



# The Top 5 Questions Law Firms May NOT Ask During the Lateral Process

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The legal recruitment process is fraught with potential pitfalls from a legal and ethical perspective. What does a candidate say when the law firm asks the candidate to provide their past three years of performance reviews? Or the candidate's most recent self-evaluation? Can a law firm ask a candidate or the candidate's recruiter about competing offers received?

This article addresses some of the most frequently asked questions and details why these questions raise legal and ethical concerns. Ultimately, local, state, and federal laws and regulations must be addressed when analyzing if these questions should be answered and if they are answered, how best to do so. As such, consulting legal counsel is recommended.

## 1. Current and Historical Salary Information

The majority of states have adopted laws that prohibit employers from requesting salary history information from candidates. For example, California, Illinois, and New York have adopted laws prohibiting employers from asking candidates about their salary history information. Some cities have done the same. Certain states, such as Michigan, allow employers to ask about salary history, but only after a conditional job offer is made to the candidate. A few states prohibit employers from relying on a candidate's salary information in setting compensation if it is discovered or volunteered. Other states have remained silent on the issue.

Given the nuances in each jurisdiction and the quickly changing landscape on this topic, it is critical that law firms, recruiters, and candidates stay up-to-date on the laws of the states where the candidate resides and where the firm is located to ensure the relevant laws are followed and the candidate's rights remain protected. This is likely one of the most difficult questions to navigate, as the reality of the lateral process is that the refusal to disclose at least a salary range may preclude the process from moving forward. Accordingly, a lateral should consult with counsel to determine how best to deal with this question in order to move the process forward.

## 2. Disclosing Other Firm Offers

Another topic that may arise during the lateral process is what other

offers the candidate may have received. Offers that law firms provide candidates and/or recruiters are, in most cases, confidential. Firms may send offer letters that explicitly state the offer is to remain confidential or may otherwise express to the candidate that the offer is to remain confidential. Regardless, firms keep offers confidential from the public, competitive law firms, and other attorneys and personnel at the firm. This information is, thus, confidential to both the law firm and to the candidate. Other firms do not have a right to it.

## 3. Copies of Candidates' Performance Reviews and Evaluations

Not only is the usefulness of a candidate's prior law firm performance reviews questionable, but requesting a candidate's performance review implicates important concerns that firms, recruiters, and candidates must be mindful of.

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First, the content of attorney performance reviews likely contains confidential and privileged information. For example, the review could include confidential client-specific information related to a transaction or ongoing litigation, attorney-client information, attorney work product, and proprietary firm strategic plans. For these reasons, many law firms have policies in place requiring that performance reviews be treated as confidential and should not be shared outside of the firm or even within the firm.

Another related consideration is the privacy interest of the candidate and the reviewers at the law firm who likely draft their reviews with the expectation that the reviews will remain private. The same considerations apply to a candidate's self-evaluations.

Second, the performance reviews are the current firm's confidential information; prospective employers should not be asking for the current firm's confidential information in connection with the lateral process. Simply put, the content of attorney performance reviews and evaluations are confidential, may be privileged depending upon their content, and should not be shared outside the candidate's current firm.

## 4. Marital Status, Family Planning, and Residence

Firms, candidates, and recruiters must be aware that certain personal questions about a candidate and their plans are not permissible. For

example, law firms should not be asking about: (1) whether the candidate is married, divorced, engaged, or widowed, etc.; (2) a candidate's pregnancy, expected pregnancy, or if the candidate has children; (3) a candidate's plans to start or grow their family; (4) childcare arrangements; (5) information about the candidate's spouse and their spouse's background; (6) with whom the candidate resides and if the candidate has any dependents; and (7) whether the candidate rents or owns their home. This is not an exhaustive list, but provides a general framework of the common topics that could lead to hiring biases and potential discrimination. They should be avoided during the interview process.

#### 5. Questions about Race, Religion, Ethnicity, and Physical Health

As most people know, employers are prohibited under state and federal law from asking candidates questions about certain personal characteristics, including, but not limited to, the candidate's race, color, religion, sex, gender identity, national origin, sexual orientation, and age. While firms can generally ask whether certain reasonable accommodations may be required to perform job-related functions, employers cannot ask candidates whether they have a disability.

Overall, awareness of these issues allows law firms, candidates, and recruiters to approach the recruitment process with more certainty and caution when necessary. Consulting counsel when there is uncertainty is recommended.

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