

COSAC: Public comments on proposed Rules 5.6 and 5.9
NYSBA COMMITTEE ON LEGAL AID (COLA)

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Comments by Kevin Szanyi of Webster Szanyi LLP in Buffalo (received 10-10-2021)

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

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.

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 a the firm ~~not only limits the departed lawyer’s professional autonomy but also~~ limits the freedom of clients to choose a lawyer ~~and, concomitantly, limits the departed lawyer’s professional autonomy~~. 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:

Commented [KS1]: The concern at the root of the rule is client choice (*Cohen*, 75 NY2d @ 108), not the attorney’s financial well-being, so this should be stated first. Attorney mobility is merely “concomitant” – i.e., collateral to the main issue (*Thelan*, 24 NY3d @ 32)

Commented [KS2]: Did you mean “attorney autonomy”? If so, I do not think this is the “prime” motivation for the rule (see prior comment).

- (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)~~ensure that clients can choose freely the counsel that they determine will best represent their interests by prohibiting agreements that impose a loss of benefits that is triggered by the departed lawyer’s decision to compete.

[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.

Commented [KS3]: I think this more accurately states the purpose of the rule. This is taken loosely from the *Pierce v Morrison Mahoney* case (452 Mass. 718)

[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

Commented [KS4]: IMO, lawyers will routinely rely on this provision and not even attempt to negotiate. I would prefer a mandatory rule requiring some attempt to negotiate a joint communication. See Florida’s RPC 4-5.8(c)(1)

(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

Commented [KS5]: I'm kind of surprised there is nothing in the actual rule about this. I would like to see something that says a law firm cannot require an unreasonably long notice of a departing lawyer's intention to depart but, by the same token, a departing lawyer must provide the firm with reasonable notice of the intended departure to notify clients, transition files that are staying behind, etc.

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 Dammitt & 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.

Commented [KS6]: There may be opinions from other states that support this, but I am not aware of any in NY. To my knowledge, only *Theban* comes close but, again, the court there stated that attorney mobility is merely concomitant to client choice. Webster defines concomitant as “accompanying especially in an incidental or subordinate way” and I think that nails it. Client choice is paramount. Attorney mobility is merely an incidental byproduct of this... I think the Mass. Sup. Ct. said it best in *Pierce v Morrison Mahoney*: “The purpose of rule 5.6 is not to protect lawyer mobility.” 452 Mass @ 726.

From: Maria Ciampi mciampi@ciampilaw.com
Subject: Re: COSAC proposals on Rules 5.6 & 5.9
Date: October 13, 2021 at 4:55 PM
To: Roy Simon roy.d.simon@gmail.com
Cc: Arthur Ciampi aciampi@ciampilaw.com



Dear Roy,

Thank you so much for providing this material to us. Very interesting, and I wish we had more time to explore!

Unfortunately, we can only provide a general comment because of the timing: “Except for the provisions regarding dissolution in Rule 5.9, the proposed Rules and Comments unduly favor the law firm, would muddy the existing case law, do not reflect the actuality of how departures occur in law firms, and in some cases conflict with ABA Formal Opinion 489, other ethics opinions, and other comments to the Rules, such as those concerning lateral partner hires and information that can be disclosed in that process. It would lead to more litigation and not provide clarity for departing lawyers, law firms, or courts and other tribunals.”

Take care,
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From: Roy Simon <roy.d.simon@gmail.com>
Date: Sunday, October 10, 2021 at 8:34 AM
To: Arthur Ciampi <aciampi@ciampilaw.com>, AUTHOR 2 Ciampi <mciampi@ciampilaw.com>
Subject: COSAC proposals on Rules 5.6 & 5.9

I read your column on *Jacobson Holman, PLLC* from D.C. and meant to send you the attached proposals from COSAC, which are circulating for public comment and will be on the agenda for the State Bar House of Delegates on October 30. Formally, the deadline for public comment is tomorrow. but if you have time to submit even a short reaction by late on Thursday. that would

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be great. We will be happy to hear as much detail as you have time to submit, including line edits, but given your expertise in this area it would also help us to hear a simple conclusory comment like, "This is a good idea and will avoid a lot of litigation," or "These proposals are a bad idea because they will tie the hands of law firms." In any case, I wanted to be sure you are aware of these proposals.

