

DIVISION OF CONTINGENT FEES WHEN LAWYERS LEAVE A FIRM

By David Donaldson

Lawyers, like any other employees or business partners, have fiduciary responsibilities to their firms. Prior to departure from their firms, they are required to use their best efforts to promote the firm's business and they must refrain from competing with the firm. After departure, lawyers are permitted use their knowledge and expertise acquired at the former firm to compete with the former firm.¹ Lawyers also owe a fiduciary duty to their clients that takes precedence over his or her obligations to their business. See, e.g., Alabama Rules of Professional Conduct, Rule 1.7. Therefore, lawyers and their firms must take care to ensure that their clients's interests do not suffer when lawyers change firms.

Most disputes between departed lawyers and their former firms involve one or more of the following: (1) alleged breaches of fiduciary duty prior to the lawyer's departure, (2) the absence of a formal agreement defining the departing lawyer's and the firm's mutual rights and obligations and (3) contingent fee cases.

Two Alabama cases illustrate these problems. In *Vowell & Meelheim, P.C., et al. v. Beddow, Erben & Bowen, P.A.*, 679 So.2d 637 (Ala. 1996), a partner and two associates departed their firm and took four contingent fee cases. After announcing their departure, but before leaving, the departing lawyers contacted the clients to inform the clients of their move. The departing lawyers and their old firm had no fee agreement with respect to the four cases. In a suit brought by the former firm, the trial judge ruled that the departing lawyers had breached their fiduciary duty to their old firm by contacting clients before their departure. The trial judge ruled that the four pending contingent-fee cases were assets belonging to the originating firm and that the fees should be divided according to each lawyer's interest in the old firm. The judge also allowed an "equitable adjustment" based on a reasonable hourly rate for the time spent on the four cases after departure. The Alabama Supreme Court affirmed.

In *Gamble v. Corley, Moncus & Ward, P.C.*, 723 So.2d 627 (Ala. 1998), Client consulted Associate regarding a personal injury claim against a pharmacy. Associate's firm represented the Alabama State Board of Pharmacy and refused to allow Associate to enter an appearance in the case. Associate referred the case to a another firm and entered into an agreement allowing Associate to work on the case without entering an appearance. A year or so later, Associate changed firms and entered an appearance in the case. Upon settlement, Associate received \$135,000. Trial judge awarded fee to former firm and awarded the associate only \$20,000. The Ala. Supreme Court reversed and concluded that the former firm was entitled to be compensated on a *quantum meruit* basis for its participation in the case up until the associate resigned. The Supreme Court remanded the case to the trial court for a determination of an appropriate amount.

The Court in *Gamble* distinguished that case from *Vowell* on the grounds that *Vowell* involved a breach of fiduciary duty. The Court stated that *Gamble* was more analogous to a

¹ Alabama law prohibits non-compete agreements among lawyers and other professionals. See § 8-1-1, Code of Alabama and the cases construing that section.

decision from the Alabama Court of Civil Appeals, *Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton*, 554 So.2d 445 (Ala.Civ.App.1989). In *Gaines*, Lawyer's brother was killed in a traffic accident. Lawyer attempted unsuccessfully to negotiate a settlement of his father's wrongful death claim. Lawyer then associated the Hare Wynn firm, which agreed to pay Lawyer's 50% of the contingency fee based on an understanding that Lawyer would maintain an active role in the case. Shortly thereafter, Lawyer resigned from his firm and discontinued his involvement with the case. The father then discharged the Lawyer's former firm and entered into a new fee agreement with Hare Wynn. When the \$187,500 fee arrived, Lawyer's former firm sued to enforce its earlier fee agreement for one-half of the fee. The trial court ruled that the firm had failed to fulfill a condition to the agreement by remaining involved in the case and it awarded the firm \$7,500 fee based on the doctrine of *quantum meruit*. The Court of Civil Appeals affirmed.

As you can see, the cases are very fact-specific. A poorly-drafted pre-dispute agreement is likely to do more harm than good. Therefore, it is important to take into account many factors when drafting an agreement. Here are a few issues to keep in mind:

- Who was responsible for bringing the case in the door?
- Is the departing lawyer a partner or associate?
- What will the departing lawyer receive from future fees in cases that the departing lawyer leaves behind?
- What was the stage of the litigation in at the time of departure?
- Who will be responsible for work that is needed after departure?
- How much money did the old firm spend for overhead, litigation expenses and salaries before departure?
- Who will be responsible for future litigation expenses?
- How speculative was the case at the time of the investments?
- Will the departing lawyer reimburse the old firm for its investments at the time of the lawyer's departure or will the departing lawyer wait until arrival of the fee to reimburse the old firm?
- Keep in mind that there is a specific ethics rule governing fee-sharing agreements between lawyers in different firms, Rule 1.7.

Finally, it is important to recognize that emotions sometimes run high when lawyers leave their firms. Departing lawyers and their former firm should obtain counsel if they are unable to reach an amicable resolution in short order. Litigation should be a last resort. It's very expensive and time-consuming.