

When Partners Part: The Ethical Implications of Lawyer Mobility

BY STEVEN C. KRANE

This is the first of two articles on the problems that arise when a partner decides to leave a firm. This article deals with the responsibilities of the partner who leaves and the partners who stay. The second article deals with agreements and other devices used by law firms to protect against the financial repercussions of a partner's withdrawal. It will be published in the October NYPRR.

It's 11:30 PM on a Friday evening in September. In the airless, mostly dark offices of a thriving, 50-lawyer firm, a voice-mail message is left for a sleeping managing partner: "This is Randy Rainmaker. By this message, I am advising you that I have decided to withdraw from the partnership effective at midnight tonight. I have left in your in-box a stack of authorizations signed earlier this week by 50 of my clients. The letters direct you to turn over all of the clients' files to me so that I can take them to my new offices. You don't have to worry about logistics, because my mover is loading the files on his truck as I speak. I have also left you my new address and telephone number so that you can forward all mail and calls to me starting on Monday morning. That, by the way, is also the address at which you should send the check for the balance in my capital account and the other sums that are due to me under our partnership agreement. I wish you all the best. Goodbye."

This somewhat melodramatic scenario has become all too prevalent in the 1980s and 1990s. Almost daily, we read in the ~ or another has changed firms and~ has taken with him or her a substantial portion of the former firm's clientele — and revenues. Litigation between departing partners and former firms has been an inevitable outgrowth of this trend, and a body of case law and ethics opinions has developed to govern the rights and responsibilities of those who are leaving and those who are left behind. Likewise, to address this increased mobility, law firms have applied their collective creativity to fashion ways of discouraging their rainmakers from leaving. These methods have been generally unsuccessful in New York because of the restrictive attitude the Court of Appeals has taken toward such efforts.

In these articles, I will explore the ethical implications of partner departures from the viewpoints of the partner and the firm the partner leaves behind. I will also discuss ways in which firms have tried to mitigate the effects of otherwise devastating separations, and the methods that might be considered in view of the restrictive governing law in New York.

Ethics Of The Departed

As a general matter, the attorney-client relationship is controlled by the client, who retains exclusive decision-making authority over the representation,¹ including its termination. Unlike the lawyer, whose right to withdraw from a representation is limited under DR 2-110 of the Code of Professional Responsibility, the client has the unfettered right to discharge the lawyer at any time, with or without

cause.² For this reason, there can be no cause of action against a lawyer for tortious interference with an attorney-client relationship, which is terminable at will.³

Clients are thus unqualifiedly free at any time to choose new counsel, subject only to their obligations to pay for work done by the former firm, and to court-imposed restrictions on changes in counsel. Correlatively, those clients are entitled to receive information relating to their choice of counsel⁴ and they have a “right to know” that they are free to make a choice.⁵ Thus, a lawyer has an ethical duty to inform clients for whom he or she was performing services, or with whom the lawyer had a professional relationship, in advance of departure, of a decision to change law firms.⁶ If a lawyer changed firms, and only after arriving at the new firm advised a client for whom the lawyer was providing services that he or she was no longer affiliated with the prior firm, the client could in many cases be prejudiced or damaged.⁷

What a departing lawyer can do with respect to firm clients depends upon the timing of the conduct. From the leading New York case on this issue, *Graubard Mullen Dannett & Horowitz v. Moskowitz*,⁸ and other authorities, some lines can be drawn and guideposts identified for departing partners⁹:

- ◆ Pre-Announcement. Lawyers who plan to leave but have not announced their intention to do so can make logistical plans to leave or explore its feasibility, for example, by leasing office space and meeting with lenders, without violating any duties owed to the firm.¹⁰ However, no solicitation of firm clients is allowed before the attorney advises the firm that he is leaving: “[A]s a matter of principle, preresignation surreptitious ‘solicitation’ of firm clients for a partner’s personal gain ... is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value — the loyalty owed partners (including new partners), which distinguishes partnerships (including law partnerships) from bazaars.”¹¹ In our example, this principle was clearly violated by Randy Rainmaker, who had obviously conducted serious discussions with 50 clients before notifying her firm that she intended to leave.¹²