I apologize for sending these so close to the public comment deadline. The circulation is done by the State Bar and goes almost entirely to committee chairs and section chairs, rather than to individuals. I hope you will have a little time between now and Wednesday night (10/13) to comment, because COSAC is having a meeting on Friday to digest and react to the public comments.

Have a great weekend and be well. — Roy

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October 11, 2021

VIA E-MAIL

roy.d.simon@gmail.com

Professor Roy D. Simon
Chair of NYSBA Committee on Standard
of Attorney Conduct (“COSAC”)

Re: Proposed New Comments to Rule 5.6 Providing Guidance on Post-Termination Conduct Regarding Lawyers Who Have Left a Law Firm; and Proposed New Rule 5.9 Regarding Pre-Termination Conduct with Respect to Departing Lawyers and Dissolving Law Firms

Dear Professor Simon:

Thank you for sharing with me the Proposed New Comments to Rule 5.6 and Proposed New Rule 5.9 of the New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”).

As the Co-Author of Law Firm Partnership Agreements, I am quite familiar with and have been writing about and researching for years the issues addressed in COSAC’s proposals. The life of a law firm and law firm life for its partners is no longer static, but has become remarkably fluid and complex (even more so with the advent of COVID 19) as lawyers and entire practice groups often change where and with whom they practice. The practice of law is indeed a mobile profession.

Volatile issues in the modern day law firm in New York are created by the departure or retirement of partners and the balancing of corollary and ethical responsibilities between a departing/retiring partner and the law firm from which the partner is leaving. COSAC’s Proposals are excellent; provide clarity which should hopefully help to avoid future litigation; and I enthusiastically endorse them.

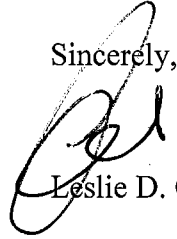
Congratulations to you and your Committee for a job truly well done!

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Duane Morris

Best personal regards.

Sincerely,

A handwritten signature in black ink, appearing to read 'LDC', written over the word 'Sincerely,'.

Leslie D. Corwin

LDC/ng

MEMORANDUM

TO: NYSBA & COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT (“COSAC”)
FROM: NYSBA COMMITTEE ON LEGAL AID (COLA)
SUBJECT: COMMENTARY ON PROPOSED NEW RULE 5.9 REGARDING PRE-TERMINATION CONDUCT WITH REPECT TO DEPARTING LAWYERS AND DISSOLVING LAW FIRMS.

COSAC proposed amendments to Rule 5.6 (Restrictions on Right to Practice), and creation of a new standard designated as 5.9 (Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms). The Comments indicate the rules have been generated to support client’s rights to know about their cases and avoid prejudicing the case. It imposes requirements to contact individual clients by both the firm and the departing attorney. It directs the law firm and departing attorney to promptly make a joint communication to affected clients regarding the departing attorney.

The organizations represented in COLA would not be directly impacted by Rule 5.6 (Restrictions on Right to Practice). Similarly, 5.9 (Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms) paragraphs (c), (d) and (e) are not problematic conditions for institutional providers. However, Rule 5.9 paragraphs (a) and (b) violate the basic tenants of free and low-cost representation of eligible clients. Rule 5.9 (a) and (b) set out the procedures that lawyers and law firms should follow when a lawyer is planning to leave a law firm. Rule 5.9 (a) and 5.9(b) should exempt Not-for-Profit/Institutional Providers and Pro Bono Providers for the following reasons: 1) the requirements interfere with our contracts to provide representation to the poor; 2) they are too onerous a financial burden for the institution; 3) the rule is overly broad in the definition of which clients should be contacted; and 4) they have the potential to violate Rule 4.2(a) (Communications with Person Represented by Counsel)ⁱ and Rule 8.4 (a) (Misconduct)ⁱⁱ.

