

Interview with Gavin McElroy

Dennis Troyanos : Welcome to this edition of Game Changers Live. This is your host Dennis Troyanos. Today I'm delighted to be here with Gavin McElroy. Gavin is a Partner at Frankfurt Kurnit Klein & Selz, a leading Media, Entertainment and Advertising law firm based in New York. Gavin is the Chair of the firm's M&A practice and Chair of the firm's Executive Compensation and Employment Practice. During his tenure at the firm Gavin has worked on well over 100 M&A deals in the marketing services, advertising, PR and digital agency world. In addition Gavin works on approximately 100 executive employment deals per year. Gavin has been at the firm since 1987. Gavin, welcome to Game Changers Live.

Gavin McElroy: Thanks Dennis, glad to be here.

DT: Gavin, you're one of the preeminent executive compensation attorneys in the country if not the world, and what I'd like to do is start the conversation by asking you what level of executive would most benefit from the services of someone like you?

GM: Dennis my practice covers a wide spectrum. While I have represented a handful of CEO's of companies and a couple of CEO's of public companies I often go down to the level of someone getting their first serious job offer or receiving an agreement which contains restrictive covenants that have some concern to them. It's a practice that covers a variety of areas and issues and it's as much as helping people understand the offer they're being made on an economic level, on a business level as well as the actual documentation for the deal.

DT: What are [the executives] trying to achieve when they go through the process with you? What do they want the end result to look like?

GM: Well, they're hoping to roll out a new position or they wouldn't be coming to me which happens in the vast majority of the situations. But I always want them to understand what's going on. Particularly many of my clients are creative executives and less experienced in thinking about things from financial long term goals and looking at not only what the new offer is but what their current position is and perhaps using their current position to better negotiate the new offer.

DT: So you're really functioning as both a legal counsel as well as helping them put an offer of employment into a broader perspective.

GM: Well, obviously I'm a lawyer and that's what I do for a living but I help people think about their job offer and what it means and where they're going. And particularly what it means as compared to what they have. Because it is not that unusual for certain executives, especially those that are less business savvy, to not really understand even what their current deal is and what long term benefits they may already have.

DT: So that leads me to this question: How do you aggressively protect an executive's legal interest without blowing up the deal in certain cases? There's a risk there for sure.

GM: There's always a risk if someone offers you a contract and you make any suggestion. However you have to think about it in a lot of different ways. One of which is; Does a company really want to hire an executive to a mid-level to senior position who wouldn't even think about asking for other things and negotiating the deal perhaps to the better? One of the things I try to do when an executive comes to me is to start with the question – *why do you want the job?*

At times the executive will look at me kind of awestruck and say why would you ask such a question? But the reason is it helps you think about what the most important issues are. Does someone want the job because they don't have a job? Does someone want the job because they want to break into a new industry? Does someone want the job because they want to break into a new sector of the industry? They're in advertising but they want to get involved in digital advertising. Are they taking the job because it's more of a long term equity play? Are they taking the job because of their age and they think this is their last landing spot and they're looking for more security? So one of the things that I think is important is to understand why the job is attractive and what is attractive about it so to think about where one may push or where one may push harder.

DT: You brought up the issue of "equity". In our recruitment practice we see senior people asking us more and more about equity involvement. Are you seeing more offers that include equity today as opposed to 3 or 5 years ago?

GM: To some degree I think I might actually be seeing less. I have done literally hundreds of deals involving executives and equity and have a certain amount of expertise dealing with the tax consequences and the business consequences and how to think about it. But as the economy has started to improve I think more companies actually have cash, have profits and are paying people closer to market salary. Probably 4 or 5 years ago there were mass layoffs in the media world, many of those executives started their own companies and then would hire friends and colleagues from similar backgrounds who had lost their positions and these were people who would often be taking positions at half or less than the compensation they would be making elsewhere; in which case you really need to think about how you are an investor in the company as opposed to a deal where you're really making more or less market salary and thinking about the equity as a sweetener which may or may not come in.

