Exit Music (For A Firm)[1]: Some Ethical Implications Of Leaving A Law Firm

Joseph M. Makalusky, Assistant Bar Counsel
July 2020

Just like the breakup of other types of relationships, separating from a law firm can be unsettling and excruciating, thrilling and invigorating or some messy combination thereof for all parties involved. In the midst of such powerful emotions lurks the danger that thoughts of attending ethical obligations are simply put out of mind. Attorneys who allow themselves to get swept away in such fashion do so at their own peril. Thus, the goal of this article is to provide some assistance by bringing to the fore the ethical duties owed to clients under the Massachusetts Rules of Professional Conduct when an attorney leaves a firm.[2]

First comes notice. Once an attorney decides to dissociate from a firm, the remaining members of the firm should be notified of that decision. Both the departing attorney and the remaining attorneys, it should be emphasized, have ethical duties concerning the affected clients. In furtherance of those duties, the departing lawyer should create a complete list of his or her client matters, and there should be an open and honest discussion between the departing attorney and the remaining members of the firm about the transition, as described in more detail below. The need for such disclosure and discussion is particularly acute for partners, as "[i]t is well settled that partners owe each other a fiduciary duty of 'the utmost good faith and loyalty.'" *Meehan v. Shaughnessy*, 404 Mass. 419, 433 (1989), quoting *Cardullo v. Landau*, 329 Mass. 5, 8 (1952). Hence, "a partner must consider his or her partners' welfare, and refrain from acting for purely private gain" (*Meehan*, 404 Mass. at 434), and he or she "has an obligation to 'render on demand true and full information of all things affecting the partnership to any partner.'" *Id.* at 436, quoting G.L. c. 108A, § 20. But even associates owe a duty of loyalty to their employer if they occupy a "'position of trust and confidence'" (*Meehan*, 404 Mass. at 438, quoting *Chelsea Indus. v. Gaffney*, 389 Mass. 1, 11 (1983)), such as when they have "access to clients and information concerning clients[.]"

In any event, sneaking away in the middle of the night with case files under your coat is hardly appropriate. And it is no better to abandon your firm and clients at high noon without reasonable notice. *See* Admonition No. 03-63, 19 Mass. Att'y Disc. R. 640 (2003)(associate attorney sanctioned for leaving her firm at lunchtime and never returning without notifying her employer and clients of her intent to withdraw from her assigned cases). Equally unacceptable are efforts by the firm's remaining members to protect the firm or punish the departing attorney by withholding assistance and resources necessary for the smooth transition of the clients who elect to go with the departing attorney.

---

[1] With credit to Radiohead, *Exit Music (For A Film)*, *on* OK Computer (Parlophone & Capitol Records 1997).

[2] While the ethical duties owed to clients generally remain the same in cases of voluntary and involuntary departures, this article will focus on the former situation. Also note that the term "firm" used in this article is intended to be more restrictive than as defined by Mass. R. Prof. C. 1.0(d), *see also* Comments 1-4 to Rule 1.10, in that it does not sweep within its ambit sole proprietorships, legal services organizations, legal departments of corporations or government entities.

If an attorney is moving to another firm, conflicts may arise between the attorney's current and former clients and the new firm's existing clients. The new firm will have to conduct appropriate conflict checks to ensure compliance with the ethical duties owed to clients and former clients. *See* Mass. R. Prof. C. 1.7, 1.9 & 1.10. In particular, the rules of imputed disqualification should be studied with care. *See* Mass. R. Prof. C. 1.10(d) & (e). Boiled to their essence, these rules prohibit the new firm, "without the consent of the former client of the disqualified lawyer or of the disqualified lawyer's former firm, to handle a matter with respect to which the personally disqualified lawyer was involved to a degree sufficient to provide a substantial benefit to the new firm's client or had confidential information relating to the matter sufficient to provide a substantial benefit to the new firm's client". Mass. R. Prof. C. 1.10, Comment 8.[3] *See*, *e.g.*, Admonition No. 19-26, 35 Mass. Att'y Disc. R. - - (2019)(attorneys violated Rules 1.9 & 1.10, where attorney representing husband in divorce left her law practice and joined attorney who was representing wife in divorce and both attorneys thereafter continued to represent wife without obtaining informed consent from husband). Consequently, the departing attorney must disclose the identity of his or her clients to the new firm, even before actually joining the firm. While such information may be confidential, Mass. R. Prof. C. 1.6(b)(7) helpfully provides that disclosure is permissible "to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." Comment 13 to this Rule further advises that "[a]ny such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, the general extent of the lawyer's involvement in the matter, and information about whether the matter has terminated."

