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The Ethical Issues of Lateral Moves

Whether, When and How to Notify Clients of a Lawyer's Resignation

By **Barry R. Temkin**

Lawyers contemplating lateral career moves are faced with an array of potentially conflicting ethical and fiduciary duties owed to their current firms, existing clients and the firms which recruit them. Partners planning a lateral move must consider when to notify existing clients of the anticipated move, when and whether to "solicit" existing clients, which clients to notify, when to notify their current law firm and how to handle the complicated business of transferring files and personal documents. While the various ethical and fiduciary duties can be identified easily enough, reconciling them is more challenging.

Client Choice of Counsel

Both the departing partner and the former firm must respect the client's right to select counsel. Under the American Bar Association Model Rules of Professional Conduct, a lawyer may not enter into an agreement restricting the right of a lawyer to practice law. According to ABA Model Rule 5.6: "A lawyer shall not participate in offering or making: (a) a partnership, shareholders, 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."¹ The commentary to Model Rule 5.6 explains the purpose behind the Rule: "An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."²

The New York County Lawyers' Association Professional Ethics Committee has explained, in interpreting a predecessor rule, that "lawyers do not 'own' clients. A client is free to choose the lawyer who will provide representation, and may discharge an existing attorney at any time."³ ABA Model Rule 1.16(a) requires a discharged lawyer to withdraw from representation of the client, thereby acknowledging the client's authority to discharge the lawyer at will. Thus, basic principles of legal ethics posit that lawyers should be free to make career moves and clients should be free to change lawyers at any time.⁴

Penalties on Competition

The principles of lawyer mobility and client choice were recognized in a line of cases beginning with *Cohen v. Lord, Day & Lord*,⁵ which considered the enforceability of a partnership agreement restricting a partner's ability to receive accrued compensation when joining a competing firm. Under the firm's partnership agreement, a withdrawing partner would receive a three-year buyout of the proportionate share of the partner's capital account. However, no payments for trailing fees or profits collected after departure would be made to a partner joining a competing firm in a contiguous jurisdiction. According to the agreement, "if a Partner withdraws from the Partnership and without the prior written consent of the Executive Committee continues to practice law in any state or other jurisdiction in which the Partnership

maintains an office or any contiguous jurisdiction, . . . he shall have no further interest in and there shall be paid to him no proportion of the net profits of the Partnership collected thereafter, whether for services rendered before or after his withdrawal.”⁶

Cohen went into competition with his former firm and sued his former partners when they refused to pay him his share of fees collected after his departure. The New York Court of Appeals declared the forfeiture-for-competition clause unenforceable pursuant to Disciplinary Rule 2-108(A) of the former New York Lawyer’s Code of Professional Responsibility, which, like New York’s current rules, proscribed “a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.”⁷ The Lord, Day & Lord partnership agreement violated the Code of Professional Responsibility because it restricted a partner’s right to practice law, and, conversely, restricted the client’s choice of counsel. According to the Court:

We hold that while the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client’s choice of counsel.⁸

The twin principles of lawyer freedom of practice and client freedom of choice were further affirmed in a 1994 legal ethics opinion from the Virginia State Bar, which disapproved a partnership agreement imposing a financial penalty upon withdrawing lawyers who go into private practice.⁹ Under the contemplated agreement, “withdrawing lawyers who take clients of the law firm and compete with it following their withdrawal are obligated to pay a certain portion of such clients’ post-withdrawal fees to the law firm.”¹⁰ Other unspecified financial disincentives were imposed on departing lawyers under the proposed partnership agreement.

Such provisions in a partnership agreement unethically restricted the right of a withdrawing partner to compete with his former firm. According to the Virginia Ethics Committee, “clients of a law firm are not commodities. . . . Clients are not ‘taken’; they have an unfettered right to choose their lawyer. Correspondingly, lawyers withdrawing from a law firm have an unfettered right to represent clients who choose them rather than choose to remain with the law firm.”¹¹ As a result, a departing lawyer who takes firm clients with him or her cannot ethically be required to share post-withdrawal fees with the lawyer’s former firm.¹² Clients are not commodities to be

bought or sold; their freedom of choice must be respected in the event of a partner’s lateral move.

