

Ethical Obligations Regarding Lateral Attorney Departures

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

Legal recruiting professionals, both in law firms and in search firms, must be aware of the ethical obligations of attorneys departing and joining law firms, both for themselves and so that they can advise their candidates. These obligations vary across the country, and the ABA and various states and municipalities have issued guidance covering their jurisdictions. Most recently, the NY City Bar Association issued an opinion on the subject, largely following the roadmap provided by the ABA. We analyze the NY City Bar Association opinion below with the expectation that most jurisdictions will focus on similar issues when analyzing a lateral's departure process.

In December 2019, the American Bar Association published Formal Opinion 489 ("ABA Opinion 489")—a game-changing opinion that clarified the ethical duties of attorneys and law firms related to the lateral attorney-departure process. ABA Opinion 489 provided a roadmap for practitioners and firms to ethically navigate the competing interests inherent in the lateral attorney departure process, including: (1) attorneys' right to practice law, (2) clients' right to their choice of counsel, and (3) law firms' obligations to properly transition client matters. The opinion provided helpful guidance on issues ranging from the enforceability of attorney fixed notice periods to attorneys communicating with clients, as well as their partners, associates, and staff pre-departure.

While ABA Opinion 489 provided significant guidance regarding the lateral attorney departure process, it is not controlling. Instead, state-specific laws, cases interpreting those laws, rules of professional conduct, and bar opinions control for each state. The laws, rules, and bar opinions vary from state to state. For example, Florida and Virginia have adopted specific ethical rules addressing attorney departures.¹ Other states have not yet done so. The New York City Bar Association, however, recently issued a comprehensive opinion, which largely mirrors the guidance set forth in ABA Opinion 489.

In June 2023, the New York City Bar Association issued Formal Opinion 2023-1 ("New York Opinion"), which provides state-specific guidance for addressing the ethical issues that often arise in the lateral attorney departure process. The New York Opinion provides New York practitioners, among other things, with guidance on how communications with clients should be handled, notice requirements should be addressed, and client files should be transferred. Generally consistent with ABA Opinion 489, the New York Opinion reinforces the importance of the clients' right to choice of counsel and attorneys' right to practice law. Below is an overview of key takeaways from the New York Opinion, which New York practitioners contemplating a lateral move, as well as law firms, and recruiters should keep in mind.

1. Notice Periods Must be Addressed on a Case-by-Case Basis

As with ABA Opinion 489, the New York Opinion states that fixed notice provisions should be addressed on a case-by-case basis and provides that attorney notice provisions must be reasonable to be enforceable. Such provisions cannot be used to improperly interfere with a departing attorney's ability to compete or punish an attorney for leaving the firm pursuant to New York Rule of Professional Conduct 5.6.²

The New York Opinion specifies that all circumstances relevant to the

departure must be taken into account in determining the enforceability of notice provisions, including: (1) the firm's need for the departing attorney to complete administrative tasks, such as notifying clients, sending invoices, and transitioning files; (2) the client's right to the attorney of their choice; and (3) the attorney's right to autonomy and mobility.³ The opinion recommends these concerns are best determined by the firm and departing attorney after assessing the particular circumstances of the attorney's departure.⁴

But the New York Opinion also notes that absent unusual circumstances, firms cannot require the immediate departure of an attorney after notice is given.⁵ Rather, departing attorneys must be given the opportunity to address all legitimate concerns related to their transition, including tending to client matters and meeting deadlines. In short, what constitutes a "reasonable" notice period will depend on a variety of factors that must be analyzed on a case-by-case basis.

2. Attorney Communications with Clients

The New York Opinion clarified that, in line with ABA Opinion 489, attorneys should provide notice of their departure to the firm first, then to the client. The opinion noted how the New York Court of Appeals in *Graubard v. Moskovitz*, held that *ideally* attorneys would not notify clients of the upcoming departure until after they provided notice to the firm—leaving open the possibility that pre-notice solicitation could be legally permissible in some cases.⁶ The New York Opinion states that while New York Rule of Professional Conduct 1.4 requires attorneys to "promptly inform the client" of any "material developments in the matter," this obligation can likely be fulfilled *after* the attorney provides notice to the firm of their departure.⁷ Accordingly, "absent unique circumstances" the New York Opinion provides that attorneys should not inform clients of their intention to change firms without first providing notice to the firm.⁸

"In addition to ethical rules, it is critical to consult state-specific laws related to attorney departures, including, but not limited to, fiduciary obligations, contractual commitments, and trade secret law, as well as the departing attorney's employment and partnership agreements."

