Washington and Lee Law Review

Volume 55 | Issue 4 | Article 2

Fall 9-1-1998

Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms

Robert W. Hillman

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* Professor of Law, University of California at Davis. The Author gratefully acknowledges the comments of Allan W. Vestal and Donald J. Weidner on an early draft of this article and the research assistance of Geoff Edwards.

I first began to work on a statement of General Principles in my role as an expert witness in a litigation matter involving former law partners. My involvement in the case ended at a very early point in the development of the principles, which were not used in the case. Although I do not believe that the substance of my analysis has been affected by my limited involvement in the matter, the reader is entitled to disclosure if there exists even the slightest possibility of bias on the part of the author.

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Introduction

For nearly two decades, law firms have been shaken by defections in the ranks of their members. Lawyers associated in firm practice necessarily cast wary eyes on their colleagues, wondering who will be the next to leave, when the exit will occur, and what the damage will be from the loss of clients who seem more often than not to follow defecting lawyers wherever they may go. Loyalty to the firm – by its members and by its clients – is a value that, at best, evokes nostalgic yearnings for some idealized past rather than a standard under which law is practiced in present times.

It is hardly a secret that the "grabbing and leaving" activities of law firm members have served to destabilize the American law firm.[1] What is surprising, at least at first glance, is the extent of the activity in light of the "fiduciary" nature of the relationship that exists among partners in a firm. Whether expressed in terms of a "punctilio of an honor the most sensitive,"[2] a duty of

1. On the destabilization of the American law firm, see ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 1.1 (2d ed. 1998) [hereinafter LAWYER MOBILITY].

2. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928); *see In re* Cupples, 952 S.W.2d 226, 235 (Mo. 1997) (en banc) (noting that *Meinhard* statement "still controls" in defining duties of law partners).

"undivided loyalty,"[3] or an obligation to act with the "highest good faith,"[4] the status of partners as fiduciaries of each other would seem to offer a powerful restraint on lawyer mobility.[5] Yet at least in the law firm setting, fiduciary duties have not restricted the placement of individual interest above the interest of the group to any meaningful degree. Perhaps this fact is because, as the Illinois Supreme Court recently observed, "lawyers are [not] necessarily bound by the same fiduciary constraints that apply to nonlawyer officers and directors who are seeking to leave positions in commercial entities."[6]

The key to reconciling the existence of fiduciary standards with widespread grabbing and leaving activities is to recognize that fiduciary duties function to restrain rather than to eliminate the pursuit of private advantage by law partners.[7] The power of the fiduciary norm is the restraint it imposes on the *process* by which partners pursue opportunities outside their firms. The distinction between motive and process is critical to a realistic application of fiduciary duties. Grabbing and leaving is not in itself a breach of fiduciary duty because no partner is permanently bound to a firm. The manner in which partners plan for and implement withdrawals, on the other hand, is subject to the constraints imposed on them by virtue of their status as fiduciaries.

Although inconsistent with some expressions of the obligation of undivided loyalty,[8] the idea that an individual may terminate a fiduciary relation-

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3. Graubard Mollen Horowitz Pomeranz & Shapiro v. Moskovitz, 565 N.Y.S.2d 672, 674 (App. Div. 1990), *aff'd sub nom.* Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995).

4. Page v. Page, 359 P.2d 41, 44 (Cal. 1961) (en banc).

5. *Cf.* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829-30 (1983) ("Courts regulate fiduciaries by imposing a high standard of morality upon them. This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary.").

6. Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 364-65 (Ill. 1998). As Professor DeMott has observed, the fiduciary norm "is inevitably tied to the particular context in which it arises." Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 909. She explains:

> Fiduciary obligation is one of the most elusive concepts in Anglo-American law. Applicable in a variety of contexts, and apparently developed through a jurisprudence of analogy rather than principle, the fiduciary constraint on a party's discretion to pursue self-interest resists tidy categorization. Although one can identify common core principles of fiduciary obligation, these principles apply with greater or lesser force in different contexts involving different parties and relationships. Recognition that the law of fiduciary obligation is situation-specific should be the starting point for any further analysis.

Id. at 879.

7. On the origins of the phrase "grabbing and leaving," see LAWYER MOBILITY, *supra* note 1, § 1.1 n.3.

8. *See In re* Cupples, 952 S.W.2d 226, 235-36 (Mo. 1997) (en banc) ("A partner's

ship for the purpose of pursuing other opportunities is neither unusual nor new. The venerable *Restatement (Second) of Agency*, for example, informs us that the agent must act solely for the benefit of the principal and not in competition with the principal in all matters connected with the agency.[9] Even the *Restatement* recognizes, however, that the agent is permitted to make plans, in secret, to compete with the principal in the future,[10] and that after termination of employment the agent may not only compete with the principal[11] but also may use certain information acquired during the course of the agency in competition with the principal.[12]

The problem, then, is managing the transition from present fiduciary to future competitor. Given the sheer volume of disputes arising among former law partners, the law firm offers a splendid model for testing and, perhaps, restating ancient expressions of partner duties that are long on generalities, but disturbingly short on specifics. Along this line, many recent reported cases address the duties of partners withdrawing from law firms.[13] Individually, the cases are often insightful, but as a whole there has yet to emerge from the reported decisions a coherent set of principles useful in defining duties (fiduciary and otherwise) owed by partners withdrawing from law firms. This Article attempts to provide a framework helpful in defining and giving meaning to those duties.

The framework offered is expressed through a statement of "General Principles" that expresses core ideas rather than a detailed code of conduct.[14] When appropriate, I have drawn the principles from case law or other sources with some authoritative or persuasive weight. When case law is conflicting or nonexistent, the principles simply reflect my view of the appropriate standard for the issue addressed. Commentary follows the major divisions in the principles. For most purposes relevant to this discussion, the choice of

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fiduciary duty includes the duty to be candid concerning business opportunities, the duty to be fair, the duty not to put self-interests before the interests of the partnership, and the duty not to compete with the partnership in the business of the partnership." (citation omitted)).

9. *See* RESTATEMENT (SECOND) OF AGENCY §§ 387, 393 (1958).

10. *See id.* § 393 cmt. e.

11. *See id.* § 396(a).

12. *See id.* § 396(b).

13. The rapid development of case law on issues involving lawyer mobility is impressive. My first book on the subject, published early in 1990, cited a total of 82 cases. *See* ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING 279-81 (1990). In 1994, the successor edition, *Lawyer Mobility*, was published in loose-leaf format to accommodate the steady evolution of legal doctrine in the area. The new edition of *Lawyer Mobility*, published in 1998, cites more than 300 reported opinions addressing issues arising in law firm breakups.

14. In fact, each of the principles would support a full article.

an associational form for a law firm – whether it is partnership, corporation, limited liability company, or some variation – will not affect the substance of the duties being outlined. Although I frequently use the term "partner," I do not limit its application to situations in which the firm is organized as a partnership. Regardless of the associational form, equity members of firms tend to think of themselves as "partners," and it is in this generalized sense that the term is used here.

Admittedly, this functional and broad view of partners is somewhat at odds with the proliferation of statutes purporting to offer participants in business and professional ventures real choices in organizational forms for their associations. In recent years, the statutory law of business associations has become more detailed and varied. On a qualitative level, however, the considerable legislative and law reform activity that has taken place has done little to define the nature and quality of the relationships that exist among individuals associated in a business venture or professional practice. Thus, it falls upon the courts to continue to articulate core values, duties, and rights that transcend the associational label adopted by the participants.

A related point of generalization concerns the term "client." For the sake of clarity, I employ a unitary view of a client that recognizes only one will and voice for each client. Some clients, of course, are much more complex than the unitary view recognizes. Corporate and institutional clients, for example, may have many layers of employees that interact with various attorneys in a law firm. In such cases, the loyalties of the client may be mixed, or even divided, and it may be superficial to speak of the "choice" of the client concerning legal representation. Admittedly, basic agency principles may resolve issues concerning authority to bind the client and may make a unitary view of the client workable. Nevertheless, the unitary view and the agency model that supports it may disguise the very dynamic relationships that often exist between various actors who represent a client and their contact points at law firms.[15]

A final point of generalization concerns the very concept of a "partnership agreement." Many disputes among former law partners arise because the partners never took the time to develop a comprehensive agreement defining their mutual rights and duties. Such an agreement could resolve many of the issues addressed in this Article. Lawyer-litigants are justly criticized for failing to have in place the prophylactic measures that they never allow their own clients to discard. There is a danger, however, in simply deferring to a partnership agreement as if it represents the product of an arms-length, bilat-

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15. *See, e.g.*, *In re* Cupples, 952 S.W.2d 226, 234-35 (Mo. 1997) (en banc) ("The record even reflects that certain lower level State Farm claims personnel would have chosen [the withdrawing partner] to continue handling some of his cases, although higher State Farm management eventually directed all the work to remain with the . . . firm.").

eral negotiation between sophisticated parties. Particularly in the case of larger firms where partners are admitted on a continuing basis, the partnership agreement may more closely resemble a constitutional document than a negotiated agreement. Newly-admitted partners may have little or no opportunity to participate in the development of the agreement, which is presented as a "take-it-or-leave-it" condition to entry into the partnership.[16] This is not to deny the status of such a document as a contract or to suggest that its terms are not binding. It is to suggest, however, that the view of a partnership agreement as a product of negotiation among all of the partners does not comport with the reality of the modern large law firm.

