Protocol for Broker Recruiting: 5 Things to Consider

Insights
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The Protocol for Broker Recruiting makes it easier and less expensive to hire representatives from competitor firms. However, firms need to beware of certain pitfalls which could eliminate the protection of the Protocol and subject the hiring firm and its new representative to costly and time-consuming litigation, injunctions and damages. Below are five things to consider when representatives transition under the protection of the Protocol:

1. **You must comply in good faith with the express terms of the Protocol.** If you fail to do so, a court may decide that you're not entitled to its protection or may enter injunctive relief against you. That is exactly what happened in the recent case of Ameriprise v. Koenig (copy in .pdf format below). In that case, the representative was fired by Ameriprise. The representative then tried to "resign" pursuant to the Protocol and provide Ameriprise with a Protocol compliant list – that is a list containing only client names, addresses, telephone numbers, email addresses and account titles. However, the U.S. District Court for New Jersey found that the Protocol did not allow the representative to keep the considerable data that he had emailed to himself at home before he was fired – information that he was not entitled to take under the Protocol. As a result, the court held that he had taken information beyond that permitted and entered injunctive relief requiring return of the information.
2. **Consider whether you are hiring a team or an individual who is part of a team.** If an individual

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is part of a team or partnership and the entire team is not moving to the new firm, then the terms of the partnership agreement control as to which clients the departing representatives can take information for and solicit. Even if there is a team or partnership agreement, it cannot prevent a representative from taking information for and soliciting those clients that the representative introduced to the team.

3. A more contentious situation can arise when there is no team or partnership agreement and the departing representative has been a producing member of the team or partnership for at least four years. In those circumstances, the departing representative can take information for all of the clients serviced by the team or partnership and solicit those clients to transfer their accounts.
4. **Be aware that the Protocol does not absolve firms and representatives of all of their legal obligations.** The Protocol only protects representatives and their new firms from claims relating to their taking of certain information and solicitation of customers. It does not prevent suits to enforce training cost agreements, promissory notes or for raiding. Therefore, when hiring under the Protocol you still want to consider whether any of these types of agreements are at issue and how they will be addressed. The hiring firm should also consider whether its conduct could expose it to a claim for raiding. Otherwise, you may still be dealing with litigation and possible exposure even if you follow the Protocol.
5. **The Protocol only permits representatives to solicit customers after they resign.** As tempting as it may be to ask customers if they would be willing to transfer while still working for the old firm, the Protocol does not protect this conduct. In fact, it specifically states that firms are free to enforce whatever contractual, statutory or common law restrictions the representative may have had on the ability to solicit customers prior to leaving the firm.
6. **Consider whether a retirement program is involved.** If any of the clients at issue were transferred to the departing representative as a result of a retirement program, then the terms of that agreement will control. Ignoring those agreements can cause the return of an angry retiree and subject you and your new employee to liability.

In short, utilizing the Protocol for Broker Recruitment can be beneficial when transitioning registered representatives from one Protocol signatory firm to another, but careful planning, analysis and consideration is required.

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Ameriprise v. Koenig.pdf (119.29 kb)

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