

# MEMORANDUM

*Revised* September 15, 2021

**TO:** Members of the Bar and Public – For Public Comment

**FROM:** NYSBA Committee on Standards of Attorney Conduct (“COSAC”)

**SUBJECT:** (1) Proposed New Comments to Rule 5.6 Providing Guidance on Post-Termination Conduct Regarding Lawyers Who Have Left a Law Firm; and

(2) Proposed New Rule 5.9 Regarding Pre-Termination Conduct with Respect to Departing Lawyers and Dissolving Law Firms

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The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is comprehensively reviewing the New York Rules of Professional Conduct. This memorandum seeks public comment on two related sets of proposals – proposed new Comments to existing Rule 5.6, and a proposed new Rule 5.9 and Comments. The proposals appear first, followed by COSAC’s reasons for making these proposals.

Members of the public and members of the Bar (including bar sections, committees, and other bar groups, as well as individual lawyers and nonlawyers) are invited to submit comments on these proposals. The deadline for public comments is **Monday, October 11, 2021 at 5:00 pm**. Please send your comments directly to the Chair of COSAC, Roy D. Simon, at [roy.d.simon@gmail.com](mailto:roy.d.simon@gmail.com).

## *Proposed* New and Amended Comments to Rule 5.6 Restrictions on Right to Practice

*[Note from COSAC: COSAC is not proposing any changes to the black letter text of Rule 5.6. COSAC is proposing changes only to the Comments to Rule 5.6. COSAC’s proposed new language is in blue font and underscored. The black letter text of Rule 5.6 is reprinted here for convenient reference.]*

(a) A lawyer shall not:

- (1) participate in offering or making a partnership, shareholder, operating, employment or other similar type of agreement, except an agreement concerning benefits upon retirement, that restricts the right of a lawyer to practice after termination of the relationship;
- (2) participate in offering or making an agreement in which a restriction on a lawyer’s right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

## Comment

[1] An agreement restricting the right of [a lawyer who has left a law firm \(a “departed lawyer”\)](#) to practice after leaving [the firm](#) not only limits the departed lawyer’s professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements, except agreements imposing restrictions incident to provisions concerning retirement benefits for service with the firm [or restrictions justified by special circumstances described in this Comment](#).

### Scope of Rule

[\[1A\] Paragraph \(a\)\(1\) applies to any written or oral agreement governing or intended to govern:](#)

- [\(i\) the operation of a law firm \(including an in-house legal department\);](#)
- [\(ii\) the terms of partnership, shareholding, or of counsel status at a law firm; and](#)
- [\(iii\) the terms of an individual lawyer’s full-time or part-time employment at a law firm or other entity.](#)

[\[1B\] Paragraph \(a\)\(1\) applies whether the agreement is embodied in a formal contract, a provision in a contract, an amendment or rider to a contract, a firm or employee handbook, a memorandum, or any other kind of document. Paragraph \(a\)\(1\) prohibits any agreement \(other than a provision relating to retirement\) that prohibits or limits a departed lawyer from contacting or serving the firm’s present, former, or prospective clients who used or considered using the lawyer’s services while the lawyer worked at the firm, or who might wish to use the lawyer’s services after the lawyer and the firm have terminated the relationship, except that an agreement may include provisions to protect proprietary law firm information or confidential or proprietary client information, and may include provisions requiring the departed lawyer to take reasonable and proportionate measures to protect such information.](#)

[\[1C\] Paragraph \(a\)\(1\) applies not only to agreements regarding lawyers in private practice but also to agreements between employed \(“in-house”\) attorneys and the clients or entities that employ them, whether in a legal or nonlegal capacity. However, paragraph \(a\)\(1\) does not prevent an entity and its employed lawyers from agreeing to restrictions on post-departure non-legal functions. In every type of law firm \(see Rule 1.0\(h\), which defines “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. Comment \[1D\] addresses restrictions that ordinarily violate the Rule and Comment \[1E\] addresses restrictions that ordinarily do not violate the Rule.](#)

### Prohibited Agreements

[\[1D\] Agreements that will ordinarily violate paragraph \(a\)\(1\) include, but are not limited to, agreements that purport to do any of the following:](#)

- [\(i\) prohibit or limit the departed lawyer from contacting or representing some or all current, former, or prospective clients of the firm, except as set forth in Comment \[1E\]\(i\) below;](#)
- [\(ii\) prohibit or limit a departed lawyer from practicing law for any period of time following his or her withdrawal \(e.g., imposing a mandatory “garden leave”\);](#)

- (iii) prohibit or limit a departed lawyer from contacting or soliciting law firm employees after the lawyer and the firm have formally terminated their relationship; or
- (iv) impose more severe financial penalties on departed lawyers who intend to compete, actually compete, or are suspected of or presumed to be competing with the firm than are imposed on departed lawyers who do not compete.