I. Planning for Withdrawal

A. Contemplation of Withdrawal

A partner generally has no duty to disclose to other partners in a firm that the partner is considering withdrawal from the firm.

There is a certain whimsical quality to the suggestion that a partner's state of mind raises fiduciary duty issues. Yet the duty of a fiduciary is said to be one of "undivided loyalty."[17] Thoughts may eventually be expressed through actions, which raises the interesting and difficult question of the point at which the thoughts must be expressed to those to whom the partner must be loyal.[18]

A reasonably safe starting point may be found in the proposition that a partner merely considering withdrawal from a firm *generally* has no affirmative duty to disclose the possibility of withdrawal to the other partners. Actions that often parallel the consideration of withdrawal – including specific acts of planning for withdrawal, solicitations of clients, and disclosures of information to sources outside the partnership – are addressed in later principles.[19] The present principle concerns only the state of mind of the partner prior to the time a decision to withdraw has been made and provides that thoughts, without more, *normally* need not be shared with partners.[20]

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16. This point is developed more fully in Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 441-42 (1987).

17. *See supra* notes 2-5 and accompanying text.

18. *Cf.* Deborah A. DeMott, *Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions*, 19 DEL. J. CORP. L. 65, 65 (1994) ("Unlike a fiduciary dealing with her beneficiary, parties negotiating at arm's length are not obliged to be candid with each other.... To a considerable extent, parties who deal at arm's length are free to take a sporting view of their relationship with each other.").

19. *See infra* Parts II-III.

20. Admittedly, the generality of a principle addressing contemplation of withdrawal may

For the most part, the partnership statutes fail to support general affirmative disclosure obligations applicable to partners merely considering withdrawing from their firms. In its principal fiduciary provision, the Uniform Partnership Act (UPA) provides that "[p]artners shall render *on demand* true and full information of all things affecting the partnership to any partner."[21] Setting aside situations involving self-dealing in transactions with the partnership and receipt of undisclosed benefits,[22] case law for the most part does not support extensive affirmative disclosure obligations under the UPA.[23]

The Revised Uniform Partnership Act (RUPA), on the other hand, departs from the UPA and attempts to create affirmative disclosure obligations under certain circumstances. It provides:

> Each partner and the partnership shall furnish to a partner . . . (1) *without demand*, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act]; and (2) *on demand*, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.[24]

In addition, the Official Comments accompanying RUPA Section 403(c) note that in some cases disclosure obligations may arise independently of the information rights created by Section 403 because of the obligation of partners

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prove problematic in some cases. "Considering" a withdrawal may mean anything from the occasional, random thoughts of leaving that come to most partners, to the evaluation of a specific offer of affiliation with another firm, to acceptance in principle of the offer of affiliation. Where a partner's "thoughts" fall on this continuum is relevant to the issue of whether a disclosure duty exists.

21. UNIF. PARTNERSHIP ACT (1914) § 20 [hereinafter UPA] (emphasis added).

22. *See, e.g.*, Starr v. International Realty, Ltd., 533 P.2d 165, 169 (Or. 1975) (finding that failure of partner to disclose side compensation was illegal).

23. *See generally* Allan W. Vestal, *"Ask Me No Questions and I'll Tell You No Lies": Statutory and Common-Law Disclosure Requirements Within High-Tech Joint Ventures*, 65 TUL. L. REV. 705 (1991). Professor Vestal correctly observes that "[f]or the disclosure obligation to arise [under UPA § 20], there must be a predicate demand by another partner." *Id.* at 726. *But cf.* RESTATEMENT (SECOND) OF AGENCY § 381 (1958):

> [A]n agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

Id.

24. REVISED UNIF. PARTNERSHIP ACT (1994) § 403(c) [hereinafter RUPA] (emphasis added). In support of RUPA's expansion of disclosure obligations, see Allan W. Vestal, *The Disclosure Obligations of Partners Inter Se Under the Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. 1559, 1577-79 (1995).

under Section 404(d) to discharge their duties in good faith.[25] Interestingly, neither the information rights outlined in Section 403 nor the duty of good faith and fair dealing specified in Section 404 creates a duty that is, strictly speaking, "fiduciary" in character.[26]

A predicate for RUPA's affirmative disclosure obligation under Section 403 is that a partner has *information* concerning the business and affairs of the partnership. An economist may observe that when one partner possesses information needed by other partners, and the costs of obtaining the information through other sources are high, it is sensible to place the duty to make the information available to others on the low-cost provider of the information. Mere consideration of withdrawal, however, is not information in the possession of the partner that triggers the Section 403(c) disclosure obligation. Contemplation without more is soft or speculative "information," and mandatory disclosure would not spare other partners the high costs of securing the information from other sources (because in most cases the information simply would not be obtainable).

At some point, however, thoughts of withdrawal crystallize into an intent to withdraw that may trigger disclosure obligations. The point at which that occurs, as well as other circumstances that may trigger disclosure obligations, are addressed below.

B. Disclosure of Intent to Withdraw

1. Notice of Withdrawal

A partner should provide reasonable notice of intent to withdraw from a firm. Relevant factors in evaluating the reasonableness of notice include:

(a) Past practices concerning withdrawals from the firm;

(b) Compliance with notice provisions of a partnership agreement;

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25. *See* RUPA § 403(c) cmt. 3. RUPA § 404(d) provides that "[a] partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." *Id.* § 404(d).

26. As Dean Weidner has observed:

> Ironically, even though RUPA does not recognize the duty to provide information as a "fiduciary" duty, it makes the duty stronger than it was under the UPA. Indeed, the one area in which RUPA has expanded what courts traditionally considered fiduciary obligation has been in information rights.... The big change in section 403 is the elimination of the need to make a demand for information. Because section 403 states a duty to provide information "without demand," it constitutes a powerful new affirmative duty to disclose.

Donald J. Weidner, Cadwalader, *RUPA and Fiduciary Duty*, 54 WASH. & LEE L. REV. 877, 911-12 (1997).

(c) **The possibility of retribution from the firm that may directly or indirectly harm clients; and**

(d) **The promptness with which a partner discloses an intent to withdraw after that intent has been formed.**

Normally, issues concerning the adequacy of notice, including the point at which a partner who has resolved to leave a firm must communicate that intent to the other partners, may be resolved under a reasonableness standard, the meaning of which will vary from firm to firm.

Firms differ widely in their practices and preferences on notice issues. At one extreme are firms that contractually impose lengthy notice periods, perhaps as long as six months. Delayed departure may be in the interest of the firm if it extends the period during which income generated by the departing partner is income to the firm. At the other extreme, some firms prefer partners who have announced their withdrawal to leave immediately. A quick exit policy may be explained by pique at the newly-discovered perfidy of a partner or may be the product of a more calculated decision to deny a departing partner further access to firm resources and client files. The policies and preferences of most firms fall somewhere between the two extremes of no notice period and a lengthy notice period. Given this diversity, firm custom measured by past practice may be helpful in determining what constitutes reasonable notice for a particular firm.

Many partnership agreements include provisions specifying what is required by way of notice of withdrawal.[27] In such cases, compliance with the bargain of the parties should define the extent of the duty of the partner to give reasonable notice, although a past practice of departing from the terms of an agreement is relevant in defining what is reasonable in terms of notice.[28] Conversely, a partnership agreement that fails to include any requirements concerning notice of withdrawal *may* reflect the unstated understanding of the parties that notice need not be given.

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27. RUPA allows the partnership agreement to require that notice of withdrawal be in writing. *See* RUPA § 103(b)(6). The Act is unclear on the effect of oral notice when written notice is required by the agreement. *See generally* ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, GENERAL AND LIMITED LIABILITY PARTNERSHIPS UNDER THE REVISED UNIFORM PARTNERSHIP ACT 196-97 (1996).

28. Agreed notice provisions are often shortened in practice. *See, e.g.*, Meehan v. Shaughnessy, 535 N.E.2d 1255, 1263 n.12 (Mass. 1989) (noting that although agreement required 90 days notice parties agreed to shorten period to 30 days); Spayd v. Turner, Granzow & Hollenkamp, 482 N.E.2d 1232, 1239 (Ohio 1985) (finding that necessity of written notice required by partnership agreement was "clearly waived" in light of findings that "Spayd voluntarily expressed his desire to terminate his relationship with the partnership, and . . . all of the partners were aware of Spayd's intent to leave the firm"). *But cf.* Willard v. Cowen & Co., No. 105755/97 (N.Y. Sup. Ct. 1997) (enjoining partner withdrawing from securities firm from working for competing firms until expiration of 120-day notice period required by partnership agreement).

