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OPINION

Departure is such sweet sorrow: leaving your law firm

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You may have just been invited to leave your current firm to join a prestigious big firm. Or maybe you have decided to take that great leap into the unknown and start your own firm with a close friend. Such scenarios are increasingly frequent as law firm departures have become commonplace. But now that you have decided to leave your firm, how do you ethically depart with your practice intact?

The longstanding case providing insight on this matter is the 1989 Supreme Judicial Court decision in *Meehan, et al. v. Shaughnessy, et al.*, 404 Mass. 419.

In *Meehan*, plaintiffs James F. Meehan and Leo V. Boyle decided to leave Parker, Coulter, Daley & White to form their own firm. The court reviewed Meehan and Boyle's conduct in preparation for departure as well as their efforts to bring clients to their new firm, thus setting guidelines for attorney departures ever since.

You still have duties to your firm

The central principle established in *Meehan* is that "partners owe each other a fiduciary duty of 'the upmost good faith and loyalty,'" which applies to partners until their actual departure.

"As a fiduciary, a partner must consider his or her partners' welfare, and refrain from acting for purely private gain." This requires the departing attorneys to handle their cases, matter assignments, billing and collections for the benefit of the firm, and not for their own benefit in preparation for departure.

The departing attorney cannot engage in self-serving practices like delaying work until after departure, or funneling cases to himself and others leaving with him; any deviation from the attorney's normal practices may be scrutinized with 20/20 hindsight.

Indeed, the fiduciary duty to other partners is so deep-seated that the court wrote that "[a] partner has an obligation to 'render on demand true and full information on all things affecting the partnership to any partner,'" frowning on Meehan and Boyle's affirmative denials to their partners that they had plans to leave the firm.

Note that the partner is not required to step forward to disclose departure plans but must honestly respond if directly asked.

This does not mean, however, that the departing attorney cannot take steps to prepare for the departure. "Fiduciaries may plan to compete with the entity to which they owe allegiance, provided that in the course of such arrangements they do not otherwise act in violation of their fiduciary duties."

The SJC approved the plaintiffs' logistical arrangements, such as executing a lease, obtaining financing, and preparing lists of clients expected to leave, because those arrangements did not harm the firm. Indeed, the court reasoned that the departing attorneys had an obligation to properly represent any clients who remained with them.

For associates reading this article and hoping that these restrictions apply only to equity partners, the *Meehan* court wrote that "[e]mployees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of their employer."

Accordingly, junior partners, of counsel, counsel and senior associates are also forbidden from participating in the kind of preemptive tactics employed by Meehan and Boyle.

What about the clients?

Again, in following the principle that a partner owes the other partners a fiduciary duty, the departing partner cannot take steps to surreptitiously contact clients to gain a head start before departure.

Preemptive tactics such as pre-departure communications with clients, delays in providing partners with the list of clients that will be solicited, and sending one-sided letters to clients urging them to go with the departing partner are forbidden.

Moreover, client interests are now impacted and must be protected. A client's choice of counsel cannot be restricted, and the client must be kept apprised.

And lastly, however an attorney's departure is handled, it cannot prejudice the clients' interests or cases. The court concluded that the appropriate way to give notice to clients of an attorney departure is to send a mutual letter from both the partnership and the departing partner that outlines the separation plans and the clients' right to choose their attorney.

Further, the notice should:

- be sent by mail, though in this day and age, email should suffice;
- be sent to clients with whom the departing attorney had an active attorney-client relationship prior to the departure;
- not urge the client to sever his/her relationship with the existing firm but may advise the client of the departing attorney's willingness and ability to continue representation;
- advise the client he/she has the right to choose whether the old firm, the departing attorney or some other attorney will continue the representation until conclusion; and
- not disparage either the departing attorneys or the former firm.

What do you owe your firm?

With respect to what happens after a partner has departed a firm, the SJC has maintained the centrality of the "strong public interest in allowing clients to retain counsel of their choice." *Eisenstein, et al. v. David G. Conlin, P.C., et al.*, 444 Mass. 258, 259 (2005).

In *Eisenstein*, the court struck down as impingement on clients' choice of counsel a partnership agreement provision requiring departing partners to pay the prior firm a portion of fees they generated as a result of work for current and former clients of the prior firm.

The court reasoned that that obligation would "tend to discourage a lawyer who leaves [the firm] from competing with it. This in turn would tend to restrict a client or potential client's choice of counsel."

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On the other hand, in the case of *Pierce v. Morrison Mahoney LLP*, 452 Mass. 718 (2008), the court enforced a partnership agreement provision that imposed identical financial consequences on all departing partners whether they competed with the firm after withdrawal.

It does not appear that there is a bright-line rule on post-departure obligations between an attorney and the former firm, but arrangements that arguably limit a client's choice of counsel are certainly vulnerable.

New firm handling of old clients

If the departing attorney is joining a new firm, the latter will need to conduct a full conflicts check as to those clients that are following the departing attorney.

Rule 1.6(b)(7) of the Massachusetts Rules of Professional Conduct expressly permits the disclosure of client information necessary to complete a conflict check, as the failure to do a detailed check can lead to disaster.

The conflict check should include not only those clients likely to come with the newly arriving attorney but also persons adverse to the newly arriving attorney's clients.

The important exception, however, is that the disclosure of conflicts information cannot compromise the attorney-client privilege or prejudice the client's interests. So, the fact that a publicly traded company has retained a merger and acquisition specialist may not be disclosed if the contemplated deal is not public knowledge.

Similarly, the fact that a celebrity has retained divorce counsel would likely constitute confidential information that cannot be shared because the disclosure of the engagement itself would be prejudicial to the client's interests.

Generally speaking, absent these unusual circumstances, it is proper to disclose to the new firm the identity of the clients, persons involved, and a brief summary of the issues.

It is also important that the attorney send new engagement letters to old clients that have retained their relationship. See Massachusetts Bar Association Opinion 2017-1; Mass. R. Prof. C. 1.5.

With respect to hourly clients, it is good practice to send new engagement letters to ensure that the client understands the terms of the engagement including fee arrangements with the new firm and any conditions of the engagement — even if the attorney is charging the same hourly rate.

For contingency fee matters, the new engagement letter is mandatory, and the letter must meet all the requirements of Rule 1.5(c), especially if there will be a division of fees between the old and new firms under Rule 1.5(d).

Conclusion

By and large, the SJC has drawn reasonably clear ethical lines relating to firm departure. Do not take unfair advantage of your partners in your pre-departure preparations, and send a neutral letter to clients from you and your firm.

Once those steps are taken, call your clients to bring them along, and enjoy your new surroundings.

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