Like ABA Opinion 489, the New York Opinion stresses that the preferred but not required course of action is for the law firm and departing attorney to jointly provide notice to the client of the attorney's impending departure.⁹ But if either the law firm or departing attorney decline to send the notice jointly, it is not a violation of the rules for the law firm or

departing attorney to unilaterally provide the client with notice.¹⁰

3. Attorney Recruitment of Attorneys and Staff

Another issue addressed by the New York Opinion is when a departing attorney may reach out to other attorneys and staff about their decision to leave and begin recruiting. The opinion concludes that from an ethical standpoint, attorneys should refrain from communicating their departure and recruiting others at the firm until after the firm is informed of their departure.¹¹ The reasoning being that before the firm has notice of the departure, the departing attorney would have an unfair advantage over the firm with respect to recruiting others. Ultimately, unless a departing attorney can point to some aspect of a client's choice of counsel to justify pre-notice solicitation, the firm should be notified of the departure before the departing attorney recruits other attorneys or staff.¹²

Once a departing attorney provides notice to the firm, however, the balance shifts. According to the New York Opinion, the playing field at that point is even with respect to recruitment considering both the departing attorney and firm are aware of the impending departure.¹³ The opinion notes that solicitation of attorneys or staff after notice is provided may facilitate a client's choice of counsel because knowing who from the team is also leaving may be relevant to a client's decision whether to transition its matters to the attorney at her new firm or stay with the current firm.¹⁴ Whether firm restrictions on solicitation pre-departure will be upheld depends on the circumstances, and specifically, whether they are being used simply to give the current firm an unfair advantage.¹⁵

4. Firms Cannot Restrict Access to Departing Attorneys During Transition Period

The New York Opinion provides that firms cannot interfere with a departing attorney's obligations to competently represent clients under Rule of Professional Conduct 5.6.¹⁶ Thus, as with ABA Opinion 489, denying full access to office and computer systems, files, staff, and other firm resources essential to the departing attorney's representation of clients would violate Rule 5.6 and the client's right to choice of counsel.

Overall, the New York Opinion provides New York practitioners and law firms with clarity around the attorney departure process and also serves as a reminder that each state's rules must be consulted when addressing a lateral attorney departure. In addition to ethical rules, it is critical to consult state-specific laws related to attorney departures, including, but not limited to, fiduciary obligations, contractual commitments, and trade secret law, as well as the departing attorney's employment and partnership agreements. It is always prudent to consult legal counsel early on in the process well before resignation or notice of withdrawal is provided to the firm to ensure a smooth transition and head off any potentially thorny ethical and other issues that may arise. Recruiters working with New York practitioners should be aware of these developments and encourage their candidates to seek counsel in connection with a lateral move to avoid running afoul of these ethical and fiduciary obligations.

¹ See Fl. Rule of Prof'l Conduct 4-5.8 ("Absent a specific agreement otherwise, a lawyer who is leaving a law firm may not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful."); Va. Rule of Prof'l Conduct 5:8 ("Neither a lawyer who is leaving a law firm nor

other lawyers in the firm shall unilaterally contact clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer and an authorized representative of the law firm have conferred or attempted to confer and have been unable to agree on a joint communication to the clients concerning the lawyer leaving the law firm.").

² NY City Bar Formal Op. 2023-1 at 9-10.

³ *Id.* at 10.

⁴ *Id.* at 11.

⁵ *Id.*

⁶ *Id.* at 5 (citing *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 653 N.E.2d 1179 (1995)).

⁷ *Id.* (citing NY Rule of Prof'l Conduct 1.4, Cmt. [7A]).

⁸ *Id.* at 6.

⁹ *Id.* at 12.

¹⁰ *Id.* In contrast to the New York Opinion preferring joint communications, the Florida and Virginia Rules of Professional Conduct require good faith negotiations between the departing attorney and law firm before unilateral communications may be sent to clients. See Fl. Rule of Prof'l Conduct 4-5.8; Va. Rule of Prof'l Conduct 5:8.

¹¹ NY City Bar Formal Op. 2023-1 at 7. The New York Opinion noted that in *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 188 (1st Dep't 2000), the court held pre-departure solicitation of partners was permissible, but solicitation of associates and staff was not. The court in *Gibbs*, however, applied law related to fiduciary obligations among partners, not the Code of Professional Responsibility.

¹² NY City Bar Formal Op. 2023-1 at 7. In contrast, under Illinois law, a departing attorney may not solicit associates or staff until after their departure. *Dowd and Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 377 (1st Dist. 2004).

¹³ NY City Bar Formal Op. 2023-1 at 15.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

ABOUT THE AUTHORS:

Tina B. Solis, Esq.
Partner, Nixon Peabody in Chicago.
P: (312).977-4482
E: tbsolis@NixonPeabody.com
W: www.nixonpeabody.com



Christina E. Kurow, Esq.
Counsel, Nixon Peabody, Chicago
P: (312) 997-4642
E: ckurow@nixonpeabody.com
W: www.nixonpeabody.com