Some firms respond to departure announcements by locking out the "defecting" or "disloyal" partners and denying them access to offices, clients, and resources needed to support their clients.[29] The likelihood of such conduct and its probable impact on the departing attorney's clients may be considered in assessing whether any notice of withdrawal is required.

A particularly difficult situation may arise when a lawyer reaches an agreement to join another firm but delays informing the present firm of an intent to withdraw. Unless other factors discussed here mitigate against announcement of withdrawal (for example, reasonable fear of retribution that may harm the interests of clients), a partner should announce an intent to withdraw promptly after reaching a commitment to join another firm or otherwise reaching a decision to leave the firm. The concealment of a decision to withdraw may be the basis for a breach of fiduciary duty claim[30] if a causal link can be shown between the deception and subsequent damage to the firm.[31]

2. *Disclosure of the Possibility of Withdrawal*

A partner seriously considering withdrawal should so advise other partners if they are about to make a material decision or

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29. The most famous lockout was implemented by Melvin Belli. As to why on the day after Christmas he locked out his partner of 28 years, Belli explained that the way to protect yourself against partners departing with clients is "to kick 'em in the ass and throw 'em out. Lock the doors, and see to it that they can't take the cases." Mary Ann Galante, *For Firms, Breaking Up is Hard to Do*, NAT'L L.J., Aug. 26, 1985, at 1.

Other accounts of lockouts appear, with some regularity, in reported opinions and the legal press. *See, e.g.*, Heller v. Pillsbury, Madison & Sutro, 58 Cal. Rptr. 2d 336, 349 (Ct. App. 1996) (rejecting claim of expelled partner that following conduct was sufficiently outrageous to support claim of emotional distress: canceling partner's key card, denying him access to computers, threatening to put padlock on his door if he was not out by noon next day, posting security guard at his door and instructing guard not to leave partner unattended); Warner v. Carimi Law Firm, 678 So. 2d 561, 562 (La. Ct. App. 1996) (noting that firm changed locks on door and denied partner access to office and files); Mary Hull, *Out of His League: Racetrack Bid is Counsel's Downfall*, TEX. LAW., July 12, 1993, at 1 (reporting that complaint had been filed with State Bar of Texas by lawyer accusing his former partner of locking him out of office and stealing client files).

30. *See, e.g.*, Kantor v. Bernstein, 640 N.Y.S.2d 40, 41 (App. Div. 1996).

> [T]he amended complaint alleges that defendant partner . . . went to defendant law firm and offered them virtually all of plaintiff's class action arbitration practice in exchange for making him a partner . . . , and that defendant partner's pre-resignation discussions with his prospective new firm included a surreptitious pre-resignation agreement that defendant firm would assist defendant partner in concealing the true nature of their actions from plaintiff until his resignation. This constitutes an adequate pleading of a breach of defendant partner's fiduciary duty to plaintiff.

Id. (citation omitted).

31. Damages normally are necessary in order for a breach of fiduciary duty claim to be actionable. *See infra* notes 66-72 and accompanying text.

commitment of resources in reliance on the partner's continued membership in the firm.

Distinct from the necessity of providing reasonable notice following the formation of an intent to withdraw from a law firm is the issue of whether a disclosure obligation may arise *before* the decision to withdraw is finalized. Normally, the duty to disclose withdrawal plans does not arise before a partner actually has decided to withdraw from a firm. As discussed above, musings prior to this point, or even steps taken to explore withdrawal options, generally do not trigger disclosure obligations.[32] Under some circumstances, however, it may be reasonable to expect a partner to disclose the possibility of withdrawal. In particular, when the firm is making a material decision or commitment of resources in reliance on the partner's continued membership in the firm, a partner seriously contemplating withdrawal should so inform other partners.[33]

Law firms make and implement business plans. They hire employees, open branch offices, lease office space, purchase office equipment, and make other commitments of resources based on information available at the time. A subsequent departure by one or more partners, clients in tow, may in retrospect reveal those decisions to be ill advised. If a partner secretly planning a withdrawal knows that decisions of a material nature are being made by the partnership in reliance upon the partner's continued participation in the firm, the imposition of a duty to disclose the possibility of withdrawal may be appropriate.[34]

3. *Responding Truthfully to Inquiries*

A partner should respond truthfully to good faith inquiries made by other partners concerning the partner's plans for withdrawal.

A partner actively planning a withdrawal should respond truthfully to good faith inquiries concerning departure plans. For this purpose, good faith may be measured by reference to the reason for making the inquiry, such as rumors within the firm concerning the possible withdrawal of the partner.[35]

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32. *See supra* notes 17-31 and accompanying text.

33. *Cf.* Bancroft-Whitney Co. v. Glen, 411 P.2d 921, 936 (Cal. 1966) ("There is no requirement that an officer disclose his preparations to compete with the corporation in every case, and failure to disclose such acts will render the officer liable for a breach of his fiduciary duties only where particular circumstances render nondisclosure harmful to the corporation.").

34. This proposition is particularly true when the partner actively participates in the planning that is premised on the partner's continued participation in the firm.

35. *Cf.* Meehan v. Shaughnessy, 535 N.E.2d 1255, 1259 (Mass. 1989) (noting that partner three times falsely denied rumors about his departure).

To allow partners to falsely deny the rumors would be to condone "lying to partners," a proposition unlikely to find acceptance among many courts[36] even if a remedy for the wrong would likely prove elusive.[37]

C. Making Logistical Arrangements in Anticipation of Withdrawal

> **A partner may make plans to leave a firm prior to announcing the withdrawal to the other partners. Such plans may include logistical pre-departure arrangements such as arranging bank financing or locating alternative space and affiliations.**

At first glance, it may seem difficult to reconcile a partner's duty of loyalty to other partners with the same partner secretly making plans to compete with the partnership in the future. Yet the commentary to the *Restatement (Second) of Agency* recognizes that an agent may, consistent with loyalty obligations owed to the principal, "make arrangements to compete."[38] More recently and to the point, the Massachusetts high court observed in *Meehan v. Shaughnessy*:[39]

> Here, the judge found that Meehan and Boyle made certain logistical arrangements for the establishment of [their new law firm]. These arrangements included executing a lease for an office, preparing lists of clients expected to leave Parker Coulter for [their new firm], and obtaining financing on the basis of these lists. We believe these logistical arrangements to establish a physical plant for the new firm were permissible, especially in light of the attorneys' obligation to represent adequately any clients who might continue to retain them on their departure from Parker Coulter.[40]

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36. *See* Graubard Mollen Dannet & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1182-83 (N.Y. 1995) (finding that lying to partners about plans to leave was not consistent with partner's fiduciary duties); *see also In re* Cupples, 952 S.W.2d 226, 237 (Mo. 1997) (en banc) (stating that fact that partner "[w]hen caught . . . was not forthright about his intent to withdraw from the firm" was factor supporting imposition of disciplinary sanction of public reprimand).

37. An actionable claim against the partner may fail for lack of actual damages caused by the misrepresentations. On the importance of damages, see *infra* notes 66-72 and accompanying text.

38. RESTATEMENT (SECOND) OF AGENCY § 393 cmt. e (1958). The full comment states:

> Even before the termination of the agency, [the agent] is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business.

Id.

39. 535 N.E.2d 1255 (Mass. 1989).

40. Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989) (citation omitted).

If, as *Meehan* suggests, there may exist an obligation to clients to make appropriate arrangements in anticipation of a withdrawal it is "simple common sense," in the words of the New York Court of Appeals, that such planning is a delicate venture requiring confidentiality.[41]

There are significant limits, however, on the range of permissible planning activities taken in anticipation of withdrawal. In particular, the disclosure of information concerning the firm or its clients to third parties poses special difficulties more fully addressed below.[42] Also discussed below are limitations on the solicitation of clients[43] and the recruitment of staff (including associate attorneys) from the firm from which the attorney is withdrawing.[44]

II. Notification and Solicitation of Clients

A. Notification and Solicitation of Clients Prior to Announcement of Departure

A partner planning to withdraw from a firm should not solicit clients (that is, attempt to secure their commitments to retain the lawyer or a new firm) before informing the firm of the partner's intent to withdraw.

A lawyer considering withdrawing from a firm may desire the comfort of commitments from clients that they will remain with the lawyer.[45] In addition to providing assurances to the lawyer of ongoing revenue, client commitments may be of great importance to third parties. The bank considering financing the lawyer's practice, the landlord considering leasing the lawyer space, and the firm considering bringing the lawyer into its partnership each may desire some level of comfort concerning the income likely to follow the

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41. *See Graubard*, 653 N.E.2d at 1183.

> At one end of the spectrum, where an attorney is dissatisfied with the existing association, taking steps to locate alternative space and affiliations would not violate a partner's fiduciary duties. That this may be a delicate venture, requiring confidentiality, is simple common sense and well illustrated by the eruption caused by defendants' announced resignation in the present case.