While the foregoing is undeniably important, the ethical duty imposed by Mass. R. Prof. C. 1.4 to promptly communicate with clients remains paramount. This ethical duty necessarily includes communicating to the client that her attorney is leaving the firm. *See*, *e.g.*, *In re Benjamin*, 33 Mass. Att'y Disc. R. 38, 43-47 (2017)(respondent admitted committing a number of ethical violations, including failing to notify his clients that he was leaving his firm and would no longer be handling their cases in violation of Rule 1.4). As the American Bar Association Standing Committee on Ethics and Professional Responsibility recently saw fit to emphasize, "[c]lients are not property." ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 489 (2019)(Obligations Related to Notice When Lawyers Change Firms)(hereinafter "ABA Formal Op. 489") at 3. Thus, "[l]aw firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm." *Id.* Instead, the clients must be given prompt notice of the disruption so that they may make an informed decision about who their representative will be going forward.

The departing attorney and the firm should have a full and frank discussion about their respective desire and competency to retain the affected clients. *See Meehan*, 404 Mass. at 442 (where court adopts a rule that "encourages partners in the future to disclose seasonably and fully

[3] As for the former firm, "Rule 1.10(b), operates to permit [it], under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm." Mass. R. Prof. C. 1.10(b), Comment 7.

any plans to remove cases.") For one reason, the outcome may bear on the content of the notice to the clients. "If a departing lawyer is the only lawyer at the firm with the expertise to represent a client on a specific matter," for example, "the firm should not offer to continue to represent the client unless the firm has the ability to retain other lawyers with similar expertise."[4] ABA Formal Op. 489, at 4. Or, perhaps the departing lawyer is moving to a firm that has a conflict that would ethically prohibit the continued representation of a particular client. In such cases, the respective client must still be advised of the attorney's departure, but the notice would offer the client the choice to either remain with the departing attorney (or firm, as the case may be) or seek new counsel altogether.

In the situation where both the departing attorney and the firm are willing and able to competently represent the clients, the best practice is to work collaboratively to craft a joint notice that presents to the clients the choice between the firm, the departing attorney and new counsel. This joint notice procedure was prescribed by the Supreme Judicial Court in *Pettingell v. Morrison, Mahoney & Miller*, 426 Mass. 253, 257 (1997), citing *Meehan*, 404 Mass. at 442 n.16, and is the preferred method under the Model Rules of Professional Conduct. *See* ABA Formal Op. 489, at 2 & 3. Although it may be exceedingly tempting for a departing lawyer to answer the siren call to preemptively send a one-sided notice to clients, that course is likely to lead to discord with the firm and confusion for the client. *See Meehan*, 404 Mass. at 436-38. While the friction caused by a departure may threaten to set ablaze notions of cooperation, everyone is better served if the cool heads of true professionals prevail.

If, despite good faith efforts, agreement on a joint notice cannot be reached, both the departing attorney and the firm may send their own communication to the affected clients. Significantly, "[l]aw firms may not restrict a lawyer's prompt notification of clients, once the law firm has been notified or otherwise learns of the lawyer's intended departure." ABA Formal Op. 489, at 2. Beyond that, an attorney's cry that he failed to promptly notify his clients because his firm or superiors forbade him to do so would fall on deaf ears, since "[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." Mass. R. Prof. C. 5.2(a). But that wail might prompt a bar counsel investigation of any firm lawyer who ordered, ratified or failed to take remedial action of that unethical conduct. *See* Mass. R. Prof. C. 5.1(c). In short, the duty to notify clients may not be stymied or avoided.

Turning then to the substance of the required notice, no explicit ethical rule sets forth mandated language. Nevertheless, the notice should (i) be in writing, (ii) clearly convey the client's right to choose counsel (iii) contain no misrepresentations or false or misleading statements[5], and (iv) be civil and simple. Where separate notices are being sent by the departing attorney and firm, the notices shall not recommend that the client employ the sender of the respective notice, nor urge the client to sever the relationship with the non-sender of the

[4] *See* Mass. R. Prof. C. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.")

[5] It may be worth reminding lawyers that "[t]ruthful statements that are misleading are also prohibited by this Rule." Mass. R. Prof. C. 7.1, Comment 2.

respective notice. Each such notice, however, may express the sender's willingness to represent the client.

Then comes client decision. "The law should provide the fullest possible freedom of choice to clients." *Pettingell*, 426 Mass. at 257. And so it does; the client retains the right to decide who will handle her legal affairs (absent a disqualifying conflict, *see* Mass. R. Prof. C. 1.7(a), 1.16(a) & 3.7(a), or the need for judicial approval, *see* Mass. R. Prof. C. 1.16(c)).

