



7 Protocol Essentials for Breakaway Brokers

Advisors who go beyond protocol are taking a huge, unnecessary risk, attorney Patrick Burns says

By Gil Weinreich, AdvisorOne

Since the adoption of the Protocol for Broker Recruiting, lawsuits over breakaways have been far less common.

In a recent botched breakaway broker attempt, a team of Merrill Lynch advisors who left for Morgan Stanley last month were caught trying to remove boxes containing confidential customer information. Merrill filed a temporary restraining order demanding the Alabama brokers return its trade secrets to its Birmingham, Ala., office. The brokers opposed the motion, but the judge sided with Merrill, apparently impressed with evidence that included video surveillance of the brokers entering the office over the weekend before they resigned from Merrill.

While the case remains under adjudication, the known facts provide a cautionary tale to breakaway brokers who might be tempted to take license with the strictures of the Protocol for Broker Recruiting. Prior to the protocol's 2004 adoption, lawsuits between departing brokers and their former firms were pretty much automatic. But the occurrence of a temporary restraining order (TRO) today, much less one that a court approves, is a sign that something has gone terribly wrong.

"It's not that common that people would be that far away from complying with the protocol," the Beverly Hills-based securities attorney Patrick Burns told AdvisorOne in an interview. "The court found they did in fact do the stuff they were alleged to have done and there was a video camera that saw them come in and out over the weekend. That makes it extremely hard to defend the case," he said.

What's more, Burns (above right) says the Alabama team may well have compromised its relationship not just with Merrill but with Morgan Stanley as well.

Speaking in general terms, and not commenting on the Alabama case, Burns said that "when you get yourself tied up in a TRO proceeding... you've now entangled [the new firm's] legal folks and they're looking at a very large legal bill just to show they've done no wrong.

"The other thing is it now sets poor expectations in terms of the rest of the relationship. It raises concerns that other people will come out with new disclosures regarding client privacy or other matters," Burns adds.

Perhaps worse than merely damaging relations with the new firm, after ruining the relationship with the former firm, is the risk of nullifying financial aspects of the recruitment deal. If that deal contained a promissory note based on bringing over most of the assets managed at the previous firm, but the advisor now brings over just, say, 20% of the assets, the hiring firm will likely not hand over the funds based on the broker's failure to perform as expected, Burns says.

While these cases are rare nowadays, the Alabama case is a reminder that brokers "can't just take whatever [they] want" without fear of consequences. Burns told AdvisorOne there are seven steps that an advisor looking to leave his firm should unwaveringly follow.

Step 1: Get good legal counsel. Burns says some advisors fail to work with someone qualified in this area, though often the trouble arises from a client not following his attorney's advice rather than



the failure of the attorney to understand the Protocol that is at issue. Burns, though based in California, works with brokers from across the country.

Step 2: Take the advice you're given and follow it to a T. "If they're told to do 10 things, make sure they're not selectively following the advice, but do all 10." An

example of this is the Protocol's requirement that resigning brokers provide a list of clients together with account numbers of clients the departing broker intends to solicit. "Some want to give the client list, but not the account numbers," Burns says.

Step 3: Be sure not to solicit any client business before you've made the transition. "The more blatant you are [in violating the Protocol] the more you set yourself up for the firm taking action [on solicitation and other issues]," Burns says.

Step 4: Don't preannounce your plans to non-clients, either. "We've seen cases where [friends or family] call, get patched through and say "Is Joe still there? I thought he was leaving." Burns has seen cases where a broker is fired because a family member—not part of the brokerage industry—doesn't understand how grave the repercussions of that sort of communication would be. Bottom line: "Don't start telling other people in the office, your assistants, family members (other than your spouse); Don't tell your mom, don't tell your uncle," Burns says.

Step 5: Hand over to your former firm any information not allowed by the Protocol. "When people resign, they should make sure they've given back... anything they may have used for work-related purposes—flash drives, client statements, etc. If somebody's accidentally taken stuff, they need to return that ASAP to make sure they're not hit with a violation of the Protocol," which allows brokers to take just basic contact information, Burns says.

Step 6: Pay back any promissory notes from the old firm as quickly as possible. Burns says he's seen cases of pure retaliation, where the firm will file a frivolous TRO based on the Protocol when it is really angry about a broker's breach of contract on a large promissory note. He has also seen brokers who intended not to honor debts to their former firms.

Step 7: Don't defame your former firm. Trashing the old firm could invite another possible retaliatory suit and if the unflattering information is conveyed in writing, the firm may well get wind of it, Burns warns. "One thing [the firms] try to guard very closely is their reputation. It's much better to keep things on a positive note and explain why you went independent and how great the new practice is going to be," Burns says. He adds that clients often know how bad the old firm is "just from opening up the newspaper," so it is unnecessary to be negative.