Id.; *see* Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 366 (Ill. 1998) (citing *Graubard* favorably and noting that lawyers who are planning to leave firm "may take preliminary logistical steps of obtaining office space and supplies [but] may not solicit clients for their new venture").

42. *See infra* Part III.

43. *See infra* Part II.

44. *See infra* Part V.

45. Although this discussion assumes that it is lawyers who solicit clients, nonlawyers also may be involved in solicitation activities. *See* Kucker Kraus & Bruh, LLP v. Szold & Brandwen, P.C., N.Y. L.J., Sept. 12, 1997, at 26 col. 1 (N.Y. Sup. Ct.) (discussing postdeparture solicitation by paralegal).

lawyer. The risk associated with the uncertainty of client loyalties may be minimized rather easily through the simple measure of seeking the commitment of clients to follow the lawyer from the firm. Indeed, the ease of securing the information combined with its value may prompt the lawyer's solicitation of clients prior to informing the firm of plans to withdraw.

Business reasons for securing commitments aside, courts are consistent in viewing the solicitation of clients prior to the announcement of departure as a breach of the loyalty obligations of a partner.[46] Covert solicitation of clients differs from other forms of planning for withdrawal, such as arranging bank financing or exploring new affiliations,[47] because it is a direct act of competition with the firm.[48] Planning for competition may be consistent with fiduciary responsibilities, but actual competition is not.[49] The point is made forcefully by the New York Court of Appeals in *Graubard Mollen Dannett & Horowitz v. Moskovitz*:[50]

> [P]reresignation surreptitious "solicitation" *of firm clients* for a partner's personal gain . . . is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value – the loyalty owed partners (including law partners), which distinguishes partnerships (including law partnerships) from bazaars.[51]

Graubard rests on the assumption, explicit in the quoted statement, that clients "belong to the firm" rather than its members. Although the assumption is critical to restricting solicitation activities, it ignores the reality that clients are not "assets" susceptible to ownership.[52] To the contrary, clients are

46. *See generally* Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A., 679 So. 2d 637 (Ala. 1996); *Dowd & Dowd*, 693 N.E.2d 358; Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989); Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995); LAWYER MOBILITY, *supra* note 1, §§ 3.2 , 4.8.

47. *See supra* Part I.C.

48. *See* Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 366 (Ill. 1998) ("The case law supports the trial judge's view . . . that while lawyers who are planning to leave a firm may take preliminary logistical steps of obtaining office space and supplies, they may not solicit clients for their new venture.").

49. In the past, legal ethics provided an additional source of restraints on solicitation activities. For a discussion of the demise of ethics restrictions, see LAWYER MOBILITY, *supra* note 1, § 2.2.

50. 653 N.E.2d 1179 (N.Y. 1995).

51. Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1183 (N.Y. 1995) (emphasis added).

52. *Cf.* Williams & Montgomery, Ltd. v. Stellato, 552 N.E.2d 1100, 1104 (Ill. App. Ct. 1990) The trial court stated:

> I am satisfied that there is no protectable interest. I am satisfied that they have no protectable interest in clients per se; that they do not own clients, nor can they

consumers of legal services, free to choose the identity of the providers of those services.[53] Some clients hire the firm, but others "hire the lawyer rather than the firm."[54] Given this reality, references to the firm's clients must be

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> have – nor can they expect to protect the constant – affections isn't the right word, but constant expectations of representation of these clients such that could be protected by the courts.

Id.

53. On the right of clients to choose their lawyers, see LAWYER MOBILITY, *supra* note 1, § 2.3.1.

54. This is particularly true of sophisticated clients and is evident from the comments of those who hire the lawyers. In a *Corporate Legal Times* Roundtable, Francesca M. Maher of United Air Lines stated: "[T]he old adage that you don't hire the firm, you hire the lawyer is so true. And I want the lawyer who's working on my matters day-in and day-out to have that service mentality. It's just so important to making sure that our needs are met." *Successfully Moving Up: Hiring in Times of Change: Tips for the Restless*, CORP. LEGAL TIMES, May 1996, at 44. An article by the senior VP and general counsel of MMI Companies, Inc. stated: "I have used the term 'hire firms.' I believe the old adage applies; companies do not hire firms, they hire lawyers. We have all lost clients when a partner leaves and takes a number of clients to the new firm." Wayne A. Sinclair, *Quality Client Service: The Times They Are a Changin'*, 4 NO. 3 LEGAL MALPRACTICE REP. 1994, at 7-8.

A Chicago Lawyer/Coopers & Lybrand Environmental Law Survey, as reported in *Chicago Lawyer*, reveals similar attitudes:

> When hiring, [Peter J.] Kelly [associate general counsel, environmental, Waste Management, Inc.] looks at the individual: "It rarely has anything to do with the firm," he said. If multi-party insurance or multi-party toxic tort litigation is involved, then he might be "driven by critical mass firm size." Kelly sounds like many general counsel who answered the survey.
>
> "Alaska has a very thin community of people who are good in environmental law," ARCO's [William] Christian [senior attorney for ARCO Alaska, Inc.] said. "It's not even firms; its people we rely on and trust and use frequently . . . ."
>
> Law firms and in-house counsel were asked to assess the importance of various factors in selecting outside counsel. The individual lawyer's reputation is the most important factor, both law firms and general counsel agree . . . . "Let's face it. Good law firms are a dime a dozen. All across the country are many good law firms. So, it boils down to personal relationships, and past experience and their responsiveness; and that's not just in environmental law."

Donna Berkman & Harvey Gill, *Air, Earth and Water: Environmental Law in the 1990s*, CHI. LAW., Nov. 1992, at 4; *see* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902 (1990) (stating that "[l]ong-term relationships give way to retention of counsel in connection with discrete specialized transactions; clients select their own specialists; and the rule becomes to hire lawyers, not firms"). Professors Gilson and Mnookin explain that

> sophisticated general counsel, for whom the costs of direct investigation of quality are relatively lower, are less likely than corporate executives to pay a premium because of a firm's general reputation. Often, they can efficiently search for and hire a particular lawyer, a process made easier by the recent increased pooling of information concerning the past performances by law firms. The catchphrase now is, "Shop for a lawyer, not a law firm" . . . .

viewed with some skepticism.

Because client loyalties may run in many directions – including to the firm, to one or more lawyers in the firm, or to the firm and one or more of its lawyers – the wrong *Graubard* targets is not the "looting" of firm assets but, as the opinion states, the "surreptitious" efforts to solicit clients. Not competition itself but the fairness of the conditions of competition is the proper subject of inquiry. Once a partner announces plans to leave a firm, the firm is on notice that its relationship with certain clients may be at risk. That knowledge, in turn, may give the firm an "equal opportunity," at least in theory, to compete with the departing partner for the loyalties of the clients.[55] Accordingly, an important distinction exists between solicitation that occurs before and solicitation that occurs after a partner announces plans to leave a firm.

Merely informing a client of the potential of withdrawal is not necessarily a solicitation of the client. Some clients are interested in the affiliations of their lawyers and reasonably expect to be informed of possible changes in those affiliations.[56] This is particularly true of more sophisticated clients.

Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 385 (1985).

> Jake Krocheski, consultant with the Dallas office of Hildebrandt Inc., notes that clients have become more sophisticated buyers of legal services over the past few years . . . . Clients are more frequently hiring specialists. With an ever-increasing number of lawyers, specialization has become one way for lawyers to distinguish themselves from competitors. Clients are hiring lawyers not law firms. Clients are more closely managing their outside counsel.

Jake Krocheski, *Pricing and Collection So Clients Can Pay Up*, N.Y. L.J., Nov. 9, 1993, at 5.

Some commentators believe that client attitudes may be shifting. Quoted in another roundtable:

> [Andrew R.] Laidlaw, Seyfarth Shaw [Fairweather & Geraldson]: This relates back to your earlier question about market shift. The market for hiring law firm counsel is shifting back to hiring for the reputation of the firm as a whole.
>
> All our clients are becoming very sophisticated and are making their buying decisions on different criteria from five or 10 years ago. One phenomenon . . . is clients are starting to hire firms again, not just individual attorneys.
>
> Five or 10 years ago, common wisdom was clients chose individual lawyers as opposed to firms. Our clients still focus on the skills of the particular lawyers, but they have become much more interested than previously in the firm they're hiring.

Firms Raise the Bar on Lateral Partner Hiring: More Emphasis on Strategic Planning Than Money, ILL. LEGAL TIMES, Jan. 1997, at 2.

55. Meehan v. Shaughnessy, 535 N.E.2d 1255, 1267 (Mass. 1989) ("This disclosure will allow the partnership and the departing partner an equal opportunity to present to clients the option of continuing with the partnership or retaining the departing partner individually.").

