

Lateral Partner Moves: Ethical Obligations of Lawyers and Law Firms

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Lateral partner moves are commonplace in the legal profession. Navigating such moves raises tricky and complex issues under the Rules of Professional Conduct (RPC). In addition, partners contemplating lateral moves should be mindful of their fiduciary duties to their current firm. Conversely, law firms should be mindful of their ethical obligations.

This article explains the ethical issues faced by laterally moving partners and their firms in light of recent guidance by the New York State Bar Association and the New York City Bar Association. See New York RPC 1.4 comments 7b-7g; New York City Bar Association Eth. Op. 2023-1, “Ethical Obligations of Lawyers and Law Firms Relating to Attorney Departures” (June 20, 2022).

Ethical Restrictions on Partnerships Agreements

Partners contemplating laterals move should carefully review their partnership agreements. The Rules of Professional Conduct envision lawyer freedom of movement and client choice of counsel. RPC 5.6 prohibits partnership agreements which restrict the right of lawyers to practice. According to RPC 5.6:

A lawyer shall not participate in offering or making: (1) 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...

The New York Court of Appeals has ruled that partnership agreements which unduly restrict



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lawyer mobility or client choice of counsel are unenforceable.

In *Cohen v. Lord, Day & Lord*, the plaintiff was a withdrawing law firm partner whose partnership agreement penalized a withdrawing partner’s practice with a competing firm. *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989). The court ruled that the partnership agreement was void because it unduly restricted the lawyer’s freedom of movement, as well as the client’s choice of counsel.

Pre-Resignation Solicitation of Clients

Of course, partners owe fiduciary responsibilities to their law firms. This fiduciary duty prevents partners from soliciting firm clients prior to formal resignation from the firm.

The seminal case on a departing partner’s common-law fiduciary duty to his former firm is *Graubard*

Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112 (1995). In that case, the founding partner of a small firm left to join a competing practice. The departing partner surreptitiously solicited the business of the firm's largest client prior to giving notice to his partner. This was held to be a breach of the partner's fiduciary duty.

The New York City Bar Association Professional Ethics Committee issued a 2023 opinion reminding New York lawyers not to notify clients, prior to resignation, of their intention to change firms. According to the City Bar:

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.

NYC Bar Eth. Op. 2023-1.

Thus, departing partners may not solicit clients prior to resignation.

Pre-Resignation Solicitation of Staff

The ban on pre-resignation solicitation also applies to associates and staff. The Appellate Division has ruled that laterally moving partners breached their fiduciary duty to their law firm by soliciting associates. *Gibbs v. Breed, Abbot & Morgan*, 271 A.D.2d 180 (1st Dept. 2000). The departing partners also improperly disclosed to their new firm confidential information about associates' compensation, billing rates, bonuses and billable hours. The court held that it was a breach of fiduciary duty to recruit staff and associates and provide their confidential information to a new firm prior to resignation from their current firm.

The Gibbs court held that laterally moving lawyers may lawfully solicit their *partners* to move with them to the new firm, but they may not solicit associates or staff to move with them.

What Confidential Material Can Be Shared With the New Firm Prior to Resignation?

As noted above, unauthorized pre-resignation disclosure of confidential information to a suitor firm can be a breach of fiduciary duty. But a recruiting firm requires disclosure of certain information prior to

making an offer. Recruiting firms have an obligation to run conflict checks before hiring lateral lawyers.

The New York State Bar Association has provided a road map of sorts as to what information may ethically be disclosed to the suitor firm. According to the NYSBA, a laterally moving partner *may* disclose:

(i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each lawyer-client relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments).

RPC 1.6 [cmt 18B].

Notifying Clients

Both the departing lawyer and the current firm are obligated to give notice to the clients under NY RPC 1.4 [comment 7A]. Rule 1.4 requires lawyers to promptly notify their clients of "material developments in the matter..." RPC 1.4(a). And, as mentioned above, client notice should be generally given after the withdrawing lawyer notifies firm partners of their resignation.

Most authorities favor joint notice to the clients by the current firm and the departing attorney. See, e.g., *Graubard, supra*; NYC Bar Association Ethics Opinion 2023-1, *supra*. The resignation of an attorney with substantial responsibility for the client's matter is generally held to require such notice to the client, both by the departing lawyer and the current law firm. The commentary to RPC 1.4 specifies what information should be disclosed to clients of the departing lawyer:

(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;
(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).

RPC 1.4 cmt 7D; NYC Bar Eth.Op. 2023-1.

While the State Bar recommends joint notice from the departing lawyer and their law firm, such notice is not required and may be impractical in certain circumstances. In either event, the above information should be sufficient to discharge the lawyer's and the firm's obligation to notify the client of the change.

The State Bar also proscribes any conduct by the law firm, including in its partnership agreement, to delay or discourage the departing lawyer from providing the requisite notice to potentially affected clients. See NY RPC 1.4 [comment 7f].

What Files May the Departing Partner Take?

Departing partners may not take firm documents or files which do not belong to them. And the departing partner needs client permission to remove client files.

In *Gibbs*, the departing partners were permitted to take copies of their chronological correspondence files and other documents that they own. *Gibbs v. Breed Abbot & Morgan*, 271 A.D.2d 180 (1st Dept., 2000). However, the same lawyers breached their fiduciary duties by sharing with their suitor firm confidential firm records about associate compensation, billable hours, hourly rates and bonuses.

Lawyers may take with them "contact information for clients and others with whom the departing lawyer worked." NYC Bar. Ass. Eth. Op. 2023-1. Accord, ABA Eth. Op. 489. These "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." According to the American Bar Association, "a departing lawyer [may] retain names and contact information for clients for whom the departing lawyer worked while at the firm, in order to determine conflicts of interests at the departing lawyer's new firm and comply with other applicable ethical or legal requirements." ABA Eth. Op._489 at 4.

According to the City Bar a lawyer may bring with them: "the lawyer's personal records, address/contact file, research materials and copies of transactional and litigation publicly filed documents." NYC Bar Ass. Eth. Op. 2023-1. In addition, lawyers may remove copies of "their personal (as opposed to firm) form files, copies of litigation and transactional documents that have not been publicly filed."

Conclusion

Departing partners should review their partnership agreements before giving notice to their current firm. Certain restrictions may be invalid to the extent they conflict with the Rules of Professional Conduct, specifically RPC 5.6 and 1.4.

Departing partners should not solicit or notify clients of their lateral move until after they have resigned from their firm.

Transitioning partners are free to consult among themselves prior to a lateral move. However, they should abstain from soliciting or consulting associates or other staff prior to a lateral move. And lateral partners should presumptively limit their disclosure of information to the specific categories envisioned in the commentary to the RPC.

Upon resignation, the departing partner and the firm should endeavor to send a joint notice to clients for which the former had substantial responsibility. The content of that notice is provided in the NYSBA commentary to RPC 1.4.

The organized bar emphasizes that client welfare is paramount. Neither the firm nor the departing partners should interfere with the clients' freedom of choice. Nor should the firm or departing lawyers delay or interfere with an orderly transition in the best interest of the clients.

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