

Avoiding Accessorial Liability In Lateral Partner Recruiting

BY STEVEN C. KRANE

Toward the end of 2004, it was reported in the California legal press that the Clifford Chance law firm had agreed with the trustee of the Brobeck, Phleger & Harrison bankruptcy estate to pay \$5.5 million to settle claims arising out of that law firm's 2003 collapse. See, Brenda Sandburg, "Clifford Chance Settles Brobeck Collapse Claims," *The Recorder*, Dec. 20, 2004, at 1. Among other things, the settlement disposed of claims that had been asserted by retired Brobeck partners and employees against Clifford Chance and former Brobeck Chairman Tower Snow, Jr. in a lawsuit filed in October 2003. *Hanger v. Clifford Chance Rogers & Wells*, California Superior Court, No. RG 03120659. The plaintiffs in that action had claimed that Snow had illegally solicited his own partners – 16 of whom defected from Brobeck to Clifford Chance to form the core of a new San Francisco office – in violation of his fiduciary duties to the firm, and that Clifford Chance itself had, among other things, engaged in a "systematic campaign of predatory hiring" designed to injure Brobeck and bolster its own competitive position in California. See, Brenda Sapino Jeffreys, "Brobeck Sues Clifford Chance, Snow for \$100M," *The Recorder*, Oct. 9, 2003, at 1.

The Clifford Chance settlement came on the heels of two appellate court decisions upholding claims asserted by the former firms of departing partners against those partners – as well as their new firms – for misconduct arising out of the departure. One of these cases was *Reeves v. Hanlon*, 33 Cal. 4th 1140, 95 P.3d 513, 17 Cal. Rptr. 3d 289 (2004). In that case, the California Supreme Court held the departed partners' new firm liable for its role in inducing at wills employees of the former firm to quit and join the new firm. The facts of this case were particularly egregious, however. The defendants had spent more than five months before their departure tapping into their current firm's password protected computer database to print out confidential information on over 2,200 clients. They had made disparaging remarks to key personnel and solicited their employment prior to their departure. Notwithstanding their lengthy preparations, the defendant partners resigned without any notice, leaving no status reports or lists of matters or deadlines on which they had been working. They intentionally destroyed extensive computer files on the firm's server containing client documents and form files used by the firm. When soliciting clients of their former firm, the defendant partners failed to advise them that they had the right to choose which firm would represent them in the future. The Court concluded that while solicitation of at will employees was generally not actionable, here the departing partners and their new firm had engaged in independently wrongful conduct which induced at will employees to follow them.

Similarly, in *Dowd & Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 816 N.E.2d 754 (1st Dist. 2004), an Illinois appellate court upheld a damage award in favor of a law firm against two departed partners and their new firm chiefly for wrongful solicitation of clients and employees. The partners had spent over four months planning their departure, secretly making arrangements with at least one major client to follow them to their new firm, and enticing other firm employees to leave as well. Confidential client and firm information was used to facilitate the transfer of the major client as well as to secure financing for the new firm. As in *Reeves*, the partners gave no notice of their departure, precipitously announcing their immediate withdrawal. The court ruled that surreptitious solicitation of firm clients prior to notifying the

firm of their intention to withdraw, standing alone, constituted a breach of fiduciary duty. As in *Reeves*, liability was imposed on the new firm as well as the individual partners.

In both *Reeves* and *Dowd*, the defendant firms were newly created by the departed partners, not existing firms that were adding new partners through a lateral acquisition of legal talent. Nevertheless, the courts held the law firm entities liable, thereby effectively imposing liability on all of their partners, whether they had engaged in culpable conduct while at the former firm or were among those solicited from that firm or elsewhere to join the new partnership. The implications of these cases are significant and indicative of an emerging trend in the law to hold the hiring firm responsible as, in effect, aiders and abettors of – or even active participants in – the conduct of departing partners.

How, then, can a hiring firm avoid accessorial liability for the pre-departure conduct of its lateral hires? The answer is for the firm to understand the ethical and legal obligations of the people it is seeking to hire.

As a general matter, the attorney client relationship is controlled by the client, who retains exclusive decision making authority over the representation, including its termination. See, generally, *Hallock v. State of New York*, 64 N.Y.2d 224, 230 (1984); ECs 77, 78. Unlike the lawyer, whose right to withdraw from a representation is limited under DR 2110 of the Code of Professional Responsibility, the client has the unfettered right to discharge the lawyer at any time, with or without cause. See, *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1986); *Teichner v. W&J Holsteins Inc.*, 64 N.Y.2d 977, 979 (1985). Clients are thus unqualifiedly free at any time to choose new counsel (subject to their obligations to pay for work done by the former firm, and to court imposed restrictions on changes in counsel). Correlatively, those clients are entitled to receive information relating to their choice of counsel (see, EC 21), and have a “right to know” that they are free to make that choice (see, N.Y. City Op. 8065). If a lawyer changes firms, and only after arriving at the new firm, advises a client for whom the lawyer was providing services that he or she is no longer affiliated with the prior firm, the client can in many cases be prejudiced or damaged.

What a departing lawyer can do with respect to firm clients depends upon the timing of the conduct. The starting point for this analysis in New York is *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112 (1995), in which the Court of Appeals identified some guideposts for departing partners. The timing of the conduct, according to the Court, is critical, and can be divided into three phases.

Phase I of the departure process covers the period before any announcement of the partners’ intention to leave their current firm. During this phase, lawyers can make logistical plans to leave or explore its feasibility by, for example, leasing office space and meeting with lenders. However, no solicitation of firm clients is allowed before the attorney advises the firm that he or she is leaving. “[A]s a matter of principle, pre-resignation surreptitious ‘solicitation’ of firm clients for a partner’s personal gain . . . is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value — the loyalty owed partners (including new partners), which distinguishes partnerships (including law partnerships) from bazaars.” *Graubard Mollen*, 86 N.Y.2d at 11920.

