



DO NOT GO QUIETLY...

If you're contemplating leaving your firm, think carefully before sneaking clients away with you. By Ellen J. Bessner

My legal practice consists of representing advisors and dealers in litigation and regulatory matters, as well as employment law. So, when an employment case recently landed on my desk, I became excited.

The issue involved a dispute between advisors and a branch manager from RBC Dominion Securities in Cranbrook, B.C., who, in 2000, left to join dealer Merrill Lynch, also based in Cranbrook.

The recruiting began with the branch manager, who eventually snagged nine advisors and five staff ("departing staff"). While recruitment is not illegal, what happened next was clearly a breach of the departing staff's fiduciary obligations.

While still employed by RBC DS, the departing staff contacted clients to move their books of business to Merrill Lynch. They made one grievous mistake, however. Neither the branch manager nor the advisor team offered RBC DS advance notice of their terminations.

After the covert move, Merrill Lynch staff copied records and prepared transfer documents for each RBC client. The plan had a severe and destructive impact on the business of the RBC Cranbrook branch.

It's common knowledge employees must give their employers advance notice when leaving their jobs. And when a firing occurs, more often than

not, an employer will send the employee home to eliminate risk of corporate sabotage.

Furthermore, it's a basic tenet of employment law that an employee owes his or her employer an obligation of good faith and fidelity. This particular case represents a clear breach of this obligation.

First, the departing staff breached its obligations by not providing notice to the employer and by secretly moving company property off the premises. The gloves came off and expensive and protracted litigation ensued, culminating in a four-year court battle that found in favour of RBC.

Surely, you say, this couldn't apply to *you*, since your relationship isn't employer-employee-based. But just because you're an independent contractor and are not paid as an employee with regular deductions does not mean a judge would find you have any lesser an obligation if faced with a similar situation.

A judge will examine the relationship between advisors from one firm and the staff potentially joining it, paying close attention to any written contracts to determine whether the staff breached legal obligations to the company from which they are departing.

It's common in this industry to enter into working relationships

without the advance review and signature of a contract by a lawyer to ensure protection for both sides. But without this clear and comprehensive contract, you may have to resort to legal action, where a court will examine the behaviour of all parties throughout their relationship to ascertain any unwritten legal obligations.

The best defence is to ensure there is a written contract in place. Prior to leaving the company, employees should see a lawyer to determine what is permitted and what is prohibited. And remember, removing company data, including forms, agreements and other items, is almost always a no-no. Furthermore, privacy laws dictate it's a big-time breach to remove client records.

By not adhering to legal advice, departing employees may run the risk of receiving a judgment for punitive damages reflecting the company's loss of profits. Litigation is very costly. Moreover, your clients won't be impressed when they see your name splashed on the cover of their morning papers. **AE**

Ellen J. Bessner is a lawyer at Gowling, Lafleur, Henderson. She practises in the area of brokers' liability and offers compliance training to brokerage firms. The above is intended for a general audience and should not be considered legal advice. "Compliance Check" appears every other issue.