Relatedly, it is unethical for a lawyer to "participate in offering or making . . . [an] agreement that restricts the right of a lawyer to practice after termination of the relationship." Mass. R. Prof. C. 5.6(a). "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." *Id.* at Comment 1. As the Supreme Judicial Court has opined, "Rule 5.6 exists to protect the strong interests clients have in being able to choose freely the counsel they determine will best represent their interests." *Eisenstein v. David G. Conlin, P.C.*, 444 Mass. 258, 262 (2005). Thus, it has been held that firms cannot directly or indirectly infringe on a client's freedom of choice by economically punishing or dissuading departing attorneys from competing for clients. *Compare Eisenstein, P.C.*, 444 Mass. at 262-65 (where court held that provisions imposing economic disincentives on withdrawing partners who competed with law firm were unenforceable), *and Pettingell*, 426 Mass. at 255-58 (where court declined to enforce a "forfeiture-for-competition clause" against withdrawing partners), *with Pierce v. Morrison Mahoney LLP*, 452 Mass. 718, 719 & 724-29 (2008)(where court enforced provision that imposed financial consequences on all withdrawing partners irrespective of future competition).

In short, the affected clients of a departing attorney must be advised of their right to choose their counsel and be afforded the freedom to do so, without any repercussions.

Then comes withdrawal and the proper transition. Finally, after the client receives the appropriate notice and has made known his decision concerning the continued representation, it comes time for the departing attorney and firm to follow that direction and ensure a smooth transition.

The client's decision triggers the activation of a series of ethical rules. Under Mass. R. Prof. C. 1.16(a)(3), the discharged attorney is obliged to withdraw from the representation of the client. If the client's case is in litigation, all discharged attorneys must comply with the rules of the relevant tribunal in securing their withdrawal. *See* Mass. R. Prof. C. 1.16(c). Keep in mind too that, pursuant to Mass. R. Civ. P. 11(b), "[t]he filing of any pleading, motion, or other paper shall constitute an appearance by the attorney who signs it, unless the paper states otherwise." To avoid the risk of ongoing liability, a discharged attorney should take care to file a notice of withdrawal even if other members of the firm continue to represent the client.

Perhaps of even greater import, all discharged attorneys have an ethical duty to "take steps to the extent reasonably practicable to protect a client's interests." Mass. R. Prof. C. 1.16(d). This mandate expressly includes "surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or

incurred."[6] *Id.* This is echoed in both Mass. R. Prof. C. 1.15(c)("a lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive."), and Mass. R. Prof. C. 1.15A(b)("A lawyer must make the client's file available to the client or former client within a reasonable time following the client's or former client's request for his or her file.") With respect to client files, "[t]he firm and departing lawyer must coordinate to assure that all electronic and paper records for client matters are organized and up to date so that the files may be transferred to the new firm or to new counsel at the existing firm, depending upon the clients' choices." ABA Formal Op. 489, at 4. Additionally, ABA Formal Op. 489, at 7, offers the following guidelines:

> Once the lawyer has left the firm, the firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries. A supervising lawyer at the firm should review the departed lawyer's firm emails, voicemails, and paper mail in accordance with client directions and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer.

As shown, even after being discharged, an attorney must still be guided by the best interests of the former client. Be warned that a discharged attorney who reacts to the taste of sour grapes by intentionally complicating or impeding the transition process will only add to his own misery. *See*, *e.g.*, Mass. R. Prof. C. 1.16, Comment 9 ("Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client."); Mass. R. Prof. C. 1.15A(b)("a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would unfairly prejudice the client.") Finally, attention is also called to the Massachusetts Bar Association's ethics opinion concluding that, "[w]hen lawyers change firms and clients move with them, new engagement letters should be executed with the new firms as to hourly matters, and must be executed as to contingent matters, even when no material terms change." Opinion 2017-1 (2017).

Conclusion

Bar counsel hopes that a review of the rules discussed above and an appreciation of the wisdom behind them will bring some measure of peace to attorneys who exit their law firm and to the attorneys who stay behind. On the other hand, the failure to take heed may result in disciplinary consequences. Therefore, whether the separation feels like a skyless day or is an amicable parting of colleagues, all attorneys should retain the sense of their ethical obligations to affected clients.

---

[6] *See also* Mass. R. Prof. C. 1.15(d)(1)("Upon final distribution of any trust property . . . the lawyer shall promptly render a full written accounting regarding such property.")