The Profession

Attorney Departures Meet New Marketplace Realities: Re-examining *Meehan*

By Richard J. Yurko

Twenty-five years ago, several lawyers left the Boston law firm of Parker, Coulter, Daley & White to set up a new boutique firm, Meehan, Boyle & Cohen, P.C. The departing partners initiated an action to recover under their prior partnership agreement and Parker Coulter counterclaimed. Several years later, the Supreme Judicial Court decided *Meehan v. Shaughnessy,* 404 Mass. 419 (1989), which has since served as a guide on how lawyers should behave when leaving a firm.

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The legal marketplace today looks substantially different than it did then. A different professional landscape suggests that the "rules" laid down in *Meehan* need to be re-examined.

Meehan's Professional Landscape

Before the departure, Parker Coulter had twenty partners, several junior partners, and an equal complement of associates. It typified the mid-sized firm of its day. The departing lawyers included: Jim Meehan and Leo Boyle, both partners; Cynthia Cohen, a junior partner; and an associate. Parker Coulter was a traditional partnership; Meehan Boyle was established as a professional corporation.

The issues in *Meehan* centered around (a) what was owed to the departing partners under the Parker Coulter partnership agreement, and, more importantly, (b) whether the departing lawyers had breached their obligations by the manner in which they established their new firm and contacted clients to retain the boutique.

After a fact-laden history of the departure, the Court examined statutory partnership law, the Canons of Ethics (banning noncompetition provisions against lawyers), and general fiduciary duty doctrines. The Court concluded:

- Partners and others in positions of responsibility may confidentially make normal preparations to leave a firm (e.g., rent offices, *prepare to* contact clients, make

banking arrangements, etc.). Typically, client files should remain with the former firm until the client approves a transfer.

- It was a breach of fiduciary duty for departing lawyers to contact clients *in advance* of letting the firm know that they were planning to leave, to fail to give the firm the chance to compete fairly for the clients, and to fail to ensure that clients knew that they could continue to use the firm.

- The departing lawyers have the burden of showing that any improper conduct did *not* cause a loss of business to the former firm.

The Court leaned heavily on the rules of partnership law, ethical opinions, general fiduciary law in the corporate context, and the Court's general superintendence of the profession. *E.g.*, 404 Mass. at 442 ("[R]equiring these partners to disprove causation will encourage partners in the future to disclose seasonably and fully any plans to remove cases"). A similar dispute today between a modestly-sized partnership and several departing lawyers would likely be treated the same way. *But see* *Lampert, Hausler & Rodman, P.C. v. Gallant,* 19 Mass. L. Rptr. 283, 2005 Mass. Super. LEXIS 118 (Apr. 4, 2005), *rev'd* 67 Mass. App. Ct. 1103 (Rule 1:28 decision), *on remand,* 2007 WL 756432. However, the practice of law has changed dramatically in the interim.

Today's Profession

Whereas Parker Coulter served as a rough prototype for the profession in 1985, not so today. First, far fewer firms are operated as traditional partnerships. Today, limited liability partnerships and professional corporations with detailed operating and shareholder agreements are more prevalent.

Second, in 1985 a firm of several score lawyers practicing in a single location was the norm. Today, large numbers of lawyers practice in Massachusetts offices of multi-state, national, and international firms. As of 1990, the top 25 law firms in Boston had from 59 to 279 lawyers and all had more lawyers in Massachusetts than outside. (Boston Business Journal Book of Lists – 1990 at p. 27). As of 2010, the top 25 law firms in Boston had between 74 and 1840 lawyers and 12 of the 25 firms had more lawyers outside of Massachusetts than inside. (Boston Business Journal Book of Lists – 2010, p. 12).

Third, in 1985, the legal world was divided among partners, junior partners, and associates. Today's firms have more variants on the attorney-to-firm relationship than Ben & Jerry have flavors, including: equity partners/shareholders, contract partners/contract shareholders, non-equity partners/shareholders, principals, junior partners, counsel, of counsel, permanent associates, partnership track associates, non-partnership track associates, contract/temporary lawyers, and so on.

Finally, most profoundly, in 1985, the departure of significant business-producing lawyers was rare. Now it is commonplace. Each major law firm has experienced not only losses but also gains as significant business producers have gone from one firm to another. Not only do most lawyers no longer remain at one firm for a lifetime, but some may not remain at a firm for more than a year or two. Conversely, it is not only harder to become a "partner," but also reaching equity status in a firm guaranties little to the individual lawyer, as firms have chosen to "de-equitize" partners when the firm's needs dictate.

This is not to say that such professional evolution is a good thing. It is, however, the current professional reality.

The *Meehan* Court silently assumed that the Parker Coulter structure and operation were the professional norm. No longer. To the extent that *Meehan* was grounded on the assumption that each partner has substantial input into firm decision-making, a real opportunity to affect the course of a partnership, and thus has a strict fiduciary duty to the firm *qua* firm, the *Meehan* model seems strangely antiquated to, say, a firm that has five hundred equity-holders in three dozen cities from Singapore to London and where remaining an equity partner depends on the business model adopted by a distant managing committee. What chance does a "partner" — holding one-tenth of one percent of an interest in a firm — have to influence policy, let alone profits and losses? Why should that "partner" have any more of a fiduciary duty to the mega-firm than a well-paid stockbroker has to his mega-brokerage house? What should the rules be for a valued "permanent" associate who decides to leave to seek some equity?