Institutional providers often have contracts to provide representation to economically eligible persons or are governmental entities- such as public defender offices – that provide representation under county law § 722. Contracts come from a variety of sources including governmental (federal, state and county) in addition to foundational grants and fund-raising activities. Clients may have multiple attorneys who meet the definition of a lawyer had primary or substantial responsibility. However, all these attorneys are staff attorneys working in a team, even when there is one attorney assigned to a client. it is the institutional provider that is assigned to represent the client. Clients of an institutional provider have been deemed to NEED assistance and determined to be financially eligible for representation – they do not have the resources to retain and attorney. If the departing attorney goes to another institution, the assignment for representation does not change. If the departing attorney goes into a for profit law firm, the client may or may not follow that attorney, but the client will be required to pay for representation previously provided free of charge to the client. The nature of that interaction, conversations regarding continued representation of the client can be considered violating

Rule 4.2 (a) and 8.4 in that it is a false statement regarding the institutional client has the right to be represented by the departing lawyer and may interfere with the representation provided on the current case.ⁱⁱⁱ

The proposed rule 5.9 (a) and (b) are overly broad in the requirement to give notice to “all clients for whom the departing lawyer had primary of substantial responsibility.” This requirement appears to cover those cases which are both active and those cases which are closed. For an institutional provider this catch-all could include thousands of cases with exorbitant costs to comply with the directive to provide “written” notice to the individual clients.^{iv}

Indeed, under the Assigned Counsel Plan guidance from ILS prohibits additional payment from a client.

“8.3.c. Additional Payment. On the matter to which counsel is assigned, he or she shall not seek to be privately retained to represent the client, shall not agree to be privately retained upon request of the client, and shall neither seek nor accept payment from a client or any other person. Noncompliance with this rule is a ground for removal from the panel. Assigned counsel should not seek nor accept payment from a client or any other source to supplement fees and expenses for non-attorney professional services authorized by the ACP.^v “

Accordingly, Rule 5.9 (a) and (b) should be removed entirely and any reference of a “departing lawyer” would be removed from the rule. The guidance pursuant to Rule 5.9 regarding the closing of a law firm would remain intact. Alternatively, Not-for-Profit, Institutional Provider or Pro Bono programs are exempted from Rule 5.9 (a) and (b).

ⁱ Rule 4.2 (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.”

ⁱⁱ Rule 8.4 (a) A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist, or induce another to do so, or do so through the acts of another.

ⁱⁱⁱ Civil Law institutional provider relayed an incident of a departing attorney who left the institution and informed all her clients about her departure. The clients followed her to her new practice and did not understand that her representation, unlike the institutional provider, was not free of charge. Once the clients realized they needed to pay a fee for the representation, they returned to the institutional provider, having lost several months on their cases, and possibly having less favorable outcomes.

^{iv} Written notice for institutional clients means the United States Postal Service mailings. Our clients do not have consistent access to emails – and many clients experience housing insecurities meaning they may not have a stable address to receive USPS mail.

^v <https://www.ils.ny.gov/files/ACP>: ILS Standards for Establishing and Administering Assigned Counsel Programs Black Letter Standards, July 2019.

From: Robert Hillman rwhillman@ucdavis.edu
Subject: RE: NY proposals on Rule 5.6 & (new) Rule 5.9
Date: October 11, 2021 at 4:19 PM
To: Roy Simon roy.d.simon@gmail.com

RH

Roy,

Thanks for giving me the opportunity to comment on the Rule 5.6 commentary changes and the new Rule 5.9.

Hats off to you and COSAC for attempting to bring some clarity to the area and also for suggesting some bold new approaches to problems that have been lingering for some time. The implementation of these proposals would be a major development in the law and ethics of lawyer mobility, not just in New York but elsewhere as well. And they represent one of the best attempts I have seen to balance the interests of firms, departing lawyers, and clients.

As to specific comments, I have a few. In 1(D)(iii), I am not sure of the meaning of “formally terminated their relationship” inasmuch as some type of relationship may continue to exist after a lawyer has withdrawn. I think a better phrase would be “after the lawyer has departed from the firm,” or something to that effect.

If implemented, I(E) will prove the most important part of these proposals. The concept is excellent, but there are some issues that I urge you to address before finalizing. For example, what are reasonable restrictions (as opposed to financial penalties)? The most plausible interpretation of “restrictions” independent of financial penalties is some type of restraint on the departing lawyers’ ability to provide legal services. If this is intended, you should spell it out. More broadly, I wonder if it would not be better simply to delete the “reasonable restrictions” phrase and let financial penalties do the work

PENALTIES ON THE WORK.