56. Indeed, on occasion the change in affiliation may be at the insistence of one or more of a lawyer's clients.

When the relationship between a lawyer and client is such that the client would expect to be informed of the lawyer's possible withdrawal from a firm, the lawyer may so inform the client. Indeed, when a lawyer's withdrawal from a firm may affect the interests of a client, the lawyer may reasonably feel under some compulsion to keep the client informed.[57]

Although a distinction exists between soliciting and merely informing a client, in practice the two activities may quickly merge. A client informed of a lawyer's plans may offer spontaneous assurances of loyalty to the lawyer. That commitment in turn may greatly facilitate the lawyer's planning for withdrawal from the firm. In other words, what the lawyer could not accomplish directly through solicitation may be accomplished indirectly as a product (perhaps planned and foreseeable) of the process of keeping a client informed. The result could be avoided by banning all communications to the client on the subject of withdrawal until after the lawyer has notified the firm, but the justification for such a restriction on communications with clients is not at all apparent.

B. Notification and Solicitation of Clients After Announcement of Plans to Withdraw

1. **Following a partner's announcement of plans to withdraw from a firm, the partner may solicit clients of the firm with whom the partner has a professional relationship if each of the following conditions is satisfied:**
   - **(a) Sufficient time has elapsed following the announcement to allow the firm an equal opportunity to compete for clients;**
   - **(b) The solicitation is not done in secret; and**
   - **(c) The client is advised or otherwise aware that it is free to choose the current firm or the partner's new firm (or any other lawyer or firm).**
2. **Both the firm and the withdrawing partner have a duty to ensure that clients for whom the withdrawing partner is providing representation are informed of the withdrawal**

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57. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a) (1983) [hereinafter MODEL RULES] ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."). Recently, the Legal Ethics Committee of the District of Columbia Bar Association issued an ethics opinion suggesting that Rule 1.4 may give rise to a duty to inform clients of "[an attorney's] planned departure and of the lawyer's prospective new affiliation." *See* D.C. Bar Legal Ethics Comm., Op. 273 (1997). In a qualification severely limiting this point, however, the opinion adds that partnership law may affect duties in this regard and that a lawyer may have an obligation to inform the firm of a departure "at or around the time the lawyer so notifies clients." *Id.*

and have an opportunity to make an informed choice of counsel.

3. **When possible and appropriate, a law firm and withdrawing partner should cooperate to the end of providing joint notice of the withdrawal to clients.**

Ethics standards and case law for some time have prohibited covenants not to compete in law firm partnership agreements.[58] The ban exists principally to protect the freedom of clients to choose their lawyers[59] and secondarily to facilitate the mobility and career development of lawyers.[60] Importantly, however, most discussions of restrictive covenants have rejected their enforcement in the context of *post*-withdrawal competition for clients. At the other extreme, fiduciary duties prohibit a partner from soliciting clients before informing the firm of plans to withdraw.[61] Between the two extremes lies the period between a partner's announcement of intent to withdraw from the firm and the actual date of withdrawal.

It would be possible to prohibit any solicitation of clients until the lawyer has actually withdrawn from the partnership and is no longer a member of the firm. Such a rule would give effect to the fiduciary nature of the relationship among partners. Preservation of the fiduciary norm, however, would be accomplished at the expense of clients. Deferring the point of permissible solicitation to the time following withdrawal from the firm would deny clients material information concerning the changing affiliations of their lawyers and shorten the period during which clients could carefully explore all of their options. To preserve the fiduciary relationship among partners, the ideal that clients should be able to choose their lawyers without pressure and with the benefit of full information would be undermined.

Prohibiting solicitation of clients prior to the point of actual withdrawal is unnecessary to protect the interests of the firm in "its" client base. Follow-

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58. Dwyer v. Jung, 348 A.2d 208, 208 (N.J. Super. Ct. App. Div. 1975) (holding restrictive covenant in partnership agreement void as matter of public policy). *See, e.g.*, MODEL RULES, *supra* note 57, Rule 5.6 (prohibiting contractual restraints on competition following termination of relationship among partners). *See generally* LAWYER MOBILITY, *supra* note 1, § 2.3.3.

59. *See, e.g.*, Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1239 (Mass. 1997) (finding restraints on competition unenforceable because "[t]he law should provide the fullest possible freedom of choice to clients").

60. Most courts have treated as the equivalent of restrictive covenants economic disincentives to competition, such as withdrawal payout provisions in partnership agreements that reduce or eliminate the payment to withdrawing partners who compete with their firms. *But cf.* Howard v. Babcock, 863 P.2d 150, 156 (Cal. 1993) (suggesting that "reasonable toll" on competition would be enforceable). On economic disincentives to competition, see LAWYER MOBILITY, *supra* note 1, § 2.3.4. *See generally* Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142 (N.J. 1992).

61. *See supra* Part II.A.

ing a lawyer's announcement of plans to withdraw from a firm, the firm and the departing lawyer are on an equal footing, *in theory*, to compete for clients. On learning of a partner's planned departure, the firm is in a position to compete with the departing partner for the loyalties of clients.[62] The act that enables the solicitation by the departing partner is the notification of withdrawal rather than the withdrawal itself. Firm resources, of course, should not be used in furtherance of the partner's solicitation activities.

It is the client that chooses the lawyer rather than the lawyer who chooses the client. The turmoil and corresponding confusion often associated with partner withdrawals should not undermine the right of the client to make an informed and unpressured choice of legal counsel. Both the firm and the departing attorney have an obligation to assist the client in making an informed decision.[63] Ideally, a law firm and withdrawing partner will advance this objective by cooperating to the end of providing *joint* notice of the partner's withdrawal to clients. A California ethics opinion outlines the content of such a notification. It explains that

> Where practical, the attorneys should provide joint notice that identifies the withdrawing attorneys, identifies the field in which the withdrawing attorneys will be practicing law, gives their addresses and telephone numbers, provides information as to whether the former firm will continue to handle similar legal matters, and tells who will be handling ongoing matters during the transition. The client should also be advised of his right to select the former firm, the withdrawing attorneys, or new counsel to handle his future legal matters, as well as of his right to obtain all files and property.[64]

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62. *But cf.* Miller v. Jacobs & Goodman, P.A., 699 So. 2d 729, 734 (Fla. Dist. Ct. App. 1997) (finding that employment agreement requiring withdrawing associates to wait five days before soliciting clients is enforceable).

63. *See In re* Cupples, 952 S.W.2d 226, 235 (Mo. 1997) (en banc).

> [I]t is the responsibility of both that attorney and the law firm to ensure that the clients for whom that attorney had provided material representation are informed of the change in the circumstances of the clients' representation. This duty requires communication with those clients – whether written, personal, or by some other means – that is professional in nature and content. The primary purpose of the communication is to assist these clients in determining whether their legal work should remain with the law firm, be transferred to the departing attorney, or be transferred elsewhere. While it is natural to expect both the firm and the departing attorney to want the clients' continued legal representation, the primary purpose of the communication is to assist the clients in their needs and not to solicit the clients' business. A failure by the attorney or the firm to fulfill this duty appropriately may justify disciplinary action.

Id.

64. State Bar of Cal. Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86 (1985) (emphasis added); *see* Meehan v. Shaughnessy, 535 N.E.2d 1255, 1267 n.16 (Mass. 1989) (suggesting joint notification).

Although joint notice of the type described in the California opinion is desirable, it is very much open to question whether joint notice is the rule rather than the exception in practice, even in California.

C. Causation of Loss as an Element of the Claim for Improper Solicitation

1. **To be actionable as a breach of fiduciary duty, improper solicitation activities must cause harm to the firm. If clients would have remained with the departing lawyer in spite of any improper solicitation activities, an actionable claim does not exist.**
2. **The burden of proving that each client decision in this regard was unaffected by improper solicitation activities is on the departing lawyer.**

A breach of fiduciary duty causing harm to the party protected by the duty gives rise to a cause of action in tort in most jurisdictions. The absence of demonstrable harm flowing from the breach, however, may be fatal to the cause of action. As typically stated, the elements of a tort cause of action for a breach of fiduciary duty are as follows: (1) the existence of a duty; (2) a breach of the duty owed by the fiduciary to the beneficiary; and (3) harm resulting from the breach.[65]

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65. *See* Cremi v. Brown, 955 F. Supp. 499, 524 (D. Md. 1997) ("Under Texas law, a claim for breach of fiduciary duty has three elements: (1) the existence of a fiduciary duty owed to the plaintiff; (2) a breach of that duty; and (3) that breach was the proximate cause of the damage to the plaintiff."); Lamonte v. Sanwa Bank Cal., 52 Cal. Rptr. 2d 861, 865 (Ct. App. 1996) ("In order to plead a cause of action for breach of fiduciary duty against a trustee, the plaintiff must show the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach; the absence of any one of these elements is fatal to the cause of action."); Preferred Physicians Mut. Mgt. Group v. Preferred Physicians Mut. Risk Retention, 918 S.W.2d 805, 810 (Mo. Ct. App. 1996) (stating that in order to plead cause of action for breach of fiduciary duty against trustee, "[plaintiff] must establish that a fiduciary duty existed between it and [defendant], that [defendant] breached the duty, and that [defendant's] breach caused [plaintiff] to suffer harm"); *see also* RESTATEMENT (SECOND) OF TORTS § 874 (1977) (stating that fiduciary is liable in tort for harm caused); RESTATEMENT (SECOND) OF AGENCY § 401 cmt. b (1957) (stating that claim for breach of fiduciary duty, where there is no actual harm to plaintiff, cannot stand in tort).

