2006

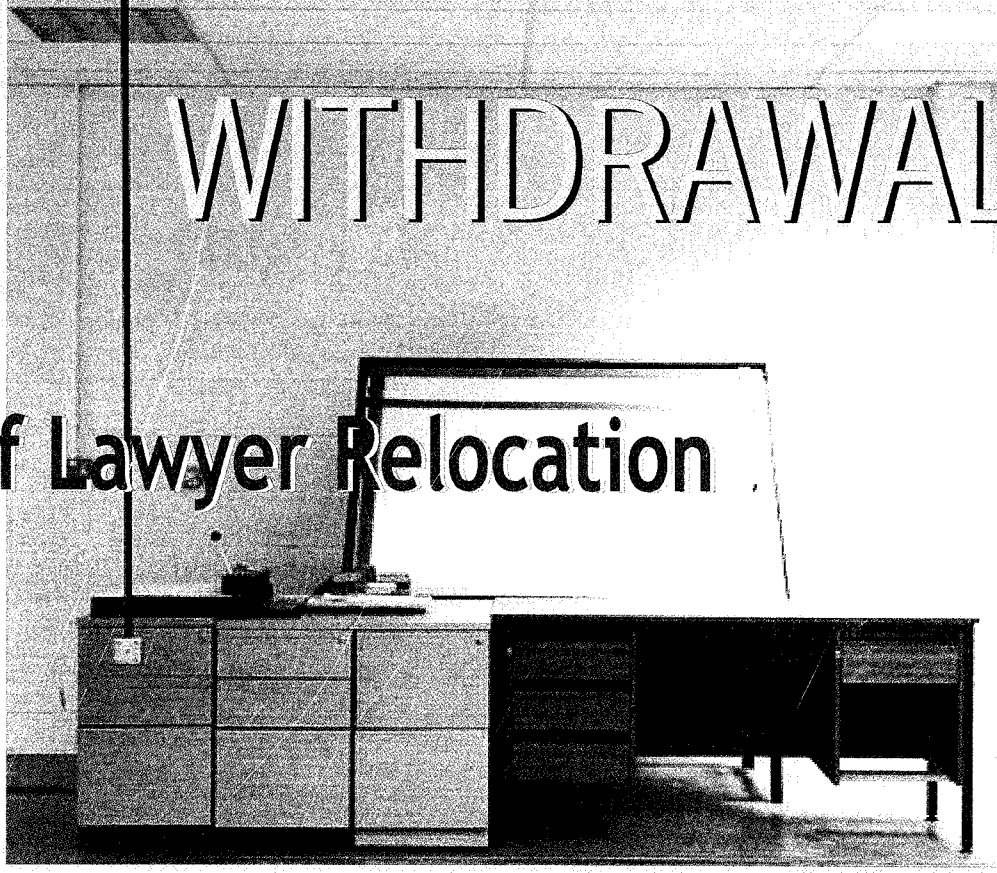
Coordinated Withdrawal: A Peril of Lawyer Relocation Feature

Fredrick E. Vars
University of Alabama - School of Law, fvars@law.ua.edu

By Fredrick E. Vars

COORDINATED WITHDRAWAL

A Peril of Lawyer Relocation



You are preparing to leave your law firm, but you would rather not go alone. With whom at the firm can you suggest the possibilitiy of a coordinated departure? When can you have such discussions?

THESE QUESTIONS IMPLICATE A FUNDAMENTAL tension faced by the withdrawing lawyers—the tension between the lawyers' duties to other members of the firm and his duties to his clients. There are several sources of relevant principles to turn to in examining these questions—and that tension. Common law principles of tortious interference, agency, and partnership hold sway. Fiduciary duties of agents and partners are central. The state partnership statute and any partnership or limited liability company agreement are also relevant. Ethics opinions and rules may be applicable as well. This article reviews the relevant case law, with an emphasis on claims of breach of fiduciary duty.