Meehan also seems to have been grounded on an assumption that the good will of a client is a joint asset of both the firm and the individual lawyer doing the client's work. Again, that may have made sense in 1985 for a mid-sized firm in Boston. It translates less well to a "contract partner" who arrives at a firm with 25 corporate clients and then opts to leave, two years later, with those same 25 corporate clients. Indeed, today's clients are increasingly sophisticated consumers of legal services, particularly corporate clients with in-house counsel.

Some firms today bear more of a resemblance to publicly-held corporations than to the late Parker Coulter. Some lawyers have convoluted, formulaic compensation arrangements that render them essentially sole practitioners paying a percentage overhead to a "firm" that houses them. Nothing in *Meehan* anticipated these changes; nothing in *Meehan* prevents courts today from recognizing this shift in how law is actually practiced.

Towards a Post-*Meehan* Model

If some law firms today bear a closer resemblance to large brokerages than to Parker Coulter and if today's lawyers can look more like hop-scotching stockbrokers than Parker Coulter partners, how does this impact the *Meehan* analysis? Today the Supreme Judicial Court would likely rely much less on idyllic notions of a partner's "fiduciary duty" and more on its general superintendence of the changing profession. *See Lampert, supra* (suggesting that *Meehan* is actually in conflict with corporate fiduciary duty caselaw). This does not mean that the result in *Meehan* would be drastically different, but the rationale would be more straightforwardly rooted in the business realities of the practice of law.

Indeed, a more current view of the profession could draw much from the Business Litigation Session's approach to stockbroker hopscotch and the brokerage house "Protocol for Broker Recruiting." In *Smith Barney v. Griffin*, Suffolk Superior Court Civ. No. 08-0022-BLS1, 23 Mass. L. Rptr. 457, Judge Gants summarized how brokerage non-competition cases had become commonplace and he pointed to the Protocol as a reason for denying injunctive relief. Many of Judge Gants' comments could easily be brought to bear on the revolving door of "partners" in and out of today's mega-law-firms.

Recognizing that non-competition provisions are already not permitted under rules of professional conduct, a post-*Meehan* analysis of law firm departures should reach similar conclusions with some nuanced differences. It seems to me that the first two prin-

ciples of *Meehan* remain generally sound if applied even-handedly:

- All lawyers, whether "partners" or not, may make normal, confidential preparations to leave a firm. Files remain with the former firm until the client specifies otherwise. Prompt transfer is required upon client direction.

- Neither a senior lawyer who is preparing to leave, *nor* a firm that gets wind that a senior lawyer is leaving, *nor* the firm that the new lawyer is joining can peremptorily contact clients without each advising the other prior to the contact and ensuring that the client understands it may also choose to have its work done by the departing lawyer or former firm. (Yes, the firms themselves can violate these rules by acting peremptorily.) Joint, or at least simultaneous, announcements should be the norm and can be drawn up within a matter of hours. Occasionally, division of responsibility for making the initial contact can be agreed upon. However, unlike in *Meehan*, there is no need for the pause before contacting clients to last more than a few hours. Today's firms are well-prepared for both attorney departures and additions. Finally, where an attorney's departure from a firm is not voluntary and not the result of misconduct, the firm can have little standing to complain about the attorney contacting clients she has worked with.

Where *Meehan* makes less sense today is in its unstated assumption that the good will of clients is equally shared between firm and the rainmaker. Experience has taught us over the last quarter century of legal musical chairs that, when lawyers leave firms and they comply with the *Meehan* rules, most clients routinely retain them. Indeed, most major law firms and recruiters would admit that, when they evaluate bringing on a lateral acquisition, the firm generally expects the lateral to perform to a business plan derived from her past "book of business."

Recognizing this, the only rationale for *Meehan's* burden-shifting to the departing lawyer to prove *lack* of causation from any breach of rules is the prophylactic effect that such a burden-shifting has in discouraging a breach. Today, one wonders whether this aspect of *Meehan* could be better achieved by a court-sanctioned protocol analogous to the Financial Industry's "Protocol for Broker Recruiting." *See* Protocol. Compulsory confidential mediation or arbitration, analogous to the Protocol's ban on litigation, might also be a wise superintendence principle to protect underlying client confidences.

One can lament or cheer the dramatic changes that have occurred in the legal marketplace over the last quarter century. Whatever one's view of those changes, those changes should lead to a re-examination and open discussion of the *Meehan* rules. My forecast is that, when faced with these issues again, the Courts will (1) examine how firms really operate in the marketplace today and will not let firms cry foul about a departing partner's conduct if the firm has also been a beneficiary of reciprocal acquisitions, (2) continue to place the client's general interests above those of the lawyers' narrow economic interests, and (3) continue to favor lawyers and firms that act above board and honestly with each other, even if swiftly, in contacting clients. ■