In 1(E)(ii), the allowance of financial penalties imposed on a departing lawyer who “has undertaken a specific, significant financial undertaking with respect to the firm that remains outstanding” is a major statement/change in existing standards. I am very sympathetic to what is being proposed here, but I worry that defining applicable financial undertakings will prove problematic. For example, you provide an example – “entering a new lease or other contract with significant financial consequences for the firm.” What does this mean? Most law firms have leases. Are you talking about a lease specifically guaranteed by the departing partner (which is rare)? If that is the case, the partner would presumably remain liable on the guarantee after withdrawal, so why further penalize the partner? If you are talking about a lease without regard to any guarantee of the departing partner, then inasmuch as most law firms have leases you are allowing most partnership agreements to impose departure penalties. I doubt that you want something this broad, but the language and examples in the commentary could be clearer.

1(E)(iii) allows financial penalties when a departing partner “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.” This is much broader than simply prohibiting pre-departure solicitation of staff. Would you apply this to a handful of partners who discuss leaving together? Effectively, that would allow significant penalties on group departures. Such a change in the current environment would be nothing short of breathtaking. Is that really what is intended?

.....

Must financial penalties be tied to compensation for harm to the firm, or may harsh penalties be imposed to deter targeted conduct? I don't think "proportionate" really addresses this issue.

I find it very interesting that the financial penalties you allow do not parallel those that are permitted in California under *Howard v. Babcock*, which allows some compensation to the firm when lawyers leave and take clients. Your financial penalties may be quite steep but imposing them for compensatory purposes when clients are taken is not allowed. I have long thought that Howard's approach is sound, but I assume you have discussed this fully and reached a contrary conclusion.

In 1(E)(iv), "partnership responsibilities" is a little vague. Perhaps "duties to the firm" would be better.

I like your proposed Rule 5.9. But there may be some problems with the 5.9(a) prohibition of unilateral notification of clients of departure plans. Existing ethics standards indicate clients have a right to know, and the attempt to delay any notification until after post-notice bona fide negotiations with the firm is inconsistent with these standards. The better approach is to focus on timing of solicitation rather than notification.

Comment 5 addresses reasonable notice, which as you know is a major issue. You should consider providing more guidance here. If the phrase "unrelated to any need to complete a matter or transaction" is intended to guide what is a reasonable notice, I think it misses the mark. It would be helpful to say that (1) notice is context specific.

(2) reasonableness considers the interests of clients, the departing lawyers, and firms, (3) firms should be encouraged to include notice provisions in their partnership/employment agreements, and (4) firms should apply notice provisions flexibly (again considering the interests of clients, departing lawyers, and firms). Many roads to Rome on this one, but I do think it would be helpful to have more guidance given widespread interest in notice issues.

I would be happy to discuss further any of these points if you like.

Best,

Bob

From: Roy Simon <roy.d.simon@gmail.com>
Sent: Monday, October 11, 2021 10:33 AM
To: Robert Hillman <rwhillman@ucdavis.edu>
Subject: NY proposals on Rule 5.6 & (new) Rule 5.9

Professor — I should have thought of this in July when my committee, the New York State Bar Association Committee on Standards of Attorney Conduct ("COSAC"), circulated the for public comment the attached proposals to add (a) new Comments to help explain Rule 5.6, and (b) a new Rule 5.9.

COSAC is meeting this Friday (Oct. 15) to discuss public comments, and if you have any time to give us some reactions, that would help us make better decisions. Even if you can get me a few sentences by late Thursday, or focus on a few words or phrases that you especially like or

...read on a few words or phrases that you especially like or don't like, that would enable me to share your views with the Committee.

I apologize for not sending these sooner, and hope you can comment. Thanks for whatever you can do. We are trying to get things right up here in the Empire State. If it's easier for you to talk than to write, feel free to give me a call anytime at (607) 342-0840. Be well.

Professor Roy D. Simon, Distinguished Professor of Legal Ethics Emeritus
Author, Simon's New York Rules of Professional Conduct Annotated
Chair of NYSBA Committee on Standards of Attorney Conduct ("COSAC")

(607) 342-0840

www.linkedin.com/in/roydsimon

From: Marjorie Gross marjgross@verizon.net
Subject: COSAC
Date: September 21, 2021 at 3:17 PM
To: Roy Simon roy.d.simon@gmail.com

MG

A quick comment on the 5.6/5.9 proposal -- actually the section "Cosac's Reasons for Proposing."

Relevant and useful is the Restatement of the Law Governing Lawyers, Section 9, Cmt. i and the materials cited in the Reporter's Note to Cmt. i, even though it purports to be a restatement of law and not ethics

NY State 1221 (2021), while hardly comprehensive, is also relevant, and indicative of the problems a departing lawyer can have.

Marj