### Permissible Agreements

[1E] Agreements that are ordinarily permitted under paragraph (a)(1) include, but are not limited to, agreements permitting a firm to impose reasonable restrictions or proportionate financial penalties on a departed lawyer who:

- (i) knowingly contacts or seeks to contact firm clients for work in areas that are the same as or substantially related to the work the firm has done for those clients, if the departed lawyer did not actively and substantially work on matters for, and did not have significant contact with, those clients while at the firm;
- (ii) has undertaken a specific, significant financial undertaking with respect to the firm that remains outstanding (e.g., guaranteeing a loan to renovate the firm's premises, or entering a new lease or other contract with significant financial consequences for the firm);
- (iii) has agreed with other firm lawyers, prior to departure, that those other lawyers will join the departed lawyer at his or her new affiliation upon or shortly after departure;
- (iv) has breached material employment or partnership responsibilities to the firm in a manner that has caused or is likely to cause material financial or reputational harm to the firm; or
- (v) has breached, or has taken actions which threaten to breach, non-disclosure obligations or agreements intended to protect proprietary information, trade secrets, or confidential information belonging to the firm or the firm's clients.

### Reasonable Management Discretion

[1F] Paragraph (a)(1) is not intended to prohibit a law firm in the ordinary course of its operations from exercising reasonable management discretion regarding case assignments, case staffing, promotions, demotions, compensation, or other aspects of a law firm's operations, finances, and management. The Rule is intended to prevent overly restrictive practices with respect to lawyers who have provided notice of an intention to leave a firm, or who have taken affirmative steps toward planning to leave the firm (with or without notice to the firm).

[1G] Paragraph (a)(1) addresses agreements governing the relationship between a departed lawyer and the prior law firm *after* the departed lawyer has left the firm. Rule 5.9, in contrast, addresses the relationship between a law firm and a lawyer intending or planning to depart the firm *before* the lawyer has left the firm.

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

## *Proposed New Rule 5.9*

### **Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms**

*[Note from COSAC: Proposed Rule 5.9 and the proposed Comments are entirely new - New York currently has no equivalent to Rule 5.9 -- but COSAC is reprinting these proposals in normal font (without color or underscoring) to make the proposals easier to read.]*

(a) In the case of a lawyer who is planning to leave a law firm (a “departing lawyer”), neither the departing lawyer nor lawyers in the firm who are not planning to leave the firm shall unilaterally contact clients of the law firm for purposes of (i) notifying them about the departing lawyer’s anticipated departure or (ii) soliciting continued or future representation of the clients, unless either:

- (1) after bona fide negotiations between the departing lawyer and an authorized representative of the law firm, held promptly after notice of departure has been given, the departing lawyer and the firm have been unable to agree on a joint communication to the clients concerning the departing lawyer; or
- (2) the circumstances of or leading up to the departing lawyer’s departure, or the law firm’s policies, past practices, or current actions directed at the departing lawyer or the departing lawyer’s client contacts with regard to client notification, make such bona fide prompt negotiations reasonably unlikely to succeed.

(b) The law firm and the departing lawyer, either jointly or unilaterally, shall make reasonable efforts to give written notice to all clients for whom the departing lawyer had primary or substantial responsibility regarding the following matters:

- (1) the departing lawyer’s intention to leave the law firm and the anticipated date of departure;
- (2) the departing lawyer’s future contact information;
- (3) the status and location of the client’s file or files;
- (4) a description of any property of the client in the possession of the law firm; and
- (5) the client’s right, with respect to each matter in which the firm is representing the client, to choose one of the following options after the departing lawyer has left the firm:
  - (i) to remain a client of the law firm;
  - (ii) to be represented by the departing lawyer after departure;
  - (iii) to be represented by other lawyers or law firms; or
  - (iv) to take possession of the client files and make a decision later.
- (6) The notice or other communication to a client pursuant to this paragraph, whether written or oral, shall not contain false, deceptive, or misleading statements of fact or law.

