Avoiding the Perils Faced by Lawyers Who Change Firms

By Mariana Korsunsky and Gary M. Ronan

Many lawyers switch firms at least once during their careers. While it's natural for those lawyers to want to take their clients and files with them, they must remember that transitioning from one firm to another raises a number of ethical issues and can result in liability to the departing lawyer's old firm if duties to that firm are ignored.

Lawyers who practice together in a law firm owe one another, and the firm, fiduciary duties, including a duty of loyalty. This is true even for associates and non-equity partners who, although not owners, nevertheless owe duties to the firm as their employer. The contours of these fiduciary duties are frequently tested when attorneys prepare to move their practices elsewhere, as is illustrated by a recent decision from the Massachusetts Supreme Judicial Court in *Governo Law Firm v. Bergeron,* 487 Mass. 188 (2021).

It is permissible for attorneys, including partners, *after* they have left a firm, to compete with their former firm and invite clients to follow them to the new firm. In fact, Rule 5.6 of the Model Rules of Professional Conduct, which most states have adopted, prohibits a law firm from "restrict[ing] the right of a lawyer to practice after termination of the [partnership or employment] relationship, except an agreement concerning benefits upon retirement." The rule is intended both to give lawyers the freedom to practice where they wish, and also to ensure that clients have access to counsel of their choice.

Claims for Breach of Fiduciary Duty

What a lawyer is permitted do *before* leaving his or her old firm is substantially more limited. In the seminal case of *Meehan v. Shaughnessy*, 404 Mass. 419 (1989), for example, the Massachusetts Supreme Judicial Court held that a group of departing lawyers' clandestine solicitation of clients violated their fiduciary duties to their firm. While preparing to leave their firm, the attorneys took various actions to bring clients with them, including preparing lists of cases they planned to take and estimating the potential fees each case would generate for their new firm. They also reached out to referring attorneys and expressed a desire to continue accepting referrals at the new firm, and they contacted and attempted to persuade clients to transfer their cases—all without the knowledge of the firm's remaining partners.

When rumors of their departure began to circulate, the attorneys falsely denied their intentions to leave. The Massachusetts Supreme Judicial Court held that this preemptive campaign to poach clients (and the accompanying lying) gave the departing attorneys an unfair advantage over their law firm in derogation of their fiduciary duties.

Claims for Unfair Competition and Unfair Trade Practices

While a breach of fiduciary duty claim is bad enough, things can get even worse. In *Governo*, the Massachusetts Supreme Judicial Court held that departing lawyers who competed unfairly with their former firm could be held liable to the firm under the Massachusetts consumer protection statute, G.L. c. 93A, § 11. Section 11 prohibits anyone engaged "in any trade or commerce" from

causing losses by means of an "unfair method of competition or an unfair or deceptive act or practice" to another person engaged in the "conduct of any trade or commerce." The statute allows a prevailing plaintiff to recover attorneys' fees and costs and, where the unfair or deceptive conduct is willful or knowing, the plaintiff may also recover double or treble damages. The statute has long been construed to exclude claims arising out of intra-entity relationships. Nevertheless, courts have held that an employee's misappropriation of an employer's trade secret *while employed by the employer* may support a claim under Chapter 93A, especially where the trade secret was illicitly used *after* the end of the employment relationship.

In *Governo*, the Court applied these principles to law firms and lawyers. A group of non-equity partners in the Governo Law Firm (GLF) formed a competing firm and, while preparing for their departure, downloaded various proprietary materials developed by GLF at significant cost over 20 years. The attorneys concealed both their planned departure and their document downloading activities from GLF's sole owner, David Governo. They then made an offer to Governo to buy GLF, stating they would resign if the offer was not accepted that day. After Governo rejected the offer, the attorneys began operating their new venture, using GLF's materials to represent clients and grow their competing firm.

Governo filed suit against the departing attorneys and their new firm, asserting claims for conversion, breach of fiduciary duty, conspiracy, and Chapter 93A. When the case went to trial, the jury found in Governo's favor on claims he asserted for conversion, breach of the duty of loyalty, and conspiracy, and awarded him $900,000 in damages. The jury did not, however, find the defendants liable under Chapter 93A. Governo appealed, in part based upon a jury instruction on the applicability of Chapter 93A to the defendants' conduct. Specifically, the trial judge had instructed the jury as follows:

> [B]y law an employee and employer are [not] in trade or commerce with each other for purposes of [Chapter. 93A]. That means that [Chapter] 93A does not apply to anything [the attorney defendants] did toward the Governo Firm while they were still employed there. So anything that happened before [the attorneys' departure] whether it was negotiations, copying of materials, anything else, that's all irrelevant for purposes of [the Chapter 93A] claim.

The Supreme Judicial Court held that this jury instruction was erroneous because Chapter 93A "required the jury to consider that the attorney defendants stole GLF's materials in order to determine whether the subsequent use of these materials was unfair or deceptive." Although the Court reaffirmed the general inapplicability of Chapter 93A to disputes arising from an employment relationship or intracompany disagreements, the Court noted that the employment exception "does not mean that an employee never can be liable to its employer under G.L. c. 93A, § 11." The Court clarified that an individual's status as "employee" at the time of the misappropriation does not shield that person from liability under the statute where he or she subsequently "used the ill-gotten materials to compete with their now-former employer." The Court, therefore, remanded the case for a new trial on the Chapter 93A claim, which exposes the defendant lawyers to potential liability for multiple damages and attorneys' fees.

Practical Advice

It is risky and inadvisable for departing lawyers to begin competing with their old firm, and even to lay the groundwork for future competition, before they actually leave the firm. And the case law establishes that it is impermissible for departing lawyers to take proprietary firm information with them in order to compete against their former firm.

What can a departing lawyer do to stay out of trouble? Coordination and cooperation are key. Before speaking with and soliciting clients to come with them, departing lawyers should let their firms know they are leaving and develop a plan in coordination with the firm for communicating with clients. Those communications should inform the clients that it is *their* choice whether to stay with the firm or move with the lawyer. As the American Bar Association cautions in Formal Opinion 489, "[l]aw firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm." Departing attorneys should work with their law firms to assure an orderly transition of client matters consistent with their clients' choice of counsel.

Moreover, departing lawyers should not take firm documents or information without the firm's express consent. They also should not use their prior firm's proprietary information to compete with the firm after they leave—lest they be exposed to potential liability like the defendants in *Meehan* and *Governo*. While these cases were both decided in Massachusetts, they provide lessons for attorneys across the country.

Finally, departing lawyers should remember that impermissible conduct that might previously have escaped notice is now much more easily detected. Modern technology allows for the detection of information transfers in infinitesimal detail, and employers routinely investigate whether departing employees have downloaded or transferred confidential information prior to their departure. Departing lawyers should not think they will simply "get away with it." Complying with the rules and a lawyer's duties is both the right thing to do and important for avoiding litigation down the road.

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