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TAKING WITH YOU ONLY WHAT YOU CAN TAKE

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In the investment industry, there is often much movement of investment advisors from one brokerage firm to another, and given the customer-oriented nature of the business, advisors are tempted to take with them to a new brokerage a large amount of information relating to their investor clients.

While it is difficult to prevent an investment advisor from applying his or her skill in the industry, there are limits to the scope of information which the advisor can take with him or her to a competitor.

In general, an advisor who moves from one brokerage business to another is prohibited from unfairly competing with his or her former brokerage by using confidential information. If the advisor takes and uses confidential information in his or her new employment, he or she is in breach of the duties owed to the former employer.

One of the leading cases in this area of law is *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* wherein a group of investment advisors at the Cranbrook, B.C. branch of RBC Dominion Securities left their employment to work for Merrill Lynch Canada. However prior to leaving the advisors copied the client records held at Dominion Securities and transferred them to Merrill Lynch, where the information was used to prepare new documentation. The information copied included the clients' financial information, the confidentiality of which Dominion Securities and the advisors were bound to protect. In its decision, the Supreme Court of Canada stated that consistent with the current law which restricts post-employment duties to the duty not to misuse confidential information, a departing investment advisor can be liable for the improper use of confidential information during a notice period. The court found that the confidential information

might include such things as copies of account statements and other papers concerning the client, such as the Know Your Client Form.

In *Jones v. Klassen*, the Alberta Court of Queen's Bench was required to determine whether an investment advisor had committed a legal wrong when upon departure from his former employer he printed a copy of the brokerage's client list and thousands of pages of contact sheet information relating to those clients and a list of potential clients. On the client list, the advisor also made handwritten notes about important details concerning each account. The court found that by taking and using the information that he did, the advisor breached his duties to his former employer.

In the Ontario case of *MD Physician Services Inc. v. Jonathan Financial Inc.*, the plaintiff investment dealer and fund manager sought an Anton Piller order against two former employees who upon leaving purportedly took with them certain personal and confidential information of MD's clients. The documentation misappropriated included confidential information about MD's business system, products, marketing methods and know-how. While the court was not persuaded to issue an Anton Piller order, it found that MD had a strong *prima facie* case against the two former employees and that there was no doubt that documents which contained sensitive personal information of MD's clients qualified as confidential information and was proprietary to MD.

Lastly, in the 2012 case of *Edward Jones v. Voldeng*, the British Columbia Court of Appeal reviewed an injunction which had been issued against an investment advisor who switched brokerages. The court determined that those portions of the injunction which restrained and enjoined the advisor and his new employer from directly or indirectly using, copying, disclosing or



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conveying to others any information not made available to the public, including account records, customer statements and files, manuals, forms, customer lists, customer contact information not otherwise available to the public, trade secrets, or any other private and confidential information pertaining to Edward Jones (the former employer) and its clients was to remain in force.

However, as shown in *Stenner v. ScotiaMcLeod*, investment advisors often keep their own client contact lists which includes information such as names, addresses, telephone numbers and email addresses. Investment advisors do so to hedge against rapid change from one firm to another. Accordingly, in *Stenner* it was held that the departing investment advisor was entitled to use the personal client list she had kept on her home computer to contact and solicit clients of her former employer.

It is common in the securities industry for investment advisors to keep records for their "book of business". In fact, a healthy book of business is the lifeblood and livelihood of any investment advisor. Therefore, it is easy to see why courts will protect the personal contact lists created by an investment advisor and allow him or her to take it to a new employer without facing potential liability.

However, since liability in this area of law can be significant, we have compiled the following lists to assist investment advisors, investment dealers or fund managers in assessing whether they can face potential liability for information taken from a former employer and used by the investment advisor and his or her new employer.

Types of confidential information which could lead to liability if taken or used:

- Complete client records maintained by the investment firm which contains the following information:
 - client lists and contact sheet information relating to clients;
 - Know Your Client forms;
 - lists of potential/prospective clients;
 - information regarding the types of account held by clients, including their asset mix and approximate size in dollar value;

- documents containing client financial/credit card information, account numbers and Social Insurance Numbers;
- client transaction histories;
- information regarding expected profits as a result of client transactions; and
- individual customer pricing information.

- Business sales and marketing strategies of the former employer;
- Personnel strengths and weaknesses; and
- Employment compensation structures.

Types of information that can be brought by an investment advisor to his new employer:

- Lists of the advisor's own book of business, which he or she has prepared throughout their employment and that contains the following information:
 - client names;
 - client addresses;
 - client contact information (telephone numbers and e-mail addresses)¹

If you have an employment issue in the investment industry, or if you have questions or concerns regarding restrictive covenants, please contact Gavin Tighe or Jane Sirdevan:

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¹ The Employer is provided for educational purposes only and has been prepared by Jane Sirdevan, Stephen Thiele, and Alex Melfi (Student-at-Law)

