

Notice Periods: What Departing Attorneys and Recruiters Need to Know

by Tina B. Solis, Esq. and Christina E. Kurow, Esq.

Nowadays, fixed notice period provisions in partnership agreements are commonplace. These types of provisions require that partners (both equity and non-equity) provide the firm with a specific period of time of advance written notice before the attorney's withdrawal or resignation becomes effective. Firms typically require anywhere from 30 to 90 days' notice. There are, however, limitations on the enforceability of these provisions. Ultimately, the guidance suggests that notice provisions are not enforceable if they are longer than is reasonably necessary to transition client matters. Whether notice provisions are enforceable depends on the facts involved. It is imperative that all lateral candidates (and their recruiters) are familiar with whether the operative agreement governing their relationship with the firm includes a notice period and if so, the length of the period.

What is the Purpose of a Notice Period?

The reasoning behind notice provisions is easily understandable. Law firms have a duty to ensure that client matters transition smoothly when an attorney departs. Firms must make certain that client-related issues are completed before an attorney's departure, such as organizing and updating files, and adjusting staffing needs to meet upcoming deadlines. Providing the firm with advance notice of a departure assists with the firm's completion of these tasks in an efficient and effective manner. Moreover, as any lawyer knows, client matters are often time-sensitive and may involve multiple deadlines. An attorney's impending departure cannot take priority over serving a client's needs. Therefore, the timing of the resignation and the applicable notice period, along with short-term client demands, must be considered when planning a lateral move.

When are Notice Periods Enforceable?

Notice periods have been scrutinized for their potential to limit an attorney's ability to practice law and a client's ability to choose their counsel. In December 2019, the American Bar Association's Standing Committee on Ethics and Professional Responsibility published Formal Opinion 489 ("Opinion 489"), which provides that a firm's fixed notice period may be unenforceable if it interferes with an attorney's departure or a client's choice of counsel.

Opinion 489 held that notice provisions that do not take client considerations into account or improperly impede the departure process may be unenforceable under Model Rule 5.6(a). Specifically, Opinion 489 provides that while firms "may require some period of advance notice of an intended departure," such period "should be the **minimum necessary, under the circumstances**, for clients to make decisions about 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" (emphasis added).

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Thus, a departing attorney may not be held to a notice period where there is no reasonable justification for doing so; for instance, when the files are updated, client elections have been received, and the departing attorney has agreed to cooperate post-departure with final billing and collections.

Ultimately, the firm must have a reasonable justification to hold a departing attorney to the notice period under the teachings of Opinion 489. Otherwise, the provision may be unenforceable.

What are Best Practices for Handling Notice Provisions?

Any attorney contemplating a move should consult with ethics counsel familiar with these issues as early in the process as possible. Ethics counsel can help guide in the planning and sequencing of the resignation process and offer valuable insight with regard to the applicable notice provision, as well as other pertinent departure issues that the lateral candidate should consider before accepting an offer and providing written notice to their current firm.

Recruiters should ask any lateral candidate at the outset if they are subject to a notice period and its length. Knowing this information will assist the recruiter in setting expectations with the firms the lateral candidate speaks with in terms of when a candidate may be able to join a new firm. If all parties are operating with an understanding of the notice period, it avoids any surprises at the end of the process.

After providing notice of resignation, departing attorneys should cooperate with the firm and clients to address and resolve issues on a timely basis, such as who will be handling the clients' files once they leave, transitioning any matters that will continue to be handled at the current firm, and assisting the firm with billing and collections.

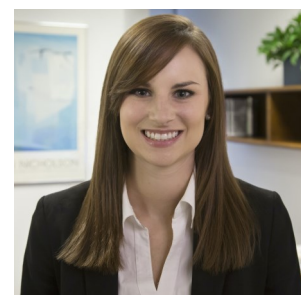
As for departing associates and counsel, while they may not be bound to a contractual notice period, the best practice is to provide two weeks' notice as a professional courtesy to the firm, not only to assist the firm with transitioning client files, but also to avoid jeopardizing time-sensitive client matters.

Simply put, any attorney considering a lateral move should be familiar with the notice period in their partnership agreement and convey this information to their recruiter and ethics counsel early on in the process. This will enable all parties involved to establish an appropriate timeline for giving notice while continuing to meet client demands and ensure as smooth a transition process as possible.



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