However, as suggested by Ronald Minkoff, a past President of the Association of Professional Responsibility Lawyers, some financial disincentives may be imposed on a withdrawing partner, provided the disincentives are applied uniformly to all departing partners across the board and do not unfairly single out partners who leave for competing law firms.¹³ For example, a New York court has upheld in principle a partnership agreement that reduces payments to all withdrawing partners “to the extent that the withdrawing partner’s annual earned income, from any source, exceeds \$100,000.”¹⁴ Thus, Minkoff posits that there is at least some authority that “across-the-board financial disincentives for leaving the firm may be acceptable” provided that competing partners are not treated more harshly than other withdrawing lawyers.¹⁵ Moreover, a firm may place restrictions on bona fide retirement benefits. A limited exception to ABA Model Rule 5.6(a) allows “restrictions incident to provisions concerning retirement benefits for service with the firm.”¹⁶

The Minority View

A minority view was taken in a California case, which upheld a partnership restriction not that dissimilar to the agreement found unenforceable by the New York Court of Appeals in *Cohen*. *Howard v. Babcock* concerned a partnership agreement which provided that departing partners who went into direct competition with their former firm were entitled to a buyout of their capital accounts but not trailing fees collected or profits earned after departure.¹⁷ The departing partners in that case went into direct competition with their former firm – both firms engaged in insurance defense work – and took 200 client files with them. When the former firm refused to pay trailing fees and profits, the former partners sued, claiming a restriction on their freedom to practice. The court sided with the former law firm and upheld the agreement. The California Supreme Court rejected the reasoning of *Cohen*, saying that “a revolution in the practice of law has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises.”¹⁸ The California court considered law firms to be subject to the same type of legal analysis as other businesses and concluded that “[a]n agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner’s unrestricted choice to pursue a particular kind of practice.”¹⁹ California’s view, however, remains the maverick, minority interpretation.²⁰ The overwhelming majority of jurisdictions eschew partnership agreements that impose financial burdens on departing partners who go into competition with their former firms.

Fiduciary Duty to Former Firm

The freedom of lawyers contemplating lateral moves is not untrammelled. They have duties not only to their clients but to their partners as well. There is some interplay between common-law tort principles, which emphasize departing partners' fiduciary duties to their law firms, and ethics rules, which promote client freedom, and lawyer mobility – and proscribe deceptive conduct by attorneys.

A departing partner's common-law fiduciary duty to his former firm was the subject of *Graubard Mollen Dannett & Horowitz v. Moskovitz*.²¹ The defendant, Moskovitz, was a founding partner of a small firm, to which he had devoted over 40 years of practice. Moskovitz, along with several other senior partners, entered into a written agreement with the firm's other partners by which they agreed to gradually wind down their practices, and "not do anything to impair the firm's relationship with its existing clients and business."²² Nonetheless, unhappy with his situation, the still-ambitious 73-year-old senior partner entered into negotiations with a competing firm and obtained the explicit promise of his current firm's largest client to move with him to the new firm. Upon learning of Moskovitz's plan to jump ship with the firm's biggest client, his existing partners locked him out and sued for breach of contract, breach of fiduciary duty and unjust enrichment.

Moskovitz moved unsuccessfully for summary judgment. In affirming denial of the defendant partner's motion, New York's then-Chief Judge, Judith Kaye, wrote that "as a matter of principle, pre-resignation surreptitious 'solicitation' of firm clients for a partner's personal gain – the issue posed to us – is actionable."²³ There is a difference, however, between preresignation *solicitation* of clients and notice to clients. According to the Court:

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 into new practice, and to remind the client of its freedom to retain counsel of its choice. . . . Ideally, such approaches would take place only after notice to the firm of the partner's plans to leave.²⁴

According to the Court, a lawyer may properly take steps to locate alternative space and interview for a new position, and departing partners may inform clients with whom they have a prior professional relationship about their planned moves. However, such approaches ideally should take place after notice to the partner's existing firm. On the specific facts before it, the Court had no problem finding Moskovitz's conduct actionable: "[L]ying 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."²⁵

While exactly what constitutes impermissible preresignation solicitation has been determined on a case-by-

case basis, one thing is for sure: courts don't like extensive surreptitious pre-resignation solicitation of clients, particularly when it causes substantial injury to the departing partner's former firm. In *Dowd & Dowd v. Gleason*, partner Nancy Gleason surreptitiously solicited the largest client of her small firm and voted herself bonuses exceeding \$150,000, without disclosing to her partners her intention to leave.²⁶ The largest bonus, \$100,000, was paid 10 days before Gleason left her firm.²⁷ She also paid down the firm's line of credit. Even before informing her partners that she was leaving, Gleason told her future bankers that Dowd's largest client had agreed to follow her to her new firm. Evidence presented at trial included a "business reference" who stated that "Nancy Gleason's group has a real lock on the Allstate business and [that] he believes this client relationship will last for years."²⁸

