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Whose Client Is It? Morgan Stanley Argues Both Sides, Former Broker Claims

January 31, 2018
by Mason Braswell

A former Morgan Stanley broker has asked a judge to deny the firm's bid to block him from calling his former clients, saying that the firm had "for years condoned and encouraged that very same conduct," according to a filing in U.S. District Court in Jacksonville, Fla.

Daniel J. Abel argued as part of a 21-page filing on Tuesday that he is entitled to contact his former clients because he had brought many of them to Morgan Stanley with him under the Broker Protocol when he joined from Merrill Lynch in 2014.

Abel, who left Morgan Stanley on Jan. 12 to form an independent advisory firm, also argues that his former employer's claims that he is using the firm's confidential information in contacting some former clients is hypocritical given that it argued in defense of a broker who joined the firm in November that client information such as names and telephone numbers were not trade secrets.

"Fundamentally, Plaintiff is not entitled to injunctive relief because, despite its hand-wringing over Mr. Abel's alleged conduct, it has for years condoned and encouraged that very same conduct," Abel's lawyer, Ronald P. Angerer, wrote in opposing Morgan Stanley's request for an injunction and the court's granting of a temporary restraining order. "Plaintiff hasn't been harmed in any legally cognizable way by Mr. Abel's conduct."

A spokeswoman for Morgan Stanley, which has pursued at least six brokers with restraining order attempts since withdrawing from the Protocol in November, said she could not immediately comment on Abel's response. Morgan Stanley has succeeded in obtaining four orders temporarily prohibiting former brokers from calling clients, lost one attempt and has a sixth outstanding.

In the Abel case, U.S. District Judge Marcia Morales Howard wrote an opinion last week supporting her granting of the temporary order even before Abel had a chance to reply. The explained decision was an unusual action that some lawyers said could help Morgan Stanley and other nonprotocol firms in later cases.

The judge did not rule on Morgan Stanley's request for an injunction that would extend the two-week TRO.

Abel's new court filing questions some facts of Morgan Stanley's argument.

The firm's broad allegations that he was exploiting its "trade secrets" in taking client information is belied by the fact that its complaint cites just two clients who were solicited—Abel's uncle and a couple who "have trusted Mr. Abel since his time with Merrill Lynch," according to his response.

The broker included the couple's names on his "protocol list" when he joined from Merrill Lynch in 2014 at Morgan Stanley's encouragement, his filing says.

Abel and his lawyer also raised jurisdictional arguments, asserting that Morgan Stanley's claim of breaching an employment contract and a joint production agreement should be considered under New York law, Morgan Stanley's headquarters city.

"New York adheres to a public policy in favor of free competition," the filing from the Ponte Vedra, Florida-based broker's filing argues.

Since Morgan Stanley's exit from the Protocol, lawyers and headhunters have been arguing that advisors can move without fear of legal barriers if they are careful about meeting terms of their employment contracts, can prove that names they call are publicly available or re-created from memory and have the right fact patterns. At least one big producer left Morgan Stanley last week for J.P. Morgan Securities without to date having attracted a lawsuit, a fact that some lawyers believe reflect promissory note-payoff "carveouts" from the firm's standard contracts that he may have negotiated.

Without such unusual agreements, more brokers are likely to bring so-called "unclean hands" arguments, such as those made in the Agel case, said Thomas B. Lewis, a lawyer in Princeton, N.J., who frequently represents brokers in employment disputes.

"This is a perfect example," Lewis said of Abel's response paper. "This financial advisor was hired a couple years ago and all of a sudden he wants to leave and Morgan Stanley is of the opinion that if you leave you're subject to a one-year non-solicit."

—Jed Horowitz contributed to this article.

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