Infrequently, courts have held that actual damages are not indispensable elements of a claim for breach of fiduciary duty. The cases are relatively rare and do not undermine the strength of the general proposition that damages are an essential element of the claim. In *In re Tri-Star Pictures, Inc.*, 634 A.2d 319 (Del. 1992), for example, the Delaware Supreme Court rejected a lower court's conclusion that in a class action proof of individual damages was required in a suit based on failure of fiduciary to fulfill disclosure obligations, noting: "In Delaware existing law and policy have evolved into a virtual per se rule of damages for breach of the fiduciary duty of disclosure." *Id.* at 333. In *Loudon v. Archer-Daniels-Midland Co.*, 700

Meehan v. Shaughnessy provides the most explicit discussion in case law of causation questions that are raised by the improper solicitation of firm clients by departing partners. Concluding that the departing partners had the burden of "proving no causal connection between their breach of duty and [the firm's] loss of clients,"[66] the court outlined the following factors as relevant to the causation determination:[67]

(1) Who was responsible for initially attracting the client to the firm;
(2) Who managed the case at the firm;
(3) How sophisticated the client was and whether the client made the decision with full knowledge; and
(4) What was the reputation and skill of the removing attorneys.[68]

The above factors are appropriate for evaluating causation in some but not all solicitation situations. In *Meehan*, the withdrawing partners took more than 100 contingent fee cases from the firm. A plaintiff's contingent fee practice of the type involved in *Meehan* typically will involve clients of varying degrees of sophistication who will not look to their present attorneys for representation beyond resolution of their pending cases. A very different type of practice is involved when clients are institutional, sophisticated, and looking to their attorneys for ongoing representation with no defined point of termination. Indeed, even the *Meehan* court noted that the existence of clients

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A.2d 135 (Del. 1997), however, the court pointedly observed that *Tri-Star* did not generally eliminate the need to allege and prove damages, adding that the case stood "only for the narrow proposition that, where directors have breached their disclosure duties in a corporate transaction that has in turn caused impairmènt to the economic voting rights of stockholders, there must at least be an award of nominal damages." *Id.* at 142; *see* Hendry v. Pelland, 73 F.3d 397, 402 (D.C. Cir. 1996) (finding that firm could be forced to return fee to client to whom it had breached duty, even if client could not show harm flowing from breach); Gilcchrest v. Perl, 387 N.W.2d 412, 415 (Minn. 1986) (requiring firm to forfeit fee because of breach of duty even though client was not harmed); Arce v. Burrow, 958 S.W.2d 239, 247 (Tex. App. 1997) ("It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit that he may have thereby acquired.").

66. *Meehan*, 535 N.E.2d at 1267. As support for placing the burden on withdrawing attorneys to disprove causation, the court observed:

> Proof of the circumstances of the preparations for obtaining authorizations and of the actual communications with clients was more accessible to the [departing partners than to the firm]. Furthermore, requiring these partners to disprove causation will encourage partners in the future to disclose seasonably and fully any plans to remove cases. This disclosure will allow the partnership and the departing partner an equal opportunity to present to clients the option of continuing with the partnership or retaining the departing partner individually.

Id.

67. *Id.* at 1268.

68. *Id.*

who are sophisticated may render less important the factors it articulated.[69] The court might well have gone further and stated that in appropriate cases, the sophistication of the client may be the only relevant factor in the analysis of causation.

Because causation of harm is an element of the cause of action in tort for breach of fiduciary duty, *Meehan* causation analysis, and its assignment of burden in the issue, is unsurprising. Somewhat less satisfying is the court's discussion of policy reasons supporting its decision:

> [R]equiring these partners to disprove causation will encourage partners in the future to disclose seasonably and fully any plans to remove cases. This disclosure will allow the partnership and the departing partner an equal opportunity to present to clients the option of continuing with the partnership or retaining the departing partner individually.[70]

There is at least a touch of wishful thinking in these statements. In many cases, the burden of disproving causation will not prove difficult for withdrawing partners. The easiest cases are the ones involving sophisticated clients, when causation virtually disproves itself and the link between any improper solicitation activities and harm to the firm is easily broken.

When clients are less sophisticated and the factors other than sophistication come to play, causation may turn on whether the departing lawyer was the attorney within the firm chiefly responsible for the client's matters. A client view of the withdrawing attorney as "my lawyer" gives the attorney a significant advantage, to say the least, in disproving causation of harm. The benefits of such an advantage are easy to foresee and have the effect of encouraging attorneys to "hoard" clients rather than taking steps to promote client loyalty to the firm or other attorneys within the firm. Doubtless, this is not a policy objective that the *Meehan* court would have embraced.

There is no reason to exempt litigant law partners from causation requirements imposed on other plaintiffs asserting fiduciary claims. The consequence of requiring causation, however, is to make it immeasurably more difficult to state claims for improper solicitation activities. It may be clear beyond doubt that solicitation prior to the announcement of a departure is a breach of fiduciary duty, but the breach may lack an effective remedy in many, perhaps even most, cases.

Even if the absence of demonstrable harm flowing from a breach is fatal to the *firm's* cause of action for breach of fiduciary duty, disciplinary action

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69. *See id.* at 1268 n.18 ("In a minor number of removed cases, the insurance defense cases, the judge found the client was sophisticated, and made the decision to retain [the withdrawing attorneys] with full knowledge of the circumstances. In this situation, other factors, such as who originally brought the client in, may become less significant.").

70. *Id.* at 1267.

may be taken against the attorney who has improperly solicited clients without regard to harm to the firm. The use of ethics rules as a means of defining the obligations that lawyers in a firm have to each other has received relatively little attention. Several recent decisions, however, suggest that the protections of professional responsibility rules may extend to partners, as well as clients.[71] Although not yet a trend, the use of disciplinary actions to define the relationship of lawyers associated in a firm *inter se* is increasing.[72]

III. Disclosures of Firm/Client Information to Third Parties

A firm's reasonable expectation that nonpublic firm information in the possession of a partner will not be disclosed to parties outside the firm may be balanced in appropriate cases against the rights of attorneys to practice their profession and the rights of clients to be represented by the lawyer of their choice. The following principles are relevant to this balancing.[73]

A. In General

Nonpublic firm-specific information pertaining to the finances, practice, and operations of a firm may not be disclosed by a partner to third parties in competition with or to the injury of the partner's present firm.

Rare is the case of a lawyer who moves a practice from a firm without disclosing to parties outside the firm some information concerning the firm and its clients. Particularly difficult issues are raised by disclosures of nonpublic firm information by a partner as part of the discussions and negotiations with another firm concerning a possible affiliation. The information may include data on firm profitability, the identity of clients, revenues attributable to specific clients, and resources needed in order to service clients. From the firm's perspective, the information may be highly confidential and

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71. *See, e.g.*, *In re* Cupples, 952 S.W.2d 226, 237 (Mo. 1997) (en banc) (stating that withdrawing partner's "violation of his duties to the . . . firm directly affected and endangered the quality of representation the firm provided to [the client]"); *In re* Smith, 843 P.2d 449, 452 (Or. 1992).

> Although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation. Moreover, such conduct is a violation of the duty of loyalty owed by a lawyer to his or her firm based on their contractual or agency relationship.

Id.

72. *See generally* LAWYER MOBILITY, *supra* note 1, § 2.6.

73. The principles are offered as aids in balancing the rights and duties of partners inter se and are not intended to define the scope of duties owed to clients.

sensitive in nature. From the perspective of the partner considering a new affiliation and the perspective of the firm with which the partner is having discussions, the information may be important to defining the nature of the partner's practice and the interests of the two parties in moving forward. To prohibit as "disloyal" the partner's disclosure of any "confidential" firm information to another firm would dramatically limit the ability of lawyers to move among firms.

A partner's loyalty obligation includes the duty to maintain the confidentiality of information concerning the finances, practice, and operations of a firm when there is a reasonable expectation that the information will not be disclosed to parties outside the firm. Ideally, there should exist a free flow of information among partners in a firm. Because concern over leakage would impede the flow of information, protecting the information is a loyalty obligation of the partner even if the information, strictly speaking, is not "proprietary" or protectable as a trade secret.