DT: That's an interesting point of view. In terms of the more traditional companies - the large holding companies, the large client side organizations – why would an employer want to engage in a legal contract with an employee?

GM: As a general rule the contract favors the employee.

DT: The employee?

GM: The employee. Certainly restrictive covenants, non-solicitations, certain non-compete type provisions would benefit the employer but can often be included in a more of a standard confidentiality non-solicitation without going to long form employment agreement. The two main reasons why an employer would use an employee agreement is that they realize that they're not going to get an executive of a certain level without it – without a written promise of something whether it's a 20 page

employment agreement or a 2 – 3 page offer letter generally doesn't matter to the extent it's signed and contains the material terms it may well be an enforceable contract. The other reason that an employer might want one is if it is a fixed term agreement or an agreement where the executive needs to give some significant notice to resign. That can be a benefit to the company as far as stability of the workforce and knowing somebody will be there and it can also act as an impediment to an executive thinking about leaving if they have to give six months' notice. Quite honestly, six months may be too far out for the new employer to think about holding the job open, they may ultimately need to fill the position with an alternative candidate

DT: When you look at the balance in your practice how does it break out? Is it primarily agency, client side, consulting firms, PR firms – what does the basket look like?

GM: I do about 100 deals a year. Probably 75-80% of them are representing executives but I also do the other 25% representing companies who are in the agency world, production world, the post-production world or related IP businesses. When working with the executives I represent a lot of creatives, a lot of people who are executives at the agencies, at the holding companies, at the media buying companies. Often creative people who may switch over and move over into more mainstream corporate America and going to work for companies like PepsiCo and Microsoft and Apple and more Fortune 500 companies.

DT: Is there a significant difference between working with a creative to negotiate an employment agreement versus an account management person?

GM: I think there is, I think often times the creative person is less business savvy because they're a right brain person rather than a left brain person. As a result perhaps the creatives need a bit more of an understanding of the financial aspects of the deal. And then there's the question about the role the attorney plays; whether the attorney advises the client as to things to ask for or think about or whether the attorney negotiates himself. And again the business side person might be more likely to take on the negotiations or at least the discussions themselves.

DT: In terms of your skill sets, if we were sitting here with a newly minted attorney who's coming into this practice and we were talking about the skill sets that have made you successful in these complex and delicate negotiations, what would your advice be to this person? What are the three or four things that they should work on? Or better yet, what would make them naturally a good practitioner in this field?

GM: So, it's a hard question Dennis. I think that the answer is that it is legal and that is the basis of what we do. But it's a combination of people skills, both with your client and with your adversary, because as you say you don't want to blow the deal. You want to ask for things in a respectful manner or perhaps in a strong manner. And you want to understand the business and economics of it, having some background in that can be helpful. It's sort of an odd combination of law, sprinkled in with business and psychology as to helping people understand things and get to the best place they can.

DT: Do you also represent the client, in other words a situation where the client is asking you to engage with another attorney representing the executive?

GM: Absolutely. 20-25% of the time on the deals I do I will structure and draft the deal and then you will get comments from an attorney or an accountant or a business manager. My hope is that that person is someone who works in the industry. I find my biggest impediment is somebody having a lawyer or other representative who is not industry savvy because the comments they make are often the wrong comments and comments which are never going to be changed. I would have in the marketing service industry a pretty standard post term restriction that says for some period six months or a year, a year and a half maybe up to two years you won't solicit or service clients and you won't hire employees. And I have had scores of attorneys tell me this is a crazy provision; my client will never be able to get another job in the industry. And I would say that everybody who works in the industry at any reputable agency has signed a similar restriction so your client is going to have to do the same. So perhaps people are making the wrong points and I'm actually happy if the attorney on the other side knows the industry and what's going on. It makes an easier negotiation.

DT: Makes absolute sense. I want to ask you a little bit about severance. Many of our candidates ask us about severance. Are you seeing more companies today offering severance vs. say 3-5 years ago or about the same?