Gleason left abruptly, taking with her the firm's largest client and several key employees, who were also solicited prior to departure. Her conduct was held to be actionable as a breach of fiduciary duty. In finding for Gleason's former firm, the court balanced the freedom of the firm's clients to select counsel of their choice against the interest of the firm in securing the loyalty of its partners:

We are by no means asserting that clients of a law firm are the property of the firm in terms of "chattel," but we are reaffirming the tenet that preresignation solicitation of firm clients for a partner's personal gain is a breach of the partner's fiduciary duty to the firm.²⁹

Thus, the Appellate Court of Illinois affirmed a jury verdict in favor of Dowd & Dowd. Gleason was never disciplined by the Illinois State Bar.³⁰

Ethical Issues Under ABA Formal Opinion 99-414: When to Notify Clients

Although they overlap in practice, tort concepts like breach of fiduciary duty are analytically distinct from ethics rules, which are meant to guide the conduct of lawyers, and provide a basis for attorney discipline.³¹ Both the migrating partner and former firm have duties to clients under the ABA Model Rules of Professional Conduct and their state analogues. Model Rule 1.4 obligates lawyers to keep clients informed as to the status of their cases. This Rule has been interpreted to require a lawyer and law firm to notify a client of the departure of the attorney actively handling the client's files.

The American Bar Association has authored the most thorough treatment of the topic of whether, when and how to notify clients of a partner's resignation. In Formal Opinion 99-414, the ABA Ethics Committee opined that departing lawyers may ethically notify existing clients with whom they have a direct professional relationship of their departure before resigning. According to the ABA, "[t]he departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure

that prompt notice is given to clients on whose active matters she currently is working.”³²

The ABA added that “we reject any implication of [past opinions] that the notices to current clients and discussions as a matter of ethics must await departure from the firm.”³³ Ideally, the resigning partner and current firm should give joint notice to the clients. However, under some circumstances, and with certain safeguards, lawyers may notify their clients prior to announcing their resignation:

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.³⁴

While permitting a departing lawyer, in some circumstances, to notify an existing client of an anticipated move prior to resignation, ABA Opinion 99-414 imposes certain ethical guidelines on such notice. These are as follows:

1. the notice should be limited to clients on whose active matters the lawyer has direct professional responsibility at the time of the notice (i.e., the current clients);
2. the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer’s willingness and ability to continue responsibility for the matters upon which he or she currently is working;
3. the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
4. the departing lawyer must not disparage the lawyer’s former firm.³⁵

This analysis is consistent with other authorities which have recognized the departing lawyer’s duty to give notice of resignation to clients on whose files the lawyer has exercised substantial and direct responsibility.³⁶ For example, the Colorado Bar Association Ethics Committee has emphasized that clients must be given notice of the departure of a lawyer who has primary authority over the clients’ legal matters: “Not only are the remaining and departing lawyers *permitted* to contact clients about an impending change in personnel, they are *required* to provide the client with at least enough information to determine the future course of the representation.”³⁷

Preresignation Notice vs. Solicitation

These principles invite a comparison between the ethical guidelines spelled out in ABA Ethics Opinion 99-414 and the tort principles of fiduciary duty explained in *Graubard*. Interestingly, even though ABA Ethics Opinion 99-414 cites the *Graubard* case, there is mere overlap, and not complete agreement, at least in emphasis, upon

whether or not a lawyer may ethically notify existing clients prior to resigning from the firm. Both opinions express a preference for notifying the firm before the clients. *Graubard* indicates that the first notice should “ideally” be to the partner’s current firm. ABA Ethics Opinion 99-414 agrees that the “[f]ar the better course” is for the firm and departing partner to give joint notice to the lawyer’s clients.³⁸ Some ethicists urge lawyers never to give pre-resignation notice of their departure to clients.³⁹

The ABA opinion observes, however, that joint notice is not always feasible and repeatedly suggests that the departing partner may notify (but not solicit) existing clients before resignation from the firm. Paralleling some of the reasoning of Ethics Opinion 99-414, the Colorado State Bar has stated that, while it is preferable for the firm and departing lawyer jointly to notify clients of the latter’s departure, this is not always possible. If either the departing lawyer or the firm fails or refuses to participate in providing timely and appropriate joint notice, unilateral notice may be appropriate.⁴⁰