The duty not to disclose properly extends only to that information for which there is a reasonable expectation of confidentiality. It should be noted that evaluating the permissibility of disclosure with reference to the confidentiality of the information is a standard on which disagreement is likely to exist. Consider in this regard the comments of the California Supreme Court in a case involving the disclosure of key employees of a corporation and their salaries:

> It is beyond question that a corporate officer breaches his fiduciary duties when, for the purpose of facilitating the recruiting of the corporation's employees by a competitor, he supplies the competitor with a selective list of the corporation's employees who are, in his judgment, possessed of both ability and the personal characteristics desirable in an employee, together with the salary the corporation is paying the employee and a suggestion as to the salary the competitor should offer in order to be successful in recruitment. *This conclusion is inescapable even if the information regarding salaries is not deemed to be confidential.*[74]

It is not all clear why information "not deemed to be confidential" should be protected unless the improper conduct lies in the act of secret competition, discussed above,[75] rather than the act of disclosure. As to the act of disclosure, the firm's reasonable expectations of confidentiality should be the guiding standard.[76]

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74. Bancroft-Whitney Co. v. Glen, 411 P.2d 921, 938-39 (Cal. 1966) (en banc) (emphasis added).

75. *See supra* Part I.

76. Moreover, there is not a reasonable expectation of confidentiality when the information is readily available from sources outside the firm, and disclosure of such information

B. Disclosures to Parties Other than Law Firms

1. **A partner may make limited disclosures of nonpublic information concerning the firm and its clients to third parties, other than law firms, for the purpose of facilitating contractual relationships necessary to support the partner's post-withdrawal practice.**
2. **Such information must directly relate to the lawyer's practice and be of the type customarily provided in similar transactions.**
3. **Reasonable steps should be taken to insure that the third parties maintain the confidentiality of the information.**

As discussed above, lawyers withdrawing from a firm to establish their own firms, alone or with others, often must make "logistical" arrangements with third parties, such as banks financing the practice and property owners providing office space.[77] Bank financing and office leasing are transactions of considerable economic substance involving substantial commitments on the part of the third parties, who invariably wish to analyze whether the lawyer will generate the revenue needed to meet the obligations under the contracts. To facilitate that analysis, the third parties may require information concerning clients likely to follow the lawyer and pro forma financial statements reflecting projected revenues and expenses. Such projections often rest on historical data concerning revenues and expenses, which is exactly the type of information a firm may regard as confidential.

Some disclosures of information to facilitate arrangements to move a practice may be justified as necessary in order to provide ongoing services to clients with a minimum of disruption. Only limited information, however, may be disclosed to third parties. The information should directly relate to the lawyer's practice and be of the type customarily provided in similar transactions. This means, for example, that third parties should not be provided with financial statements for the firm from which the lawyer is withdrawing. Such information is beyond that which is reasonably necessary for the third party to evaluate the credit-worthiness of the lawyer. In addition, reasonable steps should be taken to insure that third parties maintain the confidentiality of information provided to them.[78]

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should not be prohibited under the rubric of fiduciary duties. For example, a considerable amount of financial information on firms is reported in the legal press. *See, e.g., The Am Law 100: America's Highest-Grossing Firms in 1996*, AM. LAW., July 1996 (1996 annual survey).

77. *See supra* Part I.C.

78. This analysis assumes that the relationship existing with a particular client does not preclude the transmittal of information concerning the client. In the event that the client has instructed the lawyer to maintain strictly the confidentiality of information concerning the client

C. Disclosures to Law Firms

Limited items of confidential firm information and client-specific information may be disclosed by a partner to another firm in connection with that partner's exploration of a possible affiliation with the firm.

1. **The information that may be disclosed to another firm is the *minimum necessary* to allow the parties to assess, with generality rather than specificity:**
   (a) **The general nature of the partner's practice;**
   (b) **The firm's interest is accommodating that practice;**
   (c) **The financial and personnel resources that would be needed to support the practice;**
   (d) **Any limitations that may exist (for example, conflict of interest and imputed disqualification rules) that may limit the firm's ability to represent clients of the partner; and**
   (e) **An appropriate range of compensation.**
2. **Reasonable care should be taken to insure that the firm to which the information is disclosed maintains the confidentiality of the information.**

A partner contemplating withdrawal from a firm may make *limited* disclosures of confidential information concerning a firm and clients to another firm. In contrast with disclosures of information to third parties that are not law firms, discussed above, disclosures to law firms raise the possibility that the party to which the disclosure is made will use the information in competition with the firm. One response to the possibility of competitive use of the information by the recipient firm is to ban disclosures of confidential firm information to other firms altogether. Such a ban, however, could operate to the detriment of clients. The hiring firm would be expected to accept the lawyer with significant uncertainty concerning the identity of the lawyer's clients,[79] the nature of the lawyer's practice,[80] and the level of firm support

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and billings of the client, the express consent of the client should be obtained before any information is provided to third parties. The same is true if the client has not expressly instructed the lawyer to maintain the confidentiality of the information but it is reasonable to assume that the client would object to the disclosure of the information.

79. Among the likely questions: To what extent will the clients the lawyer brings to the firm give rise to conflicts with the firm's existing clients?

80. Among the likely questions: What are the billing arrangements standard in the practice? Is the practice cyclical? Will the practice integrate well within the firm and likely lead to additional business?

and resources necessary to support the practice.[81] The uncertainties generated by such a ban on the use and disclosure of information would retard the ability of lawyers to change firms, even when a change of firms may facilitate the provision of services on a cost-effective basis to clients.[82] Allowing limited disclosures of firm information under conditions unlikely to give another firm a competitive advantage is preferable to banning disclosures altogether. The key, of course, lies in identifying the conditions.

Evaluating the potential profitability of a partner's practice may prove difficult without detailed information, both financial and nonfinancial, on the firm itself. Of particular interest are data on the partner's revenues, billing rates supporting the revenues, billing rates and hours billed by all attorneys and paralegals working on client matters, and overhead expenses (including compensation levels within the firm). Additional matters of interest may include billing and collection practices, the identity of attorneys and staff working on client matters, the cost and characteristics of support systems (for example, data management programs) used for particular clients, and so forth. In short, for the hiring firm to achieve a desired level of certainty in evaluating the practice of a lawyer and the resources necessary to support the practice, it may be necessary to evaluate a considerable amount of information, financial and otherwise, concerning the firm of which the lawyer is presently a partner.

Although extensive information may be desired, only limited firm information may be disclosed to another firm as part of a partner's discussions with that firm concerning a possible affiliation. The information that may be disclosed is the *minimum necessary* to allow a general assessment of the nature of the partner's practice, the resources required to support the practice, potential conflicts with existing clients of the firm, and an appropriate range of compensation.

By allowing only minimal information, a balance is struck between the interests of the firm in maintaining the confidentiality of information, the interests of clients in insuring that their representation will continue with the lawyers of their choice and with a minimum of disruption, and the interests of lawyers in career development.[83] Greater information could reduce the risks

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81. Among the likely questions: How many associates, paralegals, and other staff will be required? How much office space, and where, will be needed? To what extent will the firm be asked to advance costs for clients?

82. For a discussion of why clients may benefit from an environment in which lawyers are able to move among firms, see Robert W. Hillman, *The Law Firms as Jurassic Park: Comments on* Howard v. Babcock, 27 U.C. DAVIS L. REV. 533, 547-50 (1994).

83. For some types of information, relatively simple steps (such as redacting information) may be taken to avoid disclosures that are excessive. The ease of limiting such information is an important factor in determining whether only information that is minimally necessary to achieve the permitted objectives has been disclosed.

associated with uncertainty for both the lawyer and the firm with which the lawyer wished to affiliate, but such a gain would be at the cost of undermining, to an extent greater than is necessary, the confidentiality of firm information.

D. Disclosure of Client-Specific Information

Client-specific information (that is, information that relates in detail to a particular client and the services provided by the firm to that client) may be disclosed by a partner to another firm in connection with the partner's exploration of a possible affiliation with that firm if each of the following conditions is satisfied:

1. **The information relates directly to a client of the firm and the legal services provided by the firm to that client;**
2. **The information is available to the client, the client is under no independent duty to the firm to maintain the confidentiality of the information, and the client would itself be free to disclose it to another firm;**
3. **The partner reasonably believes the client is likely to follow the lawyer to a new firm; and**
4. **The client consents to the disclosure (before or after the fact).**

Information pertaining to specific clients – client-specific information – should be distinguished from more generic information concerning a firm. Client-specific information includes data particular to clients, such as client identity, billings, billing rates, and identity of staff within the firm working on client matters. Such information, of course, overlaps firm information. It differs from other firm information, however, in that both the firm and the client to which the information pertains may claim some right to control use of the information. Indeed, client-specific information may be available directly from the client, a fact that may lessen the firm's expectations that the information will not be revealed to third parties.[84]

Because both the firm and the client may be seen as having proprietary rights in client-specific information and potentially conflicting interests in

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84. *But cf.* Bancroft-Whitney Co. v. Glen, 411 P.2d 921, 939 (Cal. 1966) (en banc). The court suggests in a case involving the fiduciary duties of a corporate officer that disclosure of salaries may be improper even if information is available from the employees themselves:

> It requires little talent to distinguish between a situation in which an individual voluntarily discloses his own salary to another and one in which the unpublished salary list of a group of prospective employees is revealed to a competitor for the purpose of facilitating the recruitment of the corporation's personnel.

