NYPRR | September 2000

The Revolving Door: *Gibbs v. Breed Abbott*

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If they ever existed, the halcyon days of hallowed law partnerships, when those who survived to make partner loyally labored for the same firm for their entire professional lives, are now in the past. With many law firms employing hundreds of professionals and being managed like other profit-making businesses, lawyers are more focused on the bottom line, and are much more willing to leave when presented with a better offer. This has made the "revolving door" a regular feature of law firm life.

But lawyers, unlike most business executives, are fiduciaries, and thus have strictly defined legal obligations to both their partners and their clients. Attorneys who fail to comply scrupulously with these obligations when switching firms face severe liability risks.

The Graubard Case

Five years ago, in *Graubard Mollen Dannett & Horowitz v. Moskovitz,* 86 N.Y.2d 112, 629 N.Y.S.2d 1009 (1995) ("Graubard"), the Court of Appeals considered the revolving door issue for the first time. The Court ruled that departing partners have fiduciary duties both to their clients and to their partners. Clients must be given "freedom of choice in legal representation" and unrestricted access to legal services; and partners are owed the strictest obligations of loyalty. *Id.* at 120, 629 N.Y.S.2d at 1013. Recognizing that these obligations often come into conflict when lawyers switch firms, the Court suggested "broad parameters" for lawyers to follow. On the one hand, the Court stated, "an attorney ... dissatisfied with the existing association [is permitted to] tak[e] steps to locate alternative space and affiliations," and can even solicit clients, though "ideally ... only after notice to the firm of the partner's plans to leave." On the other hand, "secretly attempting to lure clients ... , lying to clients about their choice of counsel [and] lying to partners about their plans to leave" would constitute a breach of fiduciary duty subjecting the departing partner to potential personal liability.

Since *Graubard,* New York courts have struggled to apply these parameters to specific factual situations. Just how difficult this task can be is illustrated by *Gibbs v. Breed Abbott& Morgan*, 2000 N.Y. App. Div. LEXIS 7754 (1st Dept. July 13, 2000) ("Breed Abbott"), a case recently decided by the Appellate Division, First Department.

The Facts Of Gibbs

In January 1991, plaintiffs Charles Gibbs and Robert Sheehan were the only partners in Breed Abbott & Morgan's ("BAM's") Trusts and Estates ("T&E") department. That month, Gibbs, who had become dissatisfied with his compensation arrangement, asked Sheehan to join him in moving to another firm. Sheehan agreed, and the two partners began interviewing with prospective employers, including Chadbourne & Parke ("Chadbourne"). Between January and May, Gibbs mentioned to several of his partners that he was interviewing for a new position; he did not, however, mention that he was definitely leaving, or that Sheehan would be going with him.

As the interviews continued, Sheehan and Gibbs discussed with other law firms the recruitment o certain BAM associates and support personnel. On April 26, Sheehan prepared a memorandum listing the compensation (salary and bonus), educational background and billing rates of those who worked in BAM's T&E Department. Though its contents apparently were discussed with Chadbourne and others in late April and May, the memorandum was not actually sent to Chadbourne until June 24, five days after Gibbs and Sheehan notified BAM's presiding partner that they would be moving to Chadbourne.

The two lawyers left BAM on July 9 and 11, respectively; both took with them their chronological correspondence files, containing every letter they had written during the past three years. They immediately began using these to contact BAM clients and solicit their business for Chadbourne. On July 11, Gibbs made employment offers to two of BAM's three T&E associates, as well as to an accountant and paralegal. All accepted these offers. In all, 92 of BAM's 201 T&E clients followed Gibbs and Sheehan to Chadbourne.

The Trial Court's Decision

After a non-jury trial, the trial judge found that Gibbs and/or Sheehan had violated their fiduciary obligations in at least three respects:

- (Gibbs) by secretly approaching Sheehan and persuading him to leave the firm.
- (Both) by removing their chronological files from the firm.
- (Sheehan) by drafting the April 26 memorandum containing salary information, and (both) by sharing that information with prospective employers both before and after they had announced their departure from BAM.

The trial court found that this dissemination of confidential information, combined with the immediate hiring of more than half of the support personnel in BAM's T&E department, "effectively crippled" that department.

Crucially, at least some of Gibbs' and Sheehan's misconduct occurred after they had announced their intention to leave. The judge ruled that in the period between the announcement and the actual departure, "the withdrawing partner is still a partner, and owes the obligations of loyalty to the old partnership and partners . ... [E]ven after the termination of the agency, the agent owes a duty to the principal not to take advantage of the still subsisting confidential relation that was created during the prior agency relationship." Slip Op., 9/28/98 at 9.

The trial judge considered the issue of damages in a separate opinion. Ruling that "the measure of damages for breach of fiduciary duty is the amount of the loss sustained, including lost opportunities for profit by reason of the fiduciary's faithless conduct," the Court held Gibbs and Sheehan responsible for the lost profits of BAM's T&E Department for 27 months after the two partners withdrew. The Court entered judgment against Gibbs and Sheehan, jointly and severally, for $1.8 million.

The First Department's Decision

The First Department, in a 3-2 decision, modified the trial court's orders and vacated the judgment. While agreeing that "the manner in which partners plan for and implement withdrawals is [still] subject to the constraints imposed on them by virtue of their status as fiduciaries," the Court concluded that two of the three acts of misconduct cited by the trial court — the solicitation of Sheehan and the removal of the "chron" files — were not misconduct at all. *Breed Abbot,* 2000 N.Y. App. Div. LEXIS 7754, 8 (1st Dept. July 13, 2000) (citation omitted).

