Back to the Future: 2018 and the Protocol for Broker Recruiting

by David Harmon, Esq.,
co-chair of the Executive Compensation and Employee Benefits Group
at the law firm of Norris McLaughlin & Marcus

With the recent withdrawal by Morgan Stanley, UBS and Citigroup from the Protocol for Broker Recruiting, the landscape has certainly been altered, and for many a return to pre-Protocol days. While there are still approximately 1700 member firms, for many financial advisors the protections afforded by the Protocol are no longer available. For others, because their firms have never signed on to the Protocol, it's business as usual. The net effect is yet to be seen as Morgan Stanley first withdrew in November 2017. While the immediate impact may be to slow the movement of financial advisors, historically, those employed by non-Protocol firms have moved during the Protocol years, and many have move cleanly and without litigation. Whether brokers are sued by their prior firm has always been based upon the broker's pre-departure activity and the manner in which the broker communicated with clients (both before and after departure). The goal should be to depart as a "Good Leaver", moving smoothly and avoiding legal action and costs; however, it is the actions of the financial advisor that will play a significant role in whether firms will succeed in enforcing their contract provisions.

Here are things to consider when contemplating a move:

- If you are working for a non-Protocol firm or are moving to a non-Protocol firm, regardless of whether your contract contemplates protection under the Protocol, anything that was permissible under the Protocol is gone.
- Review your contracts and notes! Non-solicitation restrictions contained in employment contracts, bonus agreements and promissory notes require a laser-like focus and analysis. Not all agreements and not all versions of the same agreement are alike. Agreements and notes are continuously updated and revised as the regulatory and litigation environment evolves. Outside counsel experienced in this area should be consulted.
- Use of publicly available information and contact information recreated from memory has historically been acceptable. Some brokers have been successful in not

tripping the wire on non-solicitation provisions by mailing announcements into zip codes announcing their new affiliation. These announcements can resemble holiday cards or wedding announcements. Some have sent announcements to clients whose addresses come from the financial advisor's memory, while others update their LinkedIn pages with their new employment.

- In some instances, being a "Bad Leaver" may result in the issuance of a TRO and the subsequent loss of a job at the new firm, as accounts will not be permitted to move, while the new firm is expecting not only full compliance with the contractual obligations in place with the old firm but transition of the broker's book of business.
- Recent TROs that have been brought against departing brokers by Morgan Stanley, for example, hinge on whether (i) solicitation has occurred in violation of contracts; (ii) the financial advisor is in possession of the firm's proprietary information, (iii) that information is deemed a trade secret, and how the broker has treated that information. Was client and account information downloaded, emailed or printed before the broker resigned? Was company material removed from the branch? Were clients solicited?
- Whether Morgan Stanley or UBS or another non-Protocol firm prevails in a TRO will be entirely dependent on the conduct of the financial advisor both PRIOR and FOLLOWING departure.
- Consider that once the old firm contacts clients of the departing broker, those clients will be on notice that the broker has departed and will more than likely reach out to the broker on his/her personal cell phone. The financial advisor cannot market or solicit the movement of the account during that call. It should be acceptable to state "I left and went to ___"; however, it is the balance of the conversation that may be problematic and provide a basis for courts to enforce the contract restrictions. Keeping a running log with notes from each communication with clients that reach out to the broker will be valuable evidence to help defend any claim that clients were solicited.

- Another issue to consider is whether the financial advisor owes money to the prior firm on any promissory note. Many of the contracts provide that so long as money is owed, the non-solicitation provisions remain in effect.
- Success by a firm seeking a TRO will also depend upon the law the court applies—the contract's governing law or the law of the state where the financial advisor was employed. The more favorable a particular state's law is to employees, the less likely a TRO will issue.
- While this article covers movement within the non-Protocol arena, remember that for transitions from Protocol to Protocol firms, there will always be risks of litigation based on broker failure to comply with the four corners of the Protocol. Regardless, adherence to the terms of employment contracts, bonus agreements and promissory notes, and the Protocol, if applicable, will determine the outcome in each situation.
- Remember, no two situations and no two brokers are alike. Scrutiny of your particular agreements and circumstances, including your conduct, should be a precursor to any contemplated move.

David Harmon can be reached at dtharmon@nmmlaw.com.

This above is for informational purposes only and is not intended to be, nor should it be relied upon as, legal advice or counsel.