Id.

controlling its use, the principle addressing client-specific information attempts to balance the competing interests in the information. Prohibiting the disclosure of client-specific information undoubtedly would sharply diminish the mobility of lawyers. The promotion of firm stability, however, is not a sufficient reason in itself to restrict the use of client-specific information when disclosure of the information is consistent with the interests of clients and with their consent, if not direction.[85]

As discussed above, a lawyer may be under constraints concerning what can be discussed with a client before the firm is advised of the lawyer's intent to withdraw.[86] For this reason, the principle focuses on a lawyer's reasonable assumption that a particular client on whom information is released would choose to follow the lawyer to a new firm. For the same reason, client consent, although necessary to support the disclosures, may be secured after the firm is informed by the lawyer of the withdrawal plans and the lawyer is free to solicit the client.

IV. Client Files

A. In General

Upon authorization by the client, a lawyer withdrawing from a firm may take files of the client reasonably related to representation of the client.

B. Notice and Opportunity to Make Copies

Client files should not be taken from the firm by a departing lawyer without prior notice to the firm, which should be afforded an opportunity to copy, at its expense, the contents of any files to be removed.

C. Client Authorization

Absent client authorization, a withdrawing lawyer should not remove client files from the firm without the consent of the firm.

From the precept that clients have a near-absolute right to choose their lawyers flows the right of a client to discharge a law firm at any time, with or without cause.[87] The right to discharge a firm and substitute new counsel (for

85. On occasion, a client dissatisfied with the quality of legal services received may take the lead in suggesting that a lawyer change firms.

86. *See supra* Part II.A.

87. *See, e.g.*, MODEL RULES, *supra* note 57, Rule 1.16(a)(3) (discussing mandatory lawyer withdrawal upon discharge by client); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 43 (Tentative Draft No. 5, 1992) (stating that lawyer's authority to represent client ends when

example, a former partner of the discharged firm) could easily be frustrated by the discharged firm's refusal to release the files of the client. For this reason, a requirement that the files follow the direction of the client is an essential part of the client's right to choose counsel.[88]

To be sure, disputes over the custody of files present a clear conflict between property rights of law firms and their clients. That a firm has some "proprietary" interest in client files is undeniable, at least to the extent that the files include the work product of attorneys. Subject to exceptions discussed below, however, the firm's claim to the content of the files is not superior to the claim of the clients themselves. In rejecting the right of a discharged firm to withhold significant portions of a file absent a showing by the client that the information is needed, the New York Court of Appeals recently observed:

> [A]n attorney's fiduciary relationship with a client may continue even after representation has concluded. Among the duties of an attorney as fiduciary and agent of the client are those of openness and conscientious disclosure . . . . That obligation of forthrightness of an attorney toward a client is not furthered by the attorney's ability to cull from the client's file documents generated through fully compensated representation, which the attorney unilaterally decides the client has no right to see.[89]

In concluding that a client should be entitled to inspect and copy "work product materials, for the creation of which they paid during the course of the firm's representation,"[90] the court relied in part on the draft of the *Restatement*

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client discharges lawyer); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.5.2, at 545 (1986) ("It is now uniformly recognized that the client-lawyer contract is terminable at will by the client. For good reasons, poor reasons, or the worst of reasons, a client may fire the lawyer."). On compensation for the discharged firm, see generally LAWYER MOBILITY, *supra* note 1, § 2.3.1.

88. *See, e.g.*, Rose v. State Bar, 779 P.2d 761, 765 (Cal. 1989) ("But there can be no doubt that the balance of an attorney's litigation file is the property of the client and must be surrendered promptly upon request to the client or the client's new counsel once the representation has terminated.").

89. Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 689 N.E.2d 879, 882-83 (N.Y. 1997). In concluding that a client should be afforded presumptive access to the entire file, subject to narrow exceptions, the court of appeals rejected the lower court's conclusion that requested portions of the file constituted "private property" and that the client had failed to show why it needed the material. *See* Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 653 N.Y.S.2d 12 (App. Div.), *rev'd*, 689 N.E.2d 879 (N.Y. 1997).

90. *Sage Realty*, 689 N.E.2d at 883. It is perhaps misleading to describe the materials requested as "a file." *See* Dean Starkman, *New York Dispute Raises Issue of Clients' Right to Lawyers' Files*, WALL ST. J., Feb. 17, 1998, at B18 col. 1.

> Proskauer is now turning over all of the 175,000 or so disputed pages – and making copies for itself in preparation of its malpractice defense. The Kaufmans' new lawyers have just begun to pore over the records, and Mr. Kaufman says he still

of the Law Governing Lawyers, which generally requires delivery of "documents" on the demand of the client or upon the termination of representation.[91] A contrary position would introduce a significant limitation on a client's ability to change firms, a change for which there seems to be little present support.[92]

A limited accommodation of conflicting rights to files may be accomplished by allowing the firm to retain copies of the transferred files.[93] A firm

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> isn't sure why the law firm fought so hard to keep them. "There must be something in there they don't want us to see," he says.

Id.

91. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 58(3) (Proposed Final Draft, Mar. 29, 1996).

> Unless a client or former client consents to nondelivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Id. But cf. Neeb v. Superior Court, 262 Cal. Rptr. 887, 889 (Ct. App. 1989) (adhering to minority view suggesting that portion of file constituting attorney "work product" may be property of firm or attorney rather than client), *review granted and opinion superseded*, 788 P.2d 1154 (Cal.), *review dismissed*, 795 P.2d 782 (Cal. 1990). A related issue, not addressed in this Article, concerns the relative rights of the firm and its lawyers (independent of the rights of clients) to work product in client files.

92. *Cf.* Howard v. Babcock, 863 P.2d 150, 158-59 (Cal. 1993) (suggesting limitations that presently exist on client's choice of counsel, including conflict of interest restraints on representation).

The Legal Ethics Committee of the District of Columbia Bar Association recently issued an ethics opinion that is notably unhelpful in providing guidance on this issue. *See* D.C. Bar Legal Ethics Comm., Op. 273 (1997). After commenting that retaining liens may be asserted only in the narrowest of circumstances and that a firm may retain copies of files it surrenders to former clients, the opinion observed:

> Other questions of ownership *vis a vis* a client, and questions of ownership of files and other written materials as between departing lawyers and their former law firms, are not governed primarily by the Rules of Professional Conduct. Some ownership and control questions may be resolved by reference to statutory and common law rules of personal property. And, where the departing lawyer is a partner, partnership law principles would be relevant. Our Committee does not opine on such questions of law. Nevertheless, a lawyer should think carefully about whether the lawyer may take such materials with him/her, because a lawyer's removal or copying, without the firm's consent, of materials from a law firm that do not belong to the lawyer, that are the property of the law firm, and that are intended to be used by the lawyer in his new affiliation, could constitute dishonesty, which is professional misconduct under Rule 8.4(c).

Id. at 192.

93. *See, e.g.*, D.C. Bar Legal Ethics Comm., Op. 168 (1986) (stating that firm may copy released files, at its expense).

may wish to retain copies for many reasons, not the least of which is the usefulness of the information in defending a later malpractice action by the former client. To allow such copying, and to allow the firm an opportunity to record which files are taken, the withdrawing attorney should notify the firm *before* taking files.

D. *Retaining Liens*

The firm's obligation to release client files to a withdrawing lawyer pursuant to directions from the client is subject to the firm's limited right (recognized in some jurisdictions) to assert a retaining lien to secure payment of fees and sums advanced to the client by the firm.

A retaining lien is a possessory lien recognized by some, but not all, jurisdictions.[94] It attaches to all papers, books, documents, securities, moneys, and property of the client in the possession of the firm.[95] Because it is a possessory lien, the right to assert a retaining lien is lost upon the voluntary surrender of files.[96]

The retaining lien, which is a creature of both statutory and common law, is not recognized in all jurisdictions.[97] Even where recognized, retaining liens invite litigation.[98] Some courts and ethics opinions have concluded that files may not be retained under conditions likely to cause prejudice to clients.[99]

94. *See* RESTATEMENT (SECOND) OF AGENCY § 464(b) (1958).

95. *See id.*

96. On retaining liens generally, see LAWYER MOBILITY, *supra* note 1, § 2.3.2.

97. The draft *Restatement of the Law Governing Lawyers* does not recognize retaining liens (except to the extent authorized by statute or rule). It does, however, allow a lawyer to withhold delivery of a document prepared by the lawyer if the client has not paid the fees associated with the preparation, provided nondelivery would not unreasonably harm the client. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 55(1) (Proposed Final Draft, Mar. 29, 1996). The much older *Restatement (Second) of Agency* § 464(b) (1958), and *Restatement of Security* § 62(b) (1941), do recognize retaining liens. The Model Rules reflect drafting dexterity: Rule 1.16(d) allows a terminated lawyer to "retain papers relating to the client to the extent permitted by other law." MODEL RULES, *supra* note 57, Rule 1.16(d). Rule 1.8(j)(1) allows a lawyer to "acquire a lien granted by law to secure the lawyer's fees or expenses." *Id.* Rule 1.8(j)(1