One potential scenario where the attorney making a lateral move may seek to provide unilateral notice, or at least be entitled to additional flexibility, could occur where there is a reasonable expectation of overt hostility and/or obstructionism on the part of the partners being left behind. William Schuman, a partner at McDermott Will & Emery, has hypothesized about situations calling for advance notice to clients:

[A]dvance notice to the firm may not be feasible, especially where the lawyer’s announced departure is likely to result in acrimony. The attorney may be immediately escorted out the firm’s door, making it impossible to provide clients with advance notice. This contradictory view of “fair play” makes the departing lawyer’s determination of what to say and when to say it that much more difficult.⁴¹

The ABA Ethics Committee has similarly written, “the lawyer’s mere notice to the firm might prompt her immediate termination.”⁴²

There is little judicial authority to support Schuman’s view, however. Indeed, most departures involve some form of “acrimony” or some other form of unpleasantness. Permitting an exception to the general rule in situations involving acrimony would swallow the rule. No scholar has persuasively posited precisely what level of acrimony would justify pre-resignation notification of clients.

Active *preresignation* solicitation of clients – even clients with whom the departing lawyer has a direct, personal relationship – can raise ethical issues, as well as give rise to tort liability for breach of fiduciary duty.⁴³ Under ABA Ethics Opinion 99-414, a lawyer contemplating a lateral move to a competing firm may ethically *inform* clients of the move prior to resignation, provided that the lawyer does not *solicit* the clients’ business or disparage his or her current firm.⁴⁴ The departing lawyer

must also take into consideration the four conditions cited by the ABA. On the other end of the spectrum is the conduct of the defendant in *Graubard*, where the departing lawyer had aggressively solicited and entered into an explicit agreement with his largest client to move with him to his new firm.

The potential inconsistency between lawyers' ethical duties under ABA opinion 99-414 and their fiduciary duties under the *Graubard* line of cases can be resolved in several ways. First, there is a difference between merely notifying a client of the resigning partner's lateral move (as discussed in ABA Ethics Opinion 99-414) and actively "soliciting" those clients to migrate with the partner to the new firm, as proscribed in *Graubard*.

The question of direct solicitation of clients by a departing lawyer is the subject of Ethics Opinion 679 of the New York County Lawyers' Association (NYCLA) Professional Ethics Committee.⁴⁵ That opinion, which was written under New York's former Code of Professional Responsibility, acknowledged that, while in-person solicitation of prospective clients is generally impermissible, a lawyer may engage in direct, in-person solicitation of a current or former client. A lawyer who has left a former practice may ethically solicit business from clients "for whose active, open and pending matters the lawyer was directly responsible as a partner or associate," provided that the lawyer emphasizes the client's freedom of choice to select counsel.⁴⁶ The NYCLA opinion presupposed that the lateral partner had already left the former firm and did not address the timing of the notice.

Solicitation is a term of art (and not science) in legal ethics. Judge Kaye did not define the term in her opinion in *Graubard*. New York's Judiciary Law bans solicitation by attorneys, again without defining it.⁴⁷ New York's 2009 Rules of Professional Conduct (N.Y. Rules) – which post-date the 1995 opinion in *Graubard* – define solicitation as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients . . . the primary purpose of which is the retention of the lawyer or law firm, and a *significant motive* for which is pecuniary gain."⁴⁸

Under current N.Y. Rule 7.3(a), a lawyer may not engage in solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client."⁴⁹ A lawyer planning a lateral move could not ethically solicit business, before or after notice to his or her current firm, from firm clients with whom the lawyer had no direct personal contact. And, at least under the current rules, pecuniary motive is a factor in determining whether a conversation is impermissible solicitation. Under ABA Ethics Opinion 99-414, a law partner planning to resign from a law firm in order to pursue an opportunity in government service or to retire from the practice of law may ethically notify exist-

ing clients of a planned move prior to giving notice to the partnership. In fact, such a lawyer must notify clients of the planned move. The same result would be obtained under the current New York ethics rules, because the lawyer's motive to obtain personal pecuniary gain is part of the definition of solicitation in N.Y. Rule 7.3. And Judge Kaye included the partner's motivation to seek "personal gain" as part of her opinion in *Graubard*.⁵⁰

While there is considerable overlap and interplay between ethics rules and common law, there are important differences which help explain the differing emphases in ABA Ethics Opinion 99-414 and *Graubard*. The ABA Ethics Committee is charged with interpreting the ABA Model Rules of Professional Conduct. The ABA Ethics Committee has no jurisdiction to interpret the common law of, e.g., New York. Thus, a lawyer's conduct may be consistent with the ABA Model Rules of Professional Conduct (which are similar but not identical to the New York Rules of Professional Conduct in regards to lateral moves) and still be liable in court for breach of fiduciary duty, just as a lawyer could be held civilly liable for malpractice without having violated the lawyer's duty of diligence under N.Y. Rule 1.3. At least theoretically, a lawyer's pre-resignation notification to clients may be ethically permissible under ABA Opinion 99-414, yet still potentially subject a lawyer to tort liability for breach of fiduciary duty.