(c) In the case of a law firm that intends to dissolve, the dissolving law firm and its members, as well as the individual lawyer or lawyers with primary or substantial responsibility for a client's matter or matters, shall make reasonable efforts to give written notice to all current clients of the firm regarding the following matters:

- (1) the fact that the firm is being dissolved and the anticipated date of dissolution;
- (2) the future contact information for each lawyer in the firm who has had primary or substantial responsibility for the client's matters;
- (3) the status and location of the client's file or files;
- (4) a description of any property of the client in the possession of the law firm; and
- (5) the client's right to choose one of the following options after the firm has dissolved:
  - (i) to be represented by any member of the dissolving law firm;
  - (ii) to be represented by other lawyers or law firms; or
  - (iii) to take possession of the client's files and make a decision later.
- (6) The notice and other communications to a client pursuant to this paragraph, whether written or oral, shall not contain false, deceptive, or misleading statements of fact or law.

(d) Whether in the case of a departing lawyer or a dissolving law firm, the written notice to the client shall provide the following information:

- (1) the client's potential liability (if any) for fees for legal services previously rendered by the law firm, or for expenses incurred by the law firm on the client's behalf;
- (2) how any advance deposits for fees, expenses, or costs will be handled or applied; and
- (3) how a transfer of the client's file to the client or to another lawyer or law firm may be effectuated.

(e) If a client of a departing lawyer fails to advise the lawyer or law firm of the client's choice regarding who is to provide future legal services for a particular matter, the client shall be deemed to remain a client of the law firm for that matter until the client advises that the client has retained other counsel or the law firm has terminated the representation pursuant to Rule 1.16.

(f) In the case of a dissolving law firm:

- (1) A lawyer in a dissolving law firm shall not unilaterally contact clients of the law firm unless, after bona fide prompt negotiations:
  - (i) an authorized member of the law firm has been unable to agree with that lawyer on a method to provide notice to clients; or
  - (ii) the members of the law firm have been unable to agree among themselves on a method to provide notice to clients.
- (2) If a client of a dissolving law firm fails to advise the lawyers at the dissolving firm of the client's choice regarding who is to provide future legal services with respect to a particular matter, the client shall be deemed to remain a client of the lawyer who

primarily provided legal services to the client on behalf of the firm with respect to that matter until either:

- (i) the client gives notice to that lawyer or to the dissolving firm that the client has retained other counsel for that matter; or
- (ii) the lawyer who primarily provided legal services for that matter withdraws from the representation pursuant to Rule 1.16.

### Comment

[1] This rule addresses the rights of clients, pursuant to a lawyer's obligations under Rule 1.4, to be given sufficient information to make informed decisions about their representation. In order to minimize any disruption of client service, a joint communication from the departing lawyer and the firm best serves the client's interests, and is the preferred means of communicating the impending departure of a lawyer who is primarily or substantially responsible for handling the client's matter, and for setting out the client's choices with respect to the representation going forward. Clients of the departing lawyer are entitled to receive, ordinarily before the lawyer's departure, the following information: (i) contact information for the departing lawyer; (ii) information about the status of the client's file and any other property - including advance legal fees - in the possession of the departing lawyer or law firm; and (iii) information about the ability and willingness of the departing lawyer and/or the lawyers remaining in the firm to continue the representation (subject to Rule 1.16, the rules governing conflicts of interest, and other Rules). Similar considerations apply when a law firm is in the process of dissolution, so when a law firm intends to dissolve, clients are entitled to the same information to which they are entitled when a lawyer is departing from a law firm. Nothing in this Rule alters the ethical obligations that any individual lawyer has to a client as provided elsewhere in these Rules. Lawyers may have fiduciary, contractual, or other obligations to their firms that are outside the scope of these Rules.

[2] When a lawyer primarily or substantially responsible for a client is leaving a law firm, this Rule requires the departing lawyer and the law firm to make a bona fide effort to develop and promptly make a joint communication to the departing lawyer's clients in order to avoid prejudicing the client. Both the departing lawyer and the firm have this duty. Accordingly, the negotiations required by paragraph (a) of this Rule must be initiated promptly once the lawyer has made and announced concrete plans to leave the firm (or the firm has learned about these plans). If bona fide negotiations between the departing lawyer and the law firm fail, either the lawyer or the law firm (or both) must promptly communicate with clients as provided by paragraph (b) (or at least make a reasonable attempt to do so) to ensure that the affected clients are informed about the lawyer's departure and the clients' options for continued representation. While the level of promptness may depend on the circumstances, neither the departing lawyer nor the firm may unduly delay the process so as to jeopardize clients' rights to prompt notification of material developments in the client's matter under Rule 1.4. However, if the level of contention or animus between the departing lawyer and the law firm is high, this may make the prospects for successful negotiations reasonably unlikely. For example, the firm may have removed the departing lawyer for cause, may have failed to follow the provisions of this Rule with respect to the departing lawyer (or other departing lawyers), may have already unilaterally begun to contact the clients for whom the departing lawyer had substantial or primary responsibility, or may have exhibited animus toward the departing lawyer in other ways. If continued representation by the departing lawyer and/or by the law firm is not possible, the

