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Don't take the wrong way out

By Victor L. Hayslip and Benjamin B. Coulter
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Brokers who are considering leaving their firms have a series of choices before them — and the decisions keep stacking up. As we counsel our clients, there is a right way to change employment, and there is a wrong and very expensive way.

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When brokers leave without regard for several key issues, they open themselves, and the firms hiring them, to the possibility of costly litigation, embarrassment, regulatory inquiry and economic turmoil.

Here are a few examples of what can go wrong when brokers leave one firm and go to another, and some lessons for brokers and firms.

We all have war stories, and one of ours involves a broker who left to join a competitor. He notified his former employer (our client) that he wanted to exercise his vested options in the company.

Unfortunately, he hadn't re-viewed his employer's plan before resigning, and learned afterward that he forfeited his \$400,000 in options, which he could have exercised while he was still employed. It was a very expensive lesson that cost him far more than the forgivable loan he obtained for switching firms.

WHEN A BROKER TRIES TO STEAL

Similarly, and perhaps of more concern to firms that hire brokers, is the long list of problems that can arise when a broker tries to abscond with confidential documents.

For example, we represented a firm in a case where a broker left to join another firm. Through forensic analysis of the client's computer and servers, we were able to determine that the departed broker had e-mailed himself a number of confidential documents.

As a result, we were allowed to inspect the broker's personal computer at his home and found a number of embarrassing items, including evidence of extramarital affairs. Needless to say, the broker was mortified — and the case was resolved speedily.

In a nearly identical case, the departing broker's PC contained explicit images of a very personal nature, which, again, expedited resolution of the case.

More commonly, a departing broker may admit to (or be caught) taking a limited amount of confidential material, only to have it proved later, through discovery, that he had taken a large amount of information.

One of our clients hired a broker from another firm, and the broker decided that his future business would benefit from his taking confidential client information from his former employer without telling his new firm. After an injunction was obtained against the broker by his former firm, the firm was able to show that this individual had taken a relatively small amount of confidential information.

However, our client then was granted access to the broker's computer and discovered that he had actually taken a game-changing amount of information, despite his repeated denials of such activity until that point. His new employer promptly terminated him for false representations and he had to seek new employment with a much less impressive track record.

Finally, we represented a firm that lost a broker to a competing firm. Through a forensic study of this broker's computer, we discovered that several other employees at our client firm had been in negotiations with the same competing firm.

Our client was able to take action to minimize departures and loss of clients.

All these examples point to key lessons for departing brokers and the firms that hire them.

AVOIDING BAD TIMING

From the perspective of the departing broker, it is always important to check compensation packages, loan agreements and other financial documents to avoid a costly mistake related to timing. They should consult a qualified lawyer regarding the departure.

Brokers should avoid the temptation to take confidential materials to a new firm. If the old firm determines that confidential information was taken, the door is open to invasive, potentially damaging and embarrassing follow-up research, not to mention job loss or regulatory investigations.

Finally, departing brokers should understand what support their new firms will offer during litigation — or threats of litigation — before making a move.

From a firm's perspective, immediately determining what the departed broker has taken is crucial to deciding what to do next. Firms should analyze a former employee's work space and computer to determine whether there is evidence that the departed broker stole confidential information, whether via e-mail to himself or download.

If the investigation proves positive, the firm may pursue greater discovery aggressively, increasing chances for success.

In either case, firms and brokers should handle departures with care. There is a right way to change employment, and smart firms and brokers can put themselves ahead of the pack by considering some of the common mistakes made in these situations.

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