Risk Management Techniques

Law firms looking to bring on lateral hires may resort to a variety of techniques to minimize their own risks. Ethicist Anthony Davis, a partner at Hinshaw & Culbertson, advises law firms to manage their recruitment centrally to ensure that the hiring process itself is compliant with existing law. Davis explains, "If every individual partner in a large firm is permitted unrestrained freedom to negotiate the potential movement of colleagues at other firms, the hiring firm will always be exposed to the potential that the individual partner went further than is permissible under the standards set out in the new case law."⁵¹

In addition, the new firm should ensure that the incoming partner understands and complies with existing law. Some ethicists advise incoming counsel to confer with an independent ethics consultant to ensure that appropriate due diligence is conducted and that the incoming partner does not impermissibly solicit existing firm clients or associates. The advantage to using an independent outside consultant to manage the hiring process, rather than having the incoming firm micromanage the conduct of the incoming partner, is that it avoids the so-called Pottery Barn "you break it you own it" problem. In other words, a law firm that gives advice to an incoming partner about his or her solicitation of existing clients and/or associates could potentially find itself legally responsible, by virtue of that advice, for conduct that it otherwise would not be responsible for under the law.⁵²

Departing partners making lateral moves should also avoid managerial decisions once they have made up their minds to leave. Bear in mind that a reviewing court is likely to impose common sense notions of fairness and justice. Thus, a partner who votes herself a \$100,000 bonus two weeks before jumping ship with the law firm's largest client and all of its associates is unlikely to receive a warm judicial reception.⁵³

Conclusion

A partner contemplating a lateral move to a competing firm owes duties to existing clients pursuant to N.Y. Rule 1.4. Both the departing partner and the former firm must respect the client's freedom of choice. To this end, a law firm may not ethically impose a burden on a partner's freedom to compete with it.

The departing lawyer also owes a fiduciary duty to the old firm. While a migrating partner is obligated to give notice to existing clients, the departing partner should avoid active solicitation of existing clients until after giving notice to the former firm. The line between permissible notice and impermissible solicitation is best drawn by ABA Formal Ethics Opinion 99-414.

A word of caution is in order. ABA Model Rule 8.4(c) proscribes attorney conduct "involving dishonesty, fraud, deceit or misrepresentation." Particularly egregious cases involving deception by departing partners in law firms can result and have in some instances resulted in professional discipline. ■

1. ABA Model Rule 5.6(a). The New York Rule is similar.
2. ABA Model Rule 5.6, cmt. [1].
3. New York County Lawyers' Association Committee on Professional Ethics, Op. 679, https://www.nycla.org/siteFiles/Publications/Publications452_0.pdf; see also Colorado Eth. Op. 116, <http://www.cobar.org/index.cfm/ID/386/subID/10285/CETH/Ethics-Opinion-116--Ethical-Considerations-in-the-Dissolution-of-a-Law-Firm-or-a-Lawyer%27s-Departure/>.
4. The client's freedom to change lawyers or terminate a lawyer at any time explains the proscription on non-refundable retainers. See *In re Cooperman*, 83 N.Y.2d 465 (1994).
5. 75 N.Y.2d 95 (1989).
6. *Id.* at 97.
7. *Id.* at 98. New York amended its current Rules of Professional Conduct on May 4, 2010. The Rules were adopted on April 1, 2009.
8. *Id.*
9. Va. Legal Eth. Op. 1556, <http://www.vacle.org/opinions/1556.htm>. Virginia's state bar is an integrated arm of the state court system.
10. *Id.* at 1.
11. *Id.*
12. *Id.* at 2.
13. Ronald C. Minkoff, *Ethics Rule Speaks to Departure Restrictions*, N.Y.L.J., Feb. 1, 2010, p. 4, col. 1.
14. *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (1995), quoted in Minkoff, *supra* note 13.
15. Minkoff, *supra* note 13.
16. ABA Eth. Op. 06-444 (quoting ABA Model Rule 5.6, cmt. [1]).
17. 6 Cal. 4th 409 (Cal. 1993).
18. *Id.* at 420-21.
19. *Id.* at 419-20.
20. Cf. *Capozzi v. Latsha & Capozzi, P.C.*, 797 A.2d 314, 318-20 (Pa. 1992) (following the reasoning and rationale of *Howard v. Babcock*, and explaining Pennsylvania's agreement with the minority, California interpretation).
21. 86 N.Y.2d 112 (1995).