communication shall clearly state that fact and advise the client of the remaining options for continued representation, including the client's right to choose other lawyers or law firms. Nevertheless, the law firm and the individual lawyers may not terminate the representation except in compliance with Rule 1.16.

[3] For purposes of contact with a client by a departing lawyer or a law firm, "client" includes (i) clients for whom the departing lawyer is currently the primary lawyer responsible for the client's active or prospective matters; (ii) clients to whom the departing lawyer is currently or has in the past provided or supervised substantial legal services; and (iii) clients with whom the departing lawyer has had significant contact.

[4] Clients have the right to choose to continue or change counsel upon a lawyer's departure, but a client's change in representation may implicate certain obligations, including the client's obligation to pay for legal services rendered and costs expended to date in connection with the representation. A departing partner may have a legal or contractual obligation to assist in the collection of such fees and costs, and the departing lawyer and law firm must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and promptly refunding any part of the fee paid in advance that has not been earned. *See* Rule 1.16(e).

[5] A law firm may not provide for an unreasonably long notice period, unrelated to any need to complete a matter or transaction, before allowing a departing lawyer to transition to another firm. Likewise, after a departing lawyer has announced an intention to leave but before the notice period has expired, a law firm may not suspend, prohibit, or limit the departing lawyer from continuing to practice at the firm, unless the firm has a reasonable, good faith basis for believing that the lawyer may be accessing or planning to access the firm's confidential or proprietary information or the firm's resources for reasons unrelated to fulfilling ongoing responsibilities to clients, to the firm, or to civic or law reform organizations. An unreasonably long notice period or a lengthy mandatory leave period prior to departure (or prior to the departing lawyer's right to resume practice at another law firm) impairs lawyer autonomy and client choice.

[6] A departing lawyer, both when contemplating departure and after announcing an intention to leave a firm, may have ethical duties to the firm and its clients as long as the lawyer remains at the firm. For example, absent informed consent of the client or as otherwise permitted by Rule 1.6 (see Comments [18A]-[18F]) and by Rule 1.10 (see Comments [4A]-[5B]), a departing lawyer may not share confidential information with a prospective new firm, even as to matters on which the lawyer is currently working or is contemplating working. More broadly, a departing lawyer may not, without the client's informed consent, use a client's confidential information to the disadvantage of the client or for the advantage of the lawyer or a third person – see Rule 1.6(a). Consequently, the departing lawyer's firm may be justified in taking reasonable and proportionate measures to prevent the departing lawyer from improperly using such information (or to mitigate the effects of such improper use if it has already occurred). Such reasonable and proportionate measures do not violate Rule 5.9. The firm may also have rights under partnership, contract, or other law to take measures to protect the firm's proprietary information.

[7] A lawyer who represents a client in litigation may have duties to notify the tribunal if a lawyer leaves the firm or if the lawyer's firm has dissolved or is in the process of dissolution. In either case,

if the lawyer is counsel of record before a tribunal but will no longer be representing the client before that tribunal, the lawyer ordinarily (depending on the rules of the tribunal) must either file a motion to withdraw or a motion to substitute other counsel. *See* Rule 1.16(d).

## **COSAC's Reasons for Proposing New Comments to Rule 5.6 and New Rule 5.9**

COSAC believes that lawyers and law firms need more guidance on permitted and prohibited conduct regarding lawyers who have left their law firms (or are planning to leave their firms) to practice elsewhere. The relative lack of ethical guidance on lateral movement has created confusion and uncertainty for lawyers intending to leave a firm, for the law firms they are leaving, for the law firms to which they are moving, and for their clients. As a result, COSAC has considered whether the New York Rules of Professional Conduct should be amended to help regulate the conduct in which lawyers and law firms may and may not engage when a firm becomes aware that a lawyer will be departing from the firm.

Rule 5.6 creates a problem because, by its terms, Rule 5.6(a)(1) applies only to agreements that restrict the right of a lawyer to practice “after termination” of the relationship between the lawyer and the law firm, but restrictive conduct by a law firm *before* a lawyer leaves a firm may, as a practical matter, restrict a departing lawyer’s ability to practice *after* the lawyer leaves the firm.

