the departing lawyer has primary or substantial responsibility or is performing material legal services on one or more particular active matters. The Rules do not

[12] See footnote 7, *supra*.

expressly address the issue of notice to anyone else. Whether and when other clients may or should be notified and the content of the notice may depend on the circumstances.[13] Certainly, clients with whom the departing lawyer has had a substantial relationship but may not currently have an active matter would fall into the category of those which a departing lawyer should not be prohibited from contacting. On the other hand, from an ethics standpoint, a departing lawyer has no need to contact firm clients about the transition with whom he or she had no relationship. Whether restrictions, at least during the Notice Period, regarding contact or solicitation by a departing lawyer of such clients to transfer their cases would be enforceable involves legal issues that are beyond the scope of this opinion.

Relatedly, the departing lawyer may receive calls from prospective clients relating to possible new business during the Notice Period. From an ethical standpoint, knowledge that the lawyer is about to depart may be relevant to a prospective client's decision and therefore, in our view, there is no prohibition against providing the potential client with that information. Whether the departing lawyer may have an obligation to do so is beyond the scope of this opinion, and whether the departing attorney must advise the law firm about a call from a prospective client is a question involving fiduciary duty, partnership law and contract law, and other legal considerations that we cannot address.

*Further obligations with respect to notice:* The obligation to provide information to affected clients regarding an attorney's departure does not end with the formal notice. Important to protecting clients' interests is ensuring that all client representatives or other parties who attempt to contact the departing lawyer are aware of the lawyer's departure. To this end, the law firm must (i) take reasonable steps to ensure that anyone trying to reach the departing lawyer after departure is informed that the lawyer is no longer at the firm, and (ii) provide contact information for the departing lawyer to those who request it. We agree that the following steps outlined in ABA 489 should apply in New York:

> Once the lawyer has left the firm, the firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries. A supervising lawyer at the firm should review the departed lawyer's firm emails, voicemails, and paper mail in accordance with client directions and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer.

### C. Communicating With Attorneys or Staff of the Current Firm

The issue as to whether a departing attorney can inform or recruit other attorneys or staff during the Notice Period raises the same questions and same ethical principles as those pertaining

[13] For example, in a situation where a junior lawyer who has performed material legal services on a matter is departing but the senior lawyer who has had the primary responsibility for handling and performing services on the matter is remaining at the firm, notice of the junior lawyer's departure may be a "material development" about which the client should be notified, but advising the client of the client's right to follow the departing lawyer and requesting a form to designate its decision may not be necessary.

to communication with attorneys and staff discussed above during the Pre-Notice period, but the balance is considerably different. This is because, during the Notice Period, both the departing lawyer and the firm are aware of the impending departure and therefore the playing field is even with respect to any recruitment that may occur during that time. Moreover, permitting such solicitation during the Notice Period will generally better facilitate client choice, as knowledge of which members of a team may be leaving may be relevant to that choice. It generally will also better facilitate a smooth transition both with respect to the transfer of files and coordinated departure times so as to avoid gaps in client representation. These factors tilt the balance against the validity of blanket or severe prohibitions against solicitation during the Notice Period, at least to the extent that they are in theory or in practice being used merely to give the firm a competitive advantage. That is not to say, however, that some restrictions, such as those regarding the method and timings of the recruitment, could well be justified by legitimate firm interests during the Notice Period.[14]

### D. The Departing Lawyer's Right to Practice During the Notice Period

A Notice Period cannot be used to impose before departure the very same type of restrictions forbidden by Rule 5.6 after departure. Nor can a firm impose requirements that impinge upon a departing attorney's continuing obligations to competently represent his or her clients. Thus, contractual provisions or efforts by the law firm designed to limit the departing lawyer from continued client contact through prohibitions on continuing to handle matters during the transition or denying full access to the office, computer systems, files, staff, or other firm resources necessary to the representation violate Rule 5.6 and the policies of choice of counsel for clients and lawyer mobility underlying the Rule.[15]

Conversely, it would be a violation of a departing lawyer's ethical responsibilities to use the Notice Period to access, copy, download or otherwise use confidential or proprietary information belonging to clients or the law firm for purposes other than fulfilling his or her ongoing obligations on behalf of clients or the law firm. The same rules discussed above with respect to the Pre-Notice Period equally apply to the Notice Period.

### E. Files

Rules 1.6 and 1.9 govern confidential information of clients and former clients, and Rule 1.16 sets out the duties of lawyers and law firms when withdrawing from a representation. Those Rules apply both to the departing lawyer and the law firm during the Notice Period. Absent a

[14] Examples of what may be considered in making these determinations during either period include: how integral other attorneys or staff are to the departing lawyers' practice, clients with pending matters, the firm's practice group or the ability of either to continue to service the client; whether knowledge of the full extent of the team that is leaving is important to client decision making as to whether to stay with the current law firm or move the work to the lawyer's new firm; the staffing capacity of the firm the departing lawyer is joining and/or the immediate staffing needs of the firm the lawyer is leaving.