GM: Historically severance is way down from what I will call the old days of the early 90's, the late 80's, even into the late 90's where people had longer term contracts or a longer severance period. As the economy turned around at the turn of the century and then turned again in 2007 and 2008 there was a real pull back in severance offered. That being said, as the economy has started to improve, especially in this area for executives, and given that executives can use a bad past experience as a negotiating tool – look I'd love to take this job but last time I got laid off with two weeks' severance; if I don't have a 3 or 4 month package I just can't take this job. That can actually be used as an advantage in a negotiation rather than a disadvantage.

DT: Is 3-4 months the standard?

GM: It's all over the place. For a mid to senior level executive, two months is what I think should be the minimum, though you can't always get it, and six months is probably the maximum that you're likely to get. There may be exclusion in the pure entertainment world where people still seem to have longer term deals or longer term pay or play deals.

DT: Is there ever a relationship between the length of severance and the length of time the person has to sit on the sidelines before they can go back into the industry.

GM: There are so-called "garden leave" provisions which have migrated across the pond. It started in England and the idea is you would stay home and tend your garden while the company was paying you. Non-competes is a tricky issue in NY and we can discuss some of the issues and whether you pay or not. Some companies tie the length of severance to the length of notice the executive is required to give. So if you are willing to give 90 days' notice, they'll provide you with 90 day's severance. If you ask for six-

month severance they may say yes but they may tie it to a 6-month notice to you and it's something you really need to think about because a 6 month notice provision can be prohibitive as to taking the next position.

DT: Let's take an agency – would an agency typically want someone who has been severed or has given their resignation, to frankly hang around for 6 months?

GM: No, but the agency can use the 6 month period to effectively put the person on a garden leave and not use them during that period if they so choose. Sometimes you'll see agreements which permit the company to have the option of accepting it early and not require any additional pay or paying it out and either using the executive or putting them effectively on garden leave during the period.

DT: Gavin, I've known you for a while and it seems to me that you get a kick out of your job – you really like what you do. Why? What's fun about this for you?

GM: I particularly like doing the executive compensation deals because it so matters to the individual. It is literally their life. It's do I move to Los Angeles and take that job, do I not? Is the future really in that company? What do you think about this option and how might it work out in the long term? It's fast hitting, it's important as opposed to certain attorneys who are more involved in representing large corporations where the importance of the individuals they're dealing with seems much less.

DT: Do you get a lot of repeat business from the same executive over the course of their career?

GM: Absolutely. Many executives I will represent 3, 4, 5 times depending upon how many times they switch jobs. Just this morning I got a call from an executive I represented a couple of years ago who was now looking at a new job opportunity. The bulk of my new clients come from either a repeat client at a new deal or an executive referring their friend to me based upon how their deal had worked out.

DT: Are there different enforceability levels in different parts of the county or is it not location specific?

GM: It is location specific. Most of my executives would be in NY or Los Angeles where we have an office though I'm not admitted there. We do represent some executives in other locations. One of the issues is in connection with media and advertising specifically; there are no lawyers that specialize in that in certain locations. So if you're going to work for an ad agency in Ohio and you need a lawyer who has this expertise you would really have to go to NY, Chicago, Los Angeles or San Francisco.

DT: Lots of folks sort of glibly say that non-compete agreements are not enforceable in NY – is that true?

GM: The answer is that NY courts frown upon pure non-competes that keep someone from working in an industry. But don't take them lightly and don't sign them on that theory unless you happen to have \$125-150,000 sitting around to defend yourself. And even then we had a new client who last week signed with a new employer. They both got sued and the new employer fired the person to avoid being involved in the litigation.

DT: Well on that happy note this is Dennis Troyanos, your host on Game Changers Live. Today I had the pleasure of sitting down with Gavin McElroy of Frankfurt Kurnit Klein & Selz. Now just a programming note. This edition of Game Changers Live is Part 1 of 3 in a series that I'll be doing with Gavin. Part 2 & 3 will focus on M&A deals and how to get your agency or marketing services company well positioned and prepared for sale. Until then, this is Dennis Troyanos for Game Changers Live.

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