To address the problem, COSAC has developed two related and complementary approaches. The first approach is a series of proposed new Comments to Rule 5.6 to provide guidance to law firms on the meaning and limits of Rule 5.6(a)(1). The second approach is a new Rule 5.9 that sets out procedures that lawyers and law firms should follow when a lawyer is planning to leave the firm (or the firm intends to dissolve) but before the lawyer has actually left the firm (or before the firm has dissolved). COSAC’s proposed new Rule 5.9 follows the lead of Virginia (Va. R. of Prof’l Conduct 5.8) and Florida (amended Comment to Fla. Bar. R. 4-5:8 (2018)), which have adopted a similar approach. COSAC recommends adopting both approaches – adding new Comments to Rule 5.6 to provide guidance regarding permissible and impermissible *post-termination* provisions and adding a new Rule 5.9 (with interpretive Comments) to provide guidance regarding *pre-termination* (and pre-dissolution) conduct.

### **Background**

In December 2019, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued ABA Formal Ethics Op. 489 (“ABA 489”), entitled “Obligations Related to Notice When Lawyers Change Firms.” ABA 489 applies the ABA Model Rules of Professional Conduct to a variety of important issues concerning the lateral movement of attorneys from one law firm or in-house position to another. For example, ABA 489 provides guidance on a lawyer’s ethical right to switch firms, the problem of non-compete clauses in partnership agreements, limitations on formal pre-departure notice requirements, the obligation to notify clients of the lateral move, and the mechanics of transitioning client files.

ABA 489 is just one of many ethics opinions over the past thirty years to address these fraught issues. *See, e.g.*, ABA Formal Op. 09-455 (2009); ABA Formal Op. 99-414 (1999); Ill. Attorney



Registration & Disciplinary Commission, “Leaving a Law Firm: A Guide to the Ethical Obligations of Law Firm Departure” (Revised Jan. 2020); Colo. Bar Ass’n Ethics Op. 116 (2007); Pa. Bar Ass’n & Phila. Bar Ass’n Joint Formal Op. 2007-300 (2007); Wash. State Bar Ass’n Advisory Op. 2118 (2006); State Bar of Arizona Formal Op. 99-14 (1999); and D.C. Bar 273 (1997).

The issues surrounding lateral lawyers are especially vexing because they raise questions not only regarding the Rules of Professional Conduct but also regarding a lawyer’s fiduciary and contractual obligations to clients, law partners, and employers. While the various ethics opinions addressing lateral lawyers differ in their focus and in their nuances, the opinions provide remarkably consistent guidance. The opinions uniformly stress that the Rules of Professional Conduct favor lawyer mobility and client choice; that clients are not the property of individual lawyers or their law firms; that lawyers and law firms must promptly notify clients about a lawyer’s planned departure; and that it is preferable (though not required) that the law firm and the departing lawyer provide joint notice of the move to the client.

For New York lawyers, however, guidance on these issues has been remarkably thin. Ethics opinions on these subjects are virtually non-existent, and the handful of appellate court decisions tend to focus on specific, discrete issues rather than providing comprehensive guidance regarding the ethical obligations and restrictions on departing lawyers and their law firms. *See, e.g., Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989) (disapproving of financial penalties for partners who compete after departure); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (1995) (upholding an arbitrator’s decision permitting a law firm to take into account a departing lawyer’s future income); *Feiner & Lavy v. Zohar*, 2021 WL 2196723 (App. Div. 1st Dep’t June 1, 2021) (addressing a non-compete and non-solicitation agreement for an associate who moved to another firm); and *Gibbs v. Breed Abbot & Morgan*, 271 A.D.2d 180 (App. Div. 1st Dep’t 2001) (evaluating a departing lawyer’s disclosure of information about, and recruitment of, firm employees). The only New York Court of Appeals decision that broadly examines issues regarding lateral movement is *Graubard Mollen Dannett & Horowitz v. Moskowitz*, 86 N.Y.2d 112 (1995), but that decision is more than a quarter-century old, focuses more on fiduciary obligations than on ethics rules, and does not answer many important questions about lateral movement. In sum, New York lawyers need more guidance in this area.

COSAC believes that its proposals for new and amended Comments to Rule 5.6, together with new Rule 5.9 and its Comments, will provide the necessary guidance for New York lawyers and law firms in the context of lateral movement and dissolving firms.