Phase II commences when the partners announce, or at least give notice of, their intention to leave their current firm, and continues until their actual departure. During this period, the departing partners are free to contact the clients they have been serving, ostensibly to help them decide whether they should

stay or go. In *Graubard Mollen*, the Court observed that “[a]s a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice. Ideally, such approaches would take place only after notice to the firm of the partner’s plans to leave.” 86 N.Y.2d at 120. The current firm, of course, is free to make every effort to convince the clients to remain right where they are. Disputes during this phase have focused on exactly what can be said to the targeted clients. As a general rule, the departing partner is permitted to communicate with firm clients so long as (a) the clients are not misled as to their right to choose counsel (or are affirmatively told that they have such a right); and (b) the departing lawyer does not disparage the prior firm in his or her communications with the clients. See, generally, ABA Formal Ethics Op. 99414.

Phase III begins once the partners are gone. Clients and employees of the former firm are then generally viewed as fair game. The only restrictions are those applicable to attorney advertising and solicitation generally.

Five years after *Graubard Mollen*, the Appellate Division, First Department brought home the point that partners looking for a new firm must exercise caution in their efforts at self promotion. In *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180 (1st Dep’t 2000), the court focused on the efforts made by departing partners to recruit other lawyers in their current firm to join them, ruling that while partners may discuss departure amongst themselves, they may not engage in solicitation of associates or support staff while still members of the firm. Importantly, partners may not provide prospective employers with confidential information relating to their current firm, such as lists of firm clients and internal financial information relating to associates and support staff, including salary and productivity information and employment evaluations.

Without question, the period of highest risk for the hiring firm is Phase I. Before a partner announces an intention to leave, he or she will ordinarily have had exploratory discussions with several potential new firms and serious discussions with at least one potential new firm. These discussions inevitably center on the client base of the partner, and the “portability” of his or her business. Just as a prudent partner will generally be unwilling to advise the current firm of a planned departure until the “deal” with the new firm has been finalized, the new firm cannot be expected to approve the deal until it has completed its “due diligence” concerning the partner, which will ordinarily include an assessment of the willingness of the clients in question to follow the partner to his or her new location. Undoubtedly, there will be discussions between the departing partner or the new firm, on the one hand, and the clients in question, on the other hand, and in those conversations the implicit or explicit message will be clear. Clients will understand that a change of firm is in the offing, and that their willingness to become clients of the new firm is being explored. This process is critical to rational decision making on both sides of the proposed new affiliation.

Throughout the hiring process, then, the new firm must balance (1) the importance of obtaining meaningful information about the incoming partner and of encouraging the clients serviced by that partner and his or her colleagues at the firm to join the potential migration, against (2) the need to avoid unwittingly – or wittingly – playing a role in a breach of fiduciary duty by the incoming partner.

Seven Rules For A Hiring Firm

By following these seven rules, the hiring firm can go a long way toward minimizing its liability risk in the hiring process:

- Rule No. 1: The hiring firm must not solicit clients of the partner's current firm before the partner has advised the current firm of the planned departure. Clients for whom the partner has performed services may be contacted in the course of performing "due diligence," but care should be taken not to ask them explicitly whether they intend to terminate their relationship with the current firm and follow the partner to the new firm.
- Rule No. 2: After the partner has told the current firm that he or she is leaving, but while he or she continues to be a partner there, the departing partner is free to engage in efforts to convince clients of the current firm with respect to which the partner performed legal services to leave and follow him or her to the new firm. The hiring firm is free to participate in those efforts and to engage in direct communications with the clients. In sum, once the current firm is aware of the partner's plans to leave, the current firm's clients previously served by the departing partner are fair game.
- Rule No. 3: In any communications with clients of the current firm, negative comments about the current firm or its continuing ability to serve the needs of the clients adequately (without the presence of the departing partner) must be avoided.
- Rule No. 4: Financial information relating to the partner's billable hours and collections may be requested and received before or after the departure is announced. This information is not privileged, and is of the kind that the Code of Professional Responsibility recognizes (in the sale of law practice context, see DR 2111) as material to an acquisition decision.
- Rule No. 5: The hiring firm should not contact lawyers (whether partners or associates) or support staff in the partner's current firm and urge them to leave until after the partner has departed. The hiring firm is free to discuss partnership or employment opportunities with lawyers or staff of the current firm who approach the firm, but should not engage in efforts to convince those individuals to change firms at this stage. Relatedly, the new firm should not request or accept confidential information of the current firm relating to the salaries or employment status of other lawyers or staff. (In extreme cases, such as where a client would be immediately and irreparably prejudiced by not having continuity of staffing on a matter, there may be a justification for recruiting staff prior to departure.)
- Rule No. 6: No client files maintained by the current firm should be accepted by the new firm during any phase unless they are sent by the firm with the authorization of the client. Files are client property, and their disposition is subject to strict ethical and legal rules. (This rule applies even after departure.) Make sure that the incoming partner has written permission to take any client files he or she brings to the new firm.
- Rule No. 7: Prior to departure from his or her current firm, the partner must continue to serve clients diligently and in the same manner as if the relationships were continuing. For example, nonurgent

work that would ordinarily be performed during the period prior to departure should not be deferred so that it results in billings at the new firm. The new firm should not suggest otherwise.

The hiring firm should ensure that all partners and staff involved in the lateral hiring process follow the seven rules set forth above and that the prospective lateral is aware of and agrees to comply with them as well. In this way, the risks of liability for both the incoming partner and the hiring firm can best be controlled.

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