22. *Id.* at 116.
23. *Id.* at 119.
24. *Id.* at 120 (citations omitted).
25. *Id.* at 120-21 (citations omitted).
26. *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004).
27. *Id.* at 764.
28. *Id.*
29. *Id.* at 761.
30. See Attorney Registration Disciplinary Commission of the Supreme Court of Ill., <http://www.iardc.org/ldetail.asp?id=922011375>.
31. See Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Resp., Philadelphia Bar Ass'n Prof. Guidance Committee, Joint Formal Op. 2007-300, at 2, <http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/EthicsOpinion2007-300.pdf>.
32. ABA Eth. Op. 99-414, <http://www.abanet.org/media/youraba/200803/99-414.pdf>.
33. ABA Eth. Op. 99-414 at 5 n.11. The Pennsylvania Bar has similarly written that: "Any suggestion that the departing lawyer should not be permitted to communicate the fact of departure until after the departing lawyer has left the old firm must be rejected." Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Resp. and Philadelphia Bar Ass'n Joint Formal Op. 2007-300 at 10.
34. ABA Eth. Op. 99-414 at 6 (emphasis added).
35. ABA Eth. Op. 99-414 at 4. See also, NYCLA Eth. Op. 679, https://www.nycla.org/siteFiles/Publications/Publications452_0.pdf (departing partner may notify and solicit existing client for representation "germane" to prior representation for same client).
36. See, e.g., NYCLA Formal Opinion No. 728, https://www.nycla.org/siteFiles/Publications/Publications264_0.pdf: "[T]here may be circumstances in which a failure to notify certain clients of a particular partner's withdrawal from the firm could be misleading to the clients, in particular in circumstances in which specific clients believe that the client's legal matters at the firm are being handled by the former partner." See also Kenneth L. Jorgensen, *When Firms Break Up*, Bench & Bar of Minn. (1997), www.courts.state.mn.us/lprb/97bbarts/bb0897.html (noting professional discipline against firm associate who failed to give notice to client of his departure).
37. Colo. Bar Eth. Op. 116, <http://www.cobar.org/index.cfm/ID/386/subID/10285/CETH/Ethics-Opinion-116--Ethical-Considerations-in-the-Dissolution-of-a-Law-Firm-or-a-Lawyer%27s-Departure/>.
38. ABA Eth. Op. 99-414 at 4.
39. See, e.g., Minkoff, *supra* note 13.
40. *Id.*
41. William Schuman, *Liabilities for Lateral Movers*, Legal Times, May 1, 2006, <http://careers.mwe.com/info/L4L.pdf>.
42. ABA Eth. Op. 99-414 at 5.
43. ABA Model Rule 8.4(c) proscribes attorney conduct "involving dishonesty, fraud, deceit or misrepresentation." Particularly egregious cases involving deception by departing partners in law firms can result, and have resulted, in professional discipline in some instances.
44. ABA Eth. Op. 99-414.
45. NYCLA Eth. Op. 679, https://www.nycla.org/index.cfm?section=News_AND_Publications&page=Ethics_Opinions.
46. NYCLA Eth. Op. 679 at 5 (quoting from ABA Informal Ethics Opinions 1457 and 1466).
47. N.Y. Judiciary Law § 479:
Soliciting business on behalf of an attorney. It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.
48. N.Y. Rule 7.3(b), 22 N.Y.C.R.R. § 1200.52 (emphasis added).
49. N.Y. Rule 7.3(a), 22 N.Y.C.R.R. § 1200.52. The ABA Model Rules lack a direct definition of solicitation.
50. *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 119 (1995).
51. Anthony Davis, *Lateral Movements: Testing the Limits on Firms, Talent*, N.Y.L.J., Nov. 5, 2004, at 3, col. 1.
52. For a general discussion of liability of the hiring firm, see Ronald Minkoff, *Poaching Partners: The Legal Risks*, <http://www.fkkslaw.com/article.asp?articleID=188>.
53. *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004).