This rule, bright-line though it may be, poses significant practical difficulties to partners seeking to change firms. Ordinarily, before a partner announces an intention to leave, he or she will have had exploratory discussions with several potential new firms and serious discussions with at least one potential new firm. These discussions inevitably center around the client base of the partner, and the “portability” of the client’s business. Just as a prudent partner will generally be unwilling to advise the current firm of a planned departure until the “deal” with the new firm has been finalized, the new firm cannot be expected to approve the deal until it has completed its “due diligence” concerning the partner, which will ordinarily include an assessment of the willingness of the clients in question to follow the partner to his or her new location. Undoubtedly, there will be discussions between the departing partner or the new firm, on the one hand, and the clients in question, on the other hand. In those conversations the implicit or explicit message will be clear. Clients will understand that a change of firm is in the offing, and that their willingness to become clients of the new firm is being explored. This process, critical to rational decision-making on both sides of the proposed new affiliation, is arguably prohibited by the *Graubard Mollen* decision. We can expect to see judicial decisions over the next several years that analyze the rights and responsibilities of the affected parties during this pre-announcement dance.

- ◆ The Lame Duck Period. After the partner has announced an intention to withdraw, but before the physical separation from the firm, both the departing partner and the soon-to-be-former firm are free to

contact the affected clients and help them decide whether they should stay or go. In *Graubard Mollen*, the Court observed that “[a]s a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice. Ideally, such approaches would take place only after notice to the firm of the partner’s plans to leave.”¹³ Disputes during this transitional period, often characterized by fierce competition between the departing partner and the former firm for the clients, have focused on exactly what can be said to the targeted clients. As a general rule, the departing partner is permitted to communicate with firm clients so long as (a) the clients are not misled as to their right to choose counsel (or are affirmatively told that they have such a right)¹⁴ and (b) the departing lawyer does not disparage the prior firm in communications with the clients.¹⁵

Also to be noted is the Court of Appeals’ caution in *Graubard Mollen* that “abandoning the firm on short notice (taking clients and files) would not be consistent with a partner’s fiduciary duties.”¹⁶ Randy Rainmaker’s midnight voice-mail message falls far short of this standard. Many firms have addressed this problem by including in their partnership agreements a requirement that no one may withdraw without giving advance notice (typically 30 or 60 days).

◆ **Post-Withdrawal.** After the partner has left the firm — legally and physically — the clients of the former firm are fair game. The only restrictions on solicitation of firm clients are those applicable to attorney advertising and solicitation generally. An American Bar Association ethics opinion from 1980,¹⁷ approved by ethics committees in New York,¹⁸ provides a safe harbor for lawyers who communicate in writing to clients of the former firm with whom the lawyer had an active attorney-client relationship immediately before departure regarding open and pending matters for which the lawyer had direct responsibility. The ABA opinion states that it would be unethical for the lawyer to urge a client to sever its existing relationship with the former firm, and that lawyers should make it clear that the client has the right to decide which firm should continue or complete its matters.

The ABA-opinion, issued shortly after attorney advertising and solicitation had been forced upon the profession, is an unduly restrictive vestige of that bygone era. Perhaps most significantly, it does not allow the departed partner to do what any other lawyer could do: solicit clients of the law firm.¹⁹ Thus, while a lawyer who complies with the ABA opinion after departure can be certain to avoid an accusation of unethical conduct, departing partners should not be deluded into thinking that they must comply with the letter of the opinion in order to avoid discipline or liability.

Guidance For Those Left Behind

The departing partner’s former law firm faces fewer ethical problems. (This is generally welcome news for the former firm, which may be far more concerned with surviving the loss of a significant source of legal business.) Foremost is the firm’s obligation, parallel to that of the departing partner, to avoid misleading clients into believing that they cannot decide to follow that partner to the new firm.

Comments disparaging of the partner must likewise be avoided. The firm must respect the wishes of the client and transfer its files to the new firm, subject to the client’s obligation to pay the former firm’s fees and subject to any retaining liens that may apply to client property in the former firm’s possession.

As for clients who choose to remain with the firm, an orderly transition of matters to other attorneys must be effected. Care must be taken to ensure that the lawyers assigned to take over are competent to do so. If,

for example, Randy Rainmaker was the only tax lawyer in the firm, continuing the representation without taking steps to acquire the needed expertise could constitute a violation of DR 6-101(A)(1), which requires lawyers to decline matters they are not competent to handle.²⁰ Firms can cure this problem in a number of ways, including hiring a lawyer to replace the departed partner or engaging co-counsel, either on a long-term basis or until someone in the firm can fill that role.²¹ Lastly, while public announcements of departures are not required, a firm may have to change its letterhead immediately if a name partner leaves, or if the letterhead lists individual partners by name. Otherwise, the public could be misled into believing that the departed partner is still a member of that firm, a problem particularly acute when the departed partner has a strong reputation in her field.²²

A Word On Conflicts Of Interest

There is a significant body of case law and ethics literature devoted to analyzing the conflicts of interest created when attorneys change firms. While that subject is beyond the scope of this article, the reader should be aware that the New York State Bar Association has proposed, and the Appellate Divisions are currently considering, amending the Code (a) to provide guidance to lawyers who change law firm affiliations and are asked to undertake representations in which the interests of clients of their former firms are implicated and (b) to lift the burden of imputed disqualification for former client representations when the “tainted” lawyer has left the firm.