The majority opinion, written by Justice Angela Mazzarelli, gave short shrift to the issue of Gibbs' solicitation of Sheehan, noting only that BAM had failed to "establish that Gibbs breached any duty ... by discussing with Sheehan a joint move." *Id.* at 9. Justice David Saxe's dissent, which concurred with the majority on this point, addressed the issue in more detail and made clear that a partner's secret solicitation of firm clients must be carefully distinguished from her solicitation of other partners. Only the former is prohibited, because it involves a partner's "taking unfair advantage of the knowledge of his impending departure while his partners are still unaware of it," and thus "actual[ly] compet[ing] with the firm while still a member of it." *Id.* at 29. Nevertheless, the dissent stated, because partners are free to leave their law firms, and free to compete with their former firms after they do, they may jointly plan their departure with another partner, especially since this furthers "the important value of client freedom of choice in legal representation" by enabling departing partners to "ensure[] the capability of continuing to serve those former clients who choose to retain [them]" after they move to a new firm. Id. at 30-31.

This analysis, however, ignores the trial court's finding that Gibbs repeatedly misled BAM by failing until early June to tell his partners that Sheehan would be moving with him. Thus, he prevented BAM from competing fairly for Sheehan's services (by offering a raise, greater status, etc.). This was no different, and certainly no less damaging to BAM, than secretly soliciting its clients.

As to the removal of the "chron" files, the majority focused on Gibbs' and Sheehan's good faith in doing so. The Court found that the files contained copies of documents which the firm already had, that removal of such files was common practice for those who left the firm, and that the firm partnership agreement did not prohibit it. The Court carefully distinguished this situation from one in which the client files themselves were removed, or in which the partners had previously signed an agreement recognizing that "chron" files belong to the firm. Id. at 9-11.

Majority Upholds Decision On Sharing Employee Information

Nevertheless, the majority upheld the trial court's finding that Gibbs and Sheehan had breached their fiduciary obligations by sharing associate and support staff salary information with Chadbourne and other firms. Unlike the trial court, however, the First Department focused on Sheehan's conduct before his departure announcement. It stressed that when Sheehan had prepared the April memorandum containing salary information — which the majority labeled "confidential" — he had done so "in connection with talking to other firms," with which the information had been shared. Breed Abbott, 2000 N.Y. App. Div. LEXIS 7754,13 (1st Dept. July 13, 2000). The majority also criticized Gibbs and Sheehan for giving the memo to Chadbourne after they had announced their departure but while they were still members of BAM. "Their actions… were intended to and did place [BAM] in the position of not knowing which of their employees were targets and what steps would be appropriate for them to take in order to retain these critical employees." *Id*. at 14.

This is where the dissent and the majority parted company. The dissent, following up on its previous analysis, stated that if partners were free to solicit each other to leave, they were certainly free to solicit firm employees, and for the same reason: to satisfy "the paramount concern of ensuring that clients are completely free to choose which firm will best serve them" by enabling departing lawyers to have available the staff needed to service those clients who follow them. Because Chadbourne apparently did not solicit BAM employees until after Gibbs and Sheehan had announced their departure, "both [BAM] and the departing partners [were] on equal footing in competing for these employees."

The difference between the majority and dissenting opinions is easily summarized. The majority saw the case as an example of a standard type of fiduciary duty breach: an employee's (or former officer or partner's) intentional misappropriation of the employer's confidential information— a form of corporate property — for personal gain. The majority even cited *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969), one of the leading cases in New York on that subject. By focusing on the salary memorandum and rejecting the trial court's other findings, it placed the obligations between partners on the same plane as other fiduciary ties, and rejected any suggestion that those obligations are more strict or extensive.

The dissent, however, would have taken an even less restrictive view of law partner obligations, saying that the bonds of loyalty between such partners must give way before both the economic realities of the marketplace and the duty to ensure clients the counsel of their choice.

The Damages Findings

In any event, having eliminated two of the trial court's three findings of misconduct, the majority remanded for a new finding on the issue of damages. In doing so, the court stressed that while strict requirements of causation and damages are "often loosen[ed]" in breach of fiduciary duty cases, BAM still had to establish that "the only act which [the] court [found] to be disloyal, that of supplying employee information to Chadbourne, in and of itself, was a substantial cause of [BAM's] lost profits." Breed Abbott, 2000 N.Y. App. Div. LEXIS 7754,19 (1st Dept. July 13, 2000).

This proof should not prove much of a challenge for BAM. The First Department found that Gibbs' and Sheehan's dissemination of the April 26 Memorandum had made Chadbourne "privy to information calculated to give it an unfair advantage in recruiting certain employees." Meanwhile, the trial court ruled that the departure of BAM's T&E employees— an event facilitated by the sending of the April 26

memorandum — "effectively crippled the [T&E] department" [*See,* 9/28/98 Slip Op. at 10]. It will thus take no great leap to find that the departing partners' misconduct was a "substantial cause" of BAM's losses.

But the dialogue between the majority and dissent in *Breed Abbott* shows how unsettled this area of the law still is, and how fraught with danger the "revolving door" situation is for departing partners themselves and those who advise them. As Gibbs and Sheehan have already learned, departing partners act at their peril unless they put aside their emotions and their greed in order to deal as fairly as possible with their soon-to-be-former partners.

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