

News & Developments

Departing Partners In The Grey Zone

BY STEVEN C. KRANE

This is the third in a series of articles by Steven C. Krane, on the departing partner. This article was prompted by the decision in September of Justice Herman Cahn of the Supreme Court, New York County in the case of Gibbs v. Breed Abbott & Morgan.

In 1991, Breed Abbott's trust and estate department defected en masse to Chadbourne & Parke. The defecting partners sued for funds allegedly due them under the Breed Abbott partnership agreement. Breed Abbott counterclaimed for breach of fiduciary duty by the defectors. All of the alleged breaches fell into the "grey area" which exists between the moment the departing partner announces his intent to leave and the point of actual departure. In this grey area, the departing partner must balance continuing fiduciary duties to existing partners against the need to make plans for new relationships. The law in this area continues to develop.

In the Gibbs case, Breed Abbott's fiduciary claim was severed and tried first in a bench trial by Justice Cahn.

According to Justice Cahn, a partner may leave a firm notwithstanding the financial injury the departure may cause, but it is improper for the partner who leaves to encourage other partners to withdraw from the firm as well. The court also ruled that it was a breach of fiduciary duty for the partners to provide a memorandum to Chadbourne, prior to their departure, describing the other personnel of the Breed Abbott trusts and estates department, including their names, salaries and other pertinent hiring information, "The preparation and sending of the memo...combined with the subsequent hiring of almost all the T/E personnel [after the partners had already joined Chadbourne], constitutes an egregious breach of fiduciary duty," Justice Cahn wrote.

There was also evidence that, in encouraging associates and other trusts and estates department employees to move to Chadbourne with them, the departing partners had disparaged Breed Abbott during the pre-departure period. Justice Cahn held that "a partner can act in derogation of a preexisting confidential relationship are that partner's departure from the firm." The partners also took with them various documents and materials when they left Breed Abbott, including their chronological correspondence files. The court ruled that action constituted a breach of fiduciary duty. The files were the property of Breed Abbott and enabled the departing partners "to quickly reconstruct a list of clients whom they had previously served [at Breed Abbott], and were able to contact those clients in an attempt to have them transfer their legal business to Chadbourne." (The partners had not taken any client files with them, but apparently intended to have the files of those clients who wished to retain Chadbourne transferred upon the execution of appropriate authorization forms.)

The opinion is notable as much for this discussion of conduct that did not constitute a breach of fiduciary duty as of conduct that did. It was not improper, for example of the departing partners to provide Chadbourne with lists showing the amounts billed and income received by Breed Abbott from the various clients served by the partners during the preceding years because Breed Abbott did not prove that it was damaged or its clients prejudiced by that information. It was also not improper, according to Justice Cahn, for the lawyers to write letters to the clients they had served advising them of their impending departure; curiously, these letters did not mention Chadbourne.

It remains to be seen whether Justice Cahn's various rulings will be upheld on appeal. Particularly questionable are the rulings relating to communications with Breed Abbott clients between the decision to depart and the notice to Breed Abbott clients. Clients do have a right to know that the attorneys who have been handling their matters are changing firms, and to decide sufficiently in advance of the move whether to remain with the new firm or stay with the old one. If a client decides to stay, a transition must be made to new attorneys; if the client decides to leave, files and other critical materials must be transferred to the new firm. This cannot be done in an orderly fashion unless the process begins prior in the effective date of the partner's withdrawal. In the same way, the act of a lawyer in a practice group who discusses the plan to leave, and suggest that the others consider relocating as well, cannot (in the absence of some independent harm such as disparagement of the former firm or the provision of confidential firm information to a prospective employer) reasonably be considered wrongful.

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