

# A Matter of Protocol -- Rules for Departing Brokers Trying to Solicit Former Clients

November 4, 2016 – Dorsey Work Watch

---

**Question:** We operate a financial services firm that employs account executives who execute investment trades on behalf of clients. One of our brokers recently resigned to move to a competitor firm. With his resignation letter, he included a list of clients he plans to solicit at his new firm. This list includes clients with whom the broker may have had some association, but it's not clear he ever executed commission-generating trades for them. The broker signed a non-solicitation agreement with us when he started. Can we stop him from soliciting these clients at the new firm?

**Answer:**

*By Dorsey & Whitney*

Enforcement of restrictive covenants like non-compete, non-solicit, and non-disclosure agreements is highly dependent upon the industry in which the covenant is sought to be enforced. Nowhere is that more true than in the financial services industry. As a result of an agreement initially signed a dozen years ago by a handful of the largest financial firms and now having over 1,000 firm signatories, there exists an established methodology for a financial advisor or broker to depart a firm which, if followed, protects the broker and the new firm from litigation over the departure while protecting client privacy. The methodology is found in the [Protocol for Broker Recruiting](#), which applies only to broker moves between Protocol signatories. (The Protocol applies to “registered representatives” – we’ll use the shorthand “broker” here.) Frequently, however, brokers and firms either mistakenly or deliberately disregard the Protocol, so financial firms must remain vigilant in protecting their valuable confidential information, client relationships, and goodwill. Thus, the first necessary piece of information to answer your question is whether you and the competitor are Protocol signatories.

The Protocol itself is rather simple. A broker transitioning between signatory firms may take **only** the following information: “client name, address, phone number, email address, and account title of the clients that they serviced while at the firm.” The broker

## Related Capabilities

- Labor & Employment

is prohibited from taking any other information or documents. To gain protection under the Protocol, the broker must resign in writing, deliver the resignation to local branch management, and include with the resignation letter a copy of the client information that will be taken, including account numbers. The broker's compliance with the Protocol need not be perfect – s/he need only exercise “good faith” and “substantially comply” with the requirements.

The Protocol also places obligations upon the broker after leaving the prior firm, and upon the new firm. The information taken by the broker may be used **only** for solicitation of the former clients by the broker, and **only** after the broker has actually joined the firm. In other words, the broker may not start soliciting clients to move to the new firm while the broker is still engaged with the old firm (but planning to move), nor may client information be shared at the new firm for solicitation by other brokers. The Protocol also contains requirements regarding the movement of broker teams or partnerships and governing trailing commissions.

Many brokers have executed agreements with firms containing terms prohibiting solicitation of customers or retention of customer lists. So long as the old and new firms are signatories to the Protocol and the broker substantially complies in good faith with its terms, the Protocol protects the broker from liability to the old firm for retaining the information identified in the Protocol or soliciting clients on behalf of the new firm. But if a broker or new firm violates the Protocol, the former firm may be in a good position to file suit and seek immediate injunctive relief barring the broker and the new firm from irreparably damaging the former firm's business.

There are several points to consider when analyzing potential legal action when the Protocol is at play.

**First**, not all firms are Protocol members. Over 1,000 firms have joined the pact, including almost all of the major financial services companies, but many smaller brokerages are not. And those smaller brokerages frequently seek to poach successful brokers from more established signatory firms. If the new firm is not a Protocol signatory, then a broker taking client information, even under the Protocol's methodology, could violate the broker's non-compete or non-solicitation obligations and subject the broker and the new firm to liability. Firms should beware of the situation of a broker claiming she acted in “good faith” because she thought the new firm was a Protocol signatory. If the new firm misled the broker into that mistaken belief, liability may lie against the new firm for claims like tortious interference with contract or misappropriation of trade secrets.

**Second**, only “good faith” compliance with the Protocol provides protection. There continue to be examples when brokers purport to comply while secretly violating the Protocol, often by stealing confidential client or firm information beyond the information disclosed with the broker's resignation letter (e.g., detailed client account history). This theft can occur in any number of ways – emailing a personal email account, copying information to thumb drives, or simply walking out the door with confidential hard copy documents. Firms should establish best practices for when brokers depart, including

review of the broker's email activity in the months preceding the resignation. If the firm suspects wrongdoing, further investigation may be warranted, such as forensically examining the broker's computer for electronic evidence of wrongdoing, reviewing office copy machine electronic records, or even watching building surveillance tapes.

**Third**, and more specifically to your question, client information that permissibly may be taken covers only clients that were actually serviced by the broker at the former firm. This issue recently was litigated before a Connecticut federal court in *Westport Resources Management v. DeLaura* ([June 23, 2016](#)), with the broker arguing that client "service" included any efforts the firm made on behalf of the clients. In that case, the broker was employed by two related entities, and when he resigned both to move to a new firm, he included with his resignation letter clients of one entity even though the services he provided were through the other entity. The former entity sued under the broker's non-solicit agreement. The court held that "services" under the Protocol meant "what clients pay registered representatives to do on their behalf" – in other words, something for which the broker normally would receive a commission. The court held that because the broker had not received any commissions from the entity with which the clients were associated, they were not clients that the broker serviced at that entity. Applied to your question, you may have a claim against your former broker since it sounds like he never performed work for certain clients he included with his resignation letter.

**Fourth**, solicitation of former clients is permissible only after the broker has joined the new firm. Brokers are often tempted to start priming the pump before they depart, either secretly or overtly (and increasingly through social media) telling clients of their plans to move firms and inviting the clients to follow. This sort of pre-move solicitation is explicitly prohibited under the Protocol, is typically forbidden under non-solicitation agreements, and should be investigated by firms in the same manner described above.

**Fifth**, the Protocol does not immunize corporate raiding, i.e., one firm targeting another firm to steal a group of employees. Raiding claims can be challenging to prove, and often rely on some evidence that the new firm used the former firm's confidential information or trade secrets to aid in its improper recruitment, or that the new firm has undertaken a deliberate pattern of soliciting a competitor's key employees with the purpose of damaging the competitor's ability to compete. Firms may therefore have reason to be concerned when several brokers move to another firm, even when the competitor is a Protocol signatory.

**Finally**, whether the Protocol is implicated or not, firms must be mindful that legal claims will be governed by applicable state or federal laws. States take a variety of approaches to enforcement of non-compete, non-solicit, and non-disclosure agreements, and both state and federal law may apply to a trade secret misappropriation claim. In addition, agreements frequently contain clauses dictating where litigation may occur and what law applies. These issues should be fully investigated before a firm decides whether to bring suit against a former broker or competitor firm.