[15] However, the exception set forth in Comment [1F] to 5.6 that permits reasonable restriction where a departed lawyer is breaching contractual or partnership responsibilities to the firm or using that access for improper purposes or to cause the firm financial or reputational harm should equally apply during the Notice Period.

written instruction from a client directing the transfer of client files to the departing lawyer, it would be a violation of the Rules for departing lawyers to remove client files from the law firm or retain any such files in their possession.[16] Conversely, it would be a violation of the law firm's ethical obligations to fail to promptly transfer files or to impose conditions on the transfer of files to the departing lawyer or to his or her new affiliation as directed by the client (other than conditions permitted under law, such as those relating to retaining liens to cover payment of outstanding fees). *See* N.Y. State 1221 (2021).[17]

The question as to which other files a departing lawyer may take is more complex. Typically, the files that a lawyer may take without firm or client permission include the lawyer's personal records, address/contact file, research materials and copies of transactional and litigation publicly filed documents. In addition, lawyers often want to take their personal (as opposed to firm) form files, copies of litigation and transactional documents that have not been publicly filed, although some of these files may contain client information or relate to client representation, while others are of a more general nature. The issues that may arise generally involve whether the files are personal or belong to the firm and the protection of any client information contained in these files, which may involve legal and contractual obligations as well ethical ones.[18] The most pertinent ethical obligations are contained in Rules 1.6 and 1.9 relating to the safeguarding of confidential and client information and the need for non-confidential information for conflict checking purposes, as well as Rule 8.4 relating to dishonesty. Certainly, to the extent that any files do contain confidential information, the departing lawyer must continue to protect that information. ABA 99-414. As to Rule 8.4, the D.C. Bar opined:

> [A] lawyer's removal or copying, without the firm's consent, of materials from a law firm that do not belong to the lawyer, that are the property of the law firm, and that are intended by the lawyer to be used in his new affiliation, could constitute dishonesty, which is professional misconduct under [Model] Rule 8.4 (c).

DC Bar Legal Ethics Comm Op. 273, at 192.

Notably, in *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 188 (1st Dep't 2000), the court cited this DC Bar Opinion but held that, from a legal perspective, motive and process must be considered and concluded that the departing partners did not breach any fiduciary duty to the law firm in taking desk chronology files – which included duplicate copies of client correspondence with client contact information – where they believed in good faith that they were entitled to do so. The court did not, however, address the possibility that the correspondence may have contained privileged information.

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[16] Exceptions to this Rule may include names and contact information of clients with whom the departing lawyer worked to permit conflict checks at the new affiliation or information required to comply with other legal or ethical requirements. See Rule 1.6 cmts. [18B] and [18C].

[17] This opinion is not intended to supersede the rules and law of New York and other jurisdiction relating to retaining liens.

[18] The ABA has offered the following guidance on this issue: "To the extent that these documents were prepared by the lawyer and are considered the lawyer's property or are in the public domain, she may take copies with her. Otherwise, the lawyer may have to obtain the firm's consent to do so." (ABA 414). While we generally agree with this, the other issues set forth above may factor into this determination.

Generally, contact information for clients and others with whom the departing lawyer worked are and should be provided as these are critical for conflict purposes and consistent with the departing attorney's rights to move and continue to practice law and obligation to contact such clients. Best practices dictate that what other files a departing partner may take should be discussed with the firm. Whether any restrictions the firm seeks to impose are appropriate should take into account whether the firm is legitimately seeking to protect client confidentiality or firm property interests or is improperly trying to burden the departing lawyer's ability to compete or punish the departing lawyer.

## V. Other Firm Rules or Policies Relating to Transition Matters

While we have focused on provisions that would violate the ethics rules because they would interfere with client choice or a lawyer's right to move, nothing in the Rules prevents a law firm from establishing rules pertaining to departures and Notice Period requirements that are legitimately designed to protect client interests, to protect the confidentiality of client information, to ensure the completeness and proper filing of client files, to protect the firm's own proprietary information or trade secrets, or that are otherwise necessary to effect a smooth, professional, and orderly transition. To the contrary, as ABA Formal Opinion 489 observed, the establishment by law firm management of "reasonable procedures and policies to assure the ethical transition of client matters when lawyer elects to change firms" may be necessary to meet their obligations under Rule 5.1 to ensure that all of the firm's lawyers "conform to the Rules of Professional Conduct." We believe the same conclusion applies in New York.

In the absence of such provisions, the departing lawyer and the law firm should attempt to reach agreement as to transition matters. With respect to some such issues, the interests of the departing lawyer and the law firm may clash and result in disputes. From an ethical perspective, the resolution of such disputes should focus on what is in the best interest of the client (from the client's perspective), what will further the goals of lawyer mobility and client choice of counsel and whether any limitations address legitimate needs or desires of clients or the firm, as opposed to an impermissible effort to impose restrictions prohibited by Rule 5.6.

In addition, both the conduct of the departing lawyer and the law firm must comply with Rule 1.16 to avoid foreseeable prejudice to the client and must be consistent with any other applicable Rules. *See* ABA Formal Op. 99-414 at 3.

## VI. Conclusion

There are a number of ethics rules and principles that govern a lawyer's and a law firm's ethical obligations to each other and to clients in connection with a lawyer's departure from a law firm. The applicable Rules include Rule 1.4 (the obligation to communicate material developments to the client), Rules 1.6, 1.9 and 1.16 (the confidentiality of client information and files), Rule 5.6 (prohibitions on restrictions of the right of a lawyer to practice), and Rule 8.4(c) (the prohibition against dishonesty, fraud, deceit, and misrepresentation). The guiding and underlying ethical principles seek to protect the client's right to choose counsel and a lawyer's right to move and to ensure a smooth transition during which the client continues to be fully and competently represented. This Opinion provides guidance as to how these Rules and these fundamental principles impact the key events that arise during an attorney departure, including the substance and timing of communications with clients, notice requirements, issues and obligations pertaining to the notice and transition periods, and the transfer of files.

It is critical to note, however, that the ethics rules are not the only obligations governing the actions of departing lawyers and the firms that they are departing or joining. The laws relating to fiduciary obligations, duties of loyalty, duties of confidentiality, and employment and contractual commitments may impose obligations that need to be considered in addition to those of the ethics rules on each of these issues. This Opinion is intended to address only the obligations of lawyers and law firms under New York's Rules of Professional Conduct. It is not intended to address the rights or obligations of a law firm or a departed lawyer under the fiduciary duty, partnership, contract, employment or tort law, or other laws or rules.