When to Recruit Within the Firm

A leading case on the issue of when a lawyer contemplating withdrawal from a firm can recruit internally is *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578 (N.Y. App. Div. 2000). In that case, one partner, Gibbs, became dissatisfied with his firm. Gibbs approached the only other active partner in the same department, Sheehan, to persuade him (successfully) to move with him. The five-judge panel unanimously reversed the trial court's finding that "Gibbs breached any duty to the firm by discussing with Sheehan a joint move to another firm." However, the majority opinion stated that "[p]re-withdrawal recruitment of firm employees is generally allowed only after the firm has been given notice of the lawyer's intention to withdraw." The majority held that the pre-notice compilation and sharing with prospective law firms of a list of department employees whom Gibbs and Sheehan wanted their new firm to recruit, which included "confidential" compensation figures, was a breach of fiduciary duty and remanded for a finding on damages.

Two judges dissented on the issue of employee recruitment:

> Once it is recognized that partners in law firms do not breach their duty to the other members of their firm by speaking to colleagues about leaving the firm, there is no logic to prohibiting partners from inviting selected employees to apply for a position at the new firm as well, absent contractual obligations not at issue here. Support staff, like clients, are not the exclusive property of a firm with which they are affiliated.

Moreover, the paramount concern of ensuring that clients are completely free to choose which firm will best serve them can be protected only if lawyers are able to take with them those willing members of their legal team who have played an active and important role in the clients' work. If departing partners are not free to solicit the employees who have served their clients, those partners may not be able to continue to offer the unhampered capability to serve those clients.

Even accepting a duty not to engage in pre-notice recruitment, however, the dissent found no evidence of any such recruitment. Finally, the dissent found that the compensation figures should not have been treated as a "trade secret" or "confidential matter."

A Leap of Faith

A planned departure may hinge on whether other key lawyers and employees will join. To require a departing lawyer to give notice before having put together a team capable of serving clients would require both the lawyer and the clients to take a leap of faith. Notice should be given well in advance of the planned withdrawal, which will provide the law firm with an adequate opportunity to convince lawyers and employees to stay. Early notice can in theory put the departing lawyer and the law firm on more equal footing in the competition for lawyers and employees, but the law firm may be able to unfairly "punish" the departing lawyer by forcing an immediate termination. An extended notice period can also adversely affect client interests by requiring the client to accept services from the lawyer of choice, where that lawyer is required to work at a firm that the lawyer wishes to leave.

It is important to emphasize two points on which all of the judges in *Gibbs* agreed. First, persuading a fellow partner in the same department to take part in a coordinated withdrawal is not a breach of fiduciary duty. Second, pre-withdrawal recruitment of lawyers and employees is sometimes allowed.

The second point is confirmed by *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992), in which the court held unenforceable a provision in a contract that created a financial disincentive against a departing shareholder of a law firm "solicit[ing] other professional and/or paraprofessional employees of the [firm] to engage in the practice of law with the departed Member." This provision, the court held, violated the rule of professional conduct prohibiting all agreements that "restrict the rights of a lawyer to practice...." The court reasoned: "The 'practice of law' consists not only of lawyers' interactions with their clients, but also includes their interactions with colleagues."

It is unclear from the opinion whether the solicitation at issue occurred before or after the departing lawyers announced their intention to leave. The opinion says only that the departing lawyers, two partners and one associate, took with them a number of associates and a paralegal. Apparently, the plaintiffs in the case did not allege a breach of fiduciary duty claim. Still, if public policy (as embodied in the rules of professional conduct) renders void an "anti-raiding" contractual provision, then it would seem to also trump any common law fiduciary duty.

Further confirmation that pre-withdrawal—indeed, pre-notice—recruitment can be permissible is provided by *Appleton v. Bondurant & Appleton, P.C.*, No. 04-1106, 2005 WL 3579087 (Va. Cir. Ct. July 5, 2005). There, a departing lawyer discussed starting a new firm with his secretary and the firm's investigator before giving the firm notice of his intended withdrawal. The two employees in fact joined him, and the old firm leveled claims of breach of fiduciary duty and tortious interference. After a bench trial, the court explained that the dispositive question for both claims was whether the departing lawyer's conduct constituted a breach of the fiduciary duty of loyalty. The court found no such breach because the discussions took place after hours and away from the law firm's offices. This seems a rather arbitrary basis for the holding and demonstrates that, on the case-specific analysis required, courts may be sensitive to the circumstances surrounding pre-notice coordination, as well as the substance of that coordination.

...the paramount concern of ensuring that clients are completely free to choose which firm will best serve them can be protected only if lawyers are able to take with them those willing members of their legal team who have played an active and important role in the clients' work.

With Whom Can the Lawyer Discuss Departure?

The first point of consensus from *Gibbs*—that recruiting a close colleague is fair game—is confirmed by case law in a context beyond the law firm:

> Briefly stated, an employee may discuss job offers with his circle of friends and the group may debate whether to leave together. Such discussions are a normal part of workplace intercourse. A breach of loyalty may occur, however, when an about-to-leave employee targets employees outside his normal circle and uses his position to induce them to defect.

Quality Sys., Inc. v. Warman, 132 F. Supp. 2d 349, 354 (D. Md. 2001).

But friendship plainly does not define the outer boundary of permissible contacts in the law firm context. Lawyers must be free to recruit other lawyers and employees working together on the same active matters. Otherwise, dividing the team would likely hurt client interests. In *Lampert, Hausler & Rodman v. Gallant*, No. 031977BLS, 2005 WL 1009522, at *7-8 (Mass. Super. Apr. 4, 2005), for example, the court rejected a breach of fiduciary duty claim based on a partner's coordinated activity with an associate in planning and preparing for a move. The two lawyers "worked closely together" in the same practice area.

A slightly more expansive view is to include within the scope of permissible recruitment all lawyers and employees who have worked for a departing lawyer's clients, even if not currently doing such work. This view is consistent with the analysis of the dissenting judges in *Gibbs*: "If departing partners are not free to solicit the employees who have served their clients, those partners may not be able to continue to offer the unhampered capability to serve those clients." 710 N.Y.S.2d at 589.

The broadest view is that lawyers are free to solicit all other lawyers and employees of the firm from which they are departing. That view is expressed by the *Restatement (Third) of the Law Governing Lawyers* (2001):

> With respect to other firm lawyers and employees, [lawyers] may plan

mutual or serial departures from their law firm with such persons, so long as the lawyers and personnel do nothing prohibited to either of them (including impermissibly soliciting clients, as above) and so long as they do not misuse firm resources (such as copying files or client lists without permission or unlawfully removing firm property from its premises) or take other action detrimental to the interests of the firm or of clients, aside from whatever detriment may befall the firm due to their departure.

The broad view contained in the *Restatement* anticipates and approves pre-notice recruitment and coordination. *Appleton* also supports the view that the identity of the individual solicited does not matter. In the case, the court grounded its holding solely on the timing and location of discussions without mentioning whether the solicited individuals worked for the same clients as the departing lawyer. (One of the two individuals, however, was the secretary of the departing lawyer, so coinciding client work can be inferred.)

A few additional points are worth noting. In many cases, a law firm will be happy to see some of its lawyers and employees depart if the withdrawing lawyer is taking their source of work with him. See, *e.g.*, *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1264 n.14 (Mass. 1989) (declining to consider claim of improper recruitment since claimant identified no specific loss resulting from this alleged breach). And a lawyer or employee approached by a departing lawyer may have a duty to tell the firm about the intended departure and solicitation.

Seek Independent Advice for Uncharted Waters

This article leads to several conclusions that lawyers in Illinois should consider if contemplating a move, despite a lack of Illinois law on point with respect to this issue. First, recruiting firm lawyers and employees after giving notice of withdrawal is basically unrestricted, with the exception of using trade secrets, confidential information, or other unfair tactics. Second, before giving notice, convincing a close colleague to withdraw simultaneously is not a breach of fiduciary duty. Other types of recruitment run the risk of generating fiduciary or other liability. Safest is recruitment of individuals actively working for the withdrawing lawyer's clients, but this is a largely uncharted area of the law. Soliciting lawyers and employees who have not done work for the departing lawyer's clients does not directly implicate client service concerns and therefore should arguably be undertaken only after the departing lawyer gives notice to the firm. Because there is so much uncertainty in this area and so many different sources of ethical and legal rules, a lawyer considering inviting others along on a lateral move would be well-advised to seek independent legal advice. ■

Fredrick E. Vars is an associate at Miller Shakman & Beem LLP. His practice includes all aspects of civil litigation, with an emphasis on legal malpractice.