

First, Hire the Lawyers

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By Mindy Diamond

A good, independent lawyer can be a financial advisor's greatest partner and advocate before, during and after moving to a new firm. But most advisors take the plunge without one.

Considering the extremely generous transition packages available these days, and the myriad legal snafus an advisor can run into when switching firms, going without a lawyer seems rather penny-wise and pound foolish, as the saying goes.

Many firms offer the use of in-house or retained counsel to represent an incoming recruit. But with an in-house lawyer, the advisor must ask, "Who is the attorney representing—the firm or me?" You're much better off finding your own attorney. In the end, it will be money well spent.

The following are some of the things with which experienced legal counsel can help during the transition process:

REVIEWING YOUR EXISTING CONTRACT

When you joined your current firm, you entered into an agreement that, in all likelihood, contained noncompete, nonsolicitation and nondisclosure provisions. These terms, while often subject to different interpretations depending upon the state in which you live, are binding and govern your conduct while you are employed by your current firm, as well as for a period of time thereafter. Your resignation letter to your manager might very well be met with a temporary restraining order, which would effectively put you out of business for a period of time. It is imperative that you review your contract provisions with an attorney prior to making a move. Otherwise, all the hard work you did to find a new place to land might be for naught.

EXIT STRATEGIES

What can and can't you do in anticipation of changing firms? Many say you can copy the names and addresses of your clients because they are a matter of public record. But what about Social Security or account numbers? Can you contact your clients in anticipation of a move? What can you say to clients?

These questions are especially important if the broker is moving between "protocol" firms, which have

agreed not to sue brokers departing to other participating firms, where there are strict criteria that must be followed. Obtaining advice from your attorney in these areas is critical. Although an in-house attorney for the firm you may be joining can advise you on many matters, often that attorney's interests properly lie with the firm he is representing, not you.

Remember, too, that even without a restrictive covenant in place, all employees have a covenant of good faith and fair dealing toward their existing employers. If this covenant is violated, you could be enjoined from future activities or be liable to your former firm for damages. Like any major trip you plan, make sure your exit is carefully mapped out.

OFFENSIVE STRATEGIES

What if there is a written proscription preventing you from making a move to a new firm? There are some novel strategies that a knowledgeable attorney can offer. One possibility is to "offensively" litigate with your soon-to-be-former firm instead of waiting for them to fire the first shot, according to Liam O'Brien, managing partner with McCormick & O'Brien, a New York-based firm that represents securities industry professionals and brokerage firms.

"Sometimes it makes sense to file suit against the current firm in a friendly forum to have the restrictive covenant limited or declared invalid" says O'Brien. In this way, you would be free to make the move to your new firm without the fear of an injunction hanging over your head. O'Brien advises that many state court judges are reluctant to enforce contractual provisions that will deprive an individual of a fair opportunity to earn a living.

NEGOTIATION OF NEW CONTRACT

When all is said and done, your ultimate goal is to land at your new firm with the best deal in hand. In all probability, your attorney will not be involved in negotiating the "dollars and cents" of your deal, but there are innumerable terms and provisions in your prospective contract that can be effectively dealt with by him. Further, your attorney can give you a "reality check" says O'Brien. "Because we have looked at hundreds of these types of deals and contracts, we can advise a client on what can reasonably be negotiated and included in the agreement." Some of the nonfinancial issues that are regularly negotiated: who will supervise the broker, licensing requirements, future costs, the scope of a new restrictive covenant and payback terms for promissory notes, among other things.

ADVICE ON U5 ISSUES

What is written into your U5 by the firm you are leaving could be the most critical issue you face when switching firms. Your old firm has 30 days in which to file the language that will appear on your U5, and this will be part of your permanent record. Involving your counsel in the review and finalization of this wording is invaluable. O'Brien suggests that when you fax in your resignation, you "politely" indicate that if there are any questions about the letter they should be directed to your attorney and that your attorney would also like the opportunity to review the proposed U5 language. This will accomplish two things: First, it "starts the clock ticking on the 30-day time period." Second, it lets your old firm know that you have an attorney involved in the process and that the employer should proceed with caution.

So, why are so many brokers resistant to hiring their own attorneys? Usually, brokers say it is the cost. But given what brokers are getting paid to transition to a new firm, the potential fee that would go to an attorney for such critical services is probably worth it. Typically, an attorney charges a broker between \$5,000 and \$10,000 to review his employment contract from his old firm, advise on the "do's and don'ts" of switching firms and help negotiate an agreement with the new firm. If litigation ensues, legal fees would, of course, be greater. But when you are making a life-changing career move, it's important to do it right, and only an independent attorney can make sure you've tied up all the loose ends.

About the Author: Mindy Diamond is the President and CEO of Diamond Consultants, a boutique executive search firm specializing exclusively in the placement of investment professionals and managers nationwide, which she founded in 1997. Nationally recognized as an authority on recruiting in the financial services field, Mindy works with the nation's top brokerage firms and banks and consults with, trains, and coaches individuals and small and large groups on state-of-the-art practices, with regard to recruiting top-quality investment professionals. For more information, go to www.diamondrecruiter.com.

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