¹ See generally *Hallock so State of New York*, 64 N.Y.2d 224, 230 (1984); ECs 7-7, 7-8.

² See *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1986); *Teichner v. W&J Holsteins Inc.*, 64 N.Y.2d 977, 979 (1985); *Koepfel v. Schroder*, 122 A.D.2d 780, 782 (2d Dept 1986); *Brandeo v. Zigmond*, 151 Misc. 2d 671, 676 (Sup. ct. Nassau Co. 1991); *Misoan v. Schoenfeld*, 111 Misc. 2d 1022, 1026 (Sup. Ct. N.Y. Co. 1981); see also DR 2-110(B)(4) (withdrawal is mandatory when lawyer is discharged by client.)

³ See *Koepfel v. Sctroder*, 122 A.D.2d at 782; *Missan v. Schoenfeld*, 111 Misc. 2d at 1026; *Weiner v. Altman*, N.Y.L.J., Dec. 27, 1991 (Sup. CL N.Y. Co.)(Saxe, J.).

⁴ See EC 2-1 (“[I]mportant functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.”).

⁵ N.Y. City 80-65. This assumes that the departing lawyer wants to continue representing the client at the new firm. The client of the former firm, cannot responsibility for the representation.

⁶ DR 7-101(A)(3), for example, prohibits lawyers from intentionally prejudicing or damaging a client during the course of their professional relationship.

⁷ A lawyer may not withdraw from a matter ‘until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including *giving due notice to the client...*’ DR 2-110(A)(2).

⁸ 86 NX2d 112 (1995).

⁹ Note, in *Graubard v. Mollen*, the Court of Appeals stated: “unquestionably difficult to draw hard lines defining lawyers’ fiduciary duty to partners and their fiduciary duty to clients.” *Id.* at 119.

¹⁰ A recent case discussing the extent to which lawyers may prepare to leave a firm before announcing their intention to depart is *Dowd & Dowd Ltd. v. Gleason*, 181 Ill. 2d 460(1998), analyzed in William M. Stevens, *Restrictive Convents Forbidden in Law Firm Employment Agreements*, Bar J. 316 (June 1998).

¹¹ *Id.* at 119-20.

¹² It is not the solicitation of clients that constitutes the wrong, but rather the disloyalty to the lawyer's partners. See 2 G. Hazard & W. Hodes, *The Law of Lawyering*, section 7.3:203 at 887(1990).

¹³ *Id.* at 120 (citations omitted).

¹⁴ *Id.* at 120-21; cf. *Tuite*, "Portable Clients," 76 A.B.A. J. 106 (Aug. 1990) (suggesting that communications "must clearly State that only the client has a right to decide whether to remain with or leave the firm").

¹⁵ See ABA *lest. Op.* 1457(1980).

¹⁶ 86 N.Y.2d at 121 (citations omitted); see also DR 2-110(A)(2) (quoted in note 7 above).

¹⁷ ABA *inf. Op.* 1457 (1980).

¹⁸ N.Y. City *Op.* 80-65; N.Y.H. County *Op.* 679 (1990).

¹⁹ One reason the restriction may have been included in the ABA opinion is former DR 2-102(A)(2) of the ABA Model Code, which limited a lawyer's right to send a professional announcement card to "lawyers, clients, former clients, personal friends, and relatives." The rule is no longer valid, having been supplanted by the Model Rules in a majority of states and repeated by amendment in others, including in New York. It was, however, in effect at the time ABA *inf. op.* 1457 and N.Y. City 80-65, for example, were issued.

²⁰ "Incompetence" (as used in the ethics rules) is not consentable. See DR 6-101(A).

²¹ Temporary lawyers can also be used for this purpose (subject to ethical requirements associated with their retention, *see, e.g.* ABA *Formal Op.* 88-356; N.Y. City 1989-2).

²² See NYSBA, Proposed Amendments to New York Lawyer's Code of Professional Responsibility, March 4, 1997, at 63-64 (proposing the addition of new DRs 5-108(0) and (C)).

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