Restrictive Covenants and Moving on as a Partner

If you are in a position where a move as a partner is something that you are considering, then in order to assess your ability to move with a client following (and potentially a team), the timeline and ease with which you are able facilitate this, you will need to understand your restrictive covenants and their enforceability. Partners are sometimes taken aback to find that their covenants actually have a fighting chance of being enforced, despite on first appearance seeming overly harsh. Whilst they should be of concern and you should bear them in mind, do consider that in practice an agreement can be reached in most cases. But there are a few things you will need to do/contemplate in order to place yourself in the best position from which to negotiate.

1. Read the Deed

The first thing you will need to do is to re-familiarise yourself with your partnership deed or LLP agreement. The following "checklist" will always be applicable to equity partners, and whether or not it is applicable to salaried or to fixed share partners will depend on whether their contractual terms would have them construed as *more* than mere employees with the badge of partner; for example, those who take part in partnership decisions, make capital contributions, and/or take a share of profits.

The law treats partners and employees in this respect completely differently; the latter are deemed to have inherently weaker bargaining power and not to benefit from a stake in the goodwill of the firm. Whilst covenants are of course applicable to employees, they are certainly far more likely to be binding (and more onerous) on partners, so check where you stand.

What do clauses dealing with garden leave state? What are the provisions relating to the solicitation and canvassing of firm clients, or conducting business with firm clients? What are the provisions relating to the solicitation of other partners or assistants?

Considering the way the deed addresses all of these points will hopefully place in you a position to understand, at least in theory, how your firm deals with partner exits. Forewarned is forearmed.

2. Look at precedents

Have regard to previous departures. Of course, how you are treated will very much be dependent on what (and indeed who) you are seeking to take with you, but there will be a clue in how your current firm has handled exiting partners in the past: has this behaviour caused the restrictive covenant and notice obligations in the deed to be altered by conduct? Or, has there previously been a particularly vicious application of the terms of your firm's deed or agreement? Past conduct will give you a very good idea as to what lengths your current firm is prepared to go to limit competitive damage and what course your negotiations will take.

3. Check the drafting

You would be surprised how many firms (even some larger and very successful ones) have poorly drafted provisions in relation to non-solicitation, non-acting, non-poaching, non-compete, and garden leave, or remain silent on some or all of these, instead choosing to rely upon a notice period and a "duty of good faith" to the partnership. So, as well as reading the deed, you should also have regard to the way in which the document is drafted; are there vulnerabilities and holes or is it tightly drafted? A carefully drafted deed is generally a reflection of the way a firm will approach exit negotiations (including client portability, garden leave, and team moves) and in some senses, will make the outcome more predictable and easier to plan for.

4. Plan. Plan. Plan.

Plan your communication carefully. It is generally the case that if you have received an offer to move as a lateral, you will have presented a detailed business plan, much of which related to your client base and the likelihood of that client base instructing you in your new "home". It will be very likely that you will have already had some oblique (and in some cases not so oblique) conversations with key clients who may have represented to you that they wish to continue instructing you. You will need to think very carefully about how and to what extent this message is communicated because you may have in theory already breached your agreement. Think also about how and when you will give notice and how you would like this communicated internally. You should be planning these conversations because there will be a number of things that need to be made clear in the early stages of your exit negotiations. You will also need to consider who it is that is likely to be making the decisions on your exit. It may be that you need to alter your approach to suit their style. Well planned communication will make your discussions more productive and ultimately lead to a faster resolution.

5. Record your meetings. Keep track of email correspondence.

In some cases, exits will become contentious. Don't underestimate how time consuming and stressful this can be; sometimes in the mire of negotiations, discussions, emails, and meetings record keeping can slip (yes, this is a point that even needs to be made to lawyers, especially when it is their personal situation and not client work we are discussing). Take care in the wording of emails and keep contemporaneous notes of all meetings, no matter how informal. This is particularly relevant if you are instructed by your current firm to speak to clients or tell your team you are leaving. If you are given these instructions verbally by a representive of your firm, then confirm via email before taking any action as these could be deemed breaches of your covenants. Also, do remember that once you have left the building you will not have access to your emails so any retrospective information gathering will not be possible!

Perhaps a note here on joining your new firm; do consider very carefully any new restrictions you are about to take on and sign up to. A bit like a pre-nup, you don't want to go into a marriage thinking it is going to fail, but sometimes it helps to put in place a framework in case things don't

work out and you realise it is not the match made in heaven you thought it would be. Consider negotiating a clause within your agreement that effectively ring-fences clients to exempt them from covenants, keeping them from being regarded as “firm clients” should you elect to move again.

We should also make an observation at this point on panel relationships and the continued institutionalisation of clients; it is unusual for a partner to have a solely self-standing book of business, and we have for some time observed the effect of the increasingly panelised and institutional nature of significant client relationships. The more institutionalised the client base, the more law firms move toward the model of partners taking something akin to an “account manager” role. This shift in the shape of the market and in the business of law firms can have an impact on your ease of movement.

In some disciplines, such as banking, insurance and construction, law firm panels tend to be pretty tightly run, but do have regard to the sheer size of some of these; if the firm you are joining has the benefit of being on your client’s panel, even if it is not necessarily instructed to the same level or even for the same type of work, you will find a mutual panel spot helpful in arguing for non-enforcement of your covenants *and* your faster release. It is also significant to have an appreciation of any relevant client’s ability to instruct “off panel” – this is an important factor and something you will need to explore. Keep in mind - it is rarely the case that there is not some kind of agreement that can be reached on such matters.

Indeed, we have heard of deals being struck that perfectly illustrate the point that in these strained times, revenue (and the maintaining of it) is a priority that is jockeying for position with client wishes, shaping some interesting negotiation outcomes! For example, we know of one departing partner who was able to negotiate a substantially reduced garden leave by making an interesting arrangement with his previous firm; the firm allowed him to continue acting for his client and bill them at his new firm, and in return the associates at his previous firm actually undertook the work for a period of time. This arrangement, and the formula they agreed, meant that, although his new shop benefitted from the client relationship, for a time his old firm enjoyed the benefit of the bulk of the profit.

A final point in relation to team moves - no firm is going to be overjoyed with a partner potentially excising its entire ability to service a particular type of work, or client or the cross-selling opportunities and profile that depart with him/her. It can be difficult to judge when to raise a potential move with your team and indeed how you should do that. A good recruiter can assist you at this point and there are a number of tools that can be used to help ease a sticky situation in this regard. **Click here for more information about team moves.**

It remains the case that in the vast majority of exits, most situations are resolved amicably with a good dollop of pragmatism and commercial realism. Even with increasing efforts to wrench back or maintain the client relationships of departing partners, most firms will be able to come to a sensible

compromise with regard to both clients and garden leave; after all, who wants disaffected clients at the price of strict and unbending enforcement of covenants?

Ultimately, a client's wishes will, on balance, continue to trump those of law firms, and it would be brave or foolhardy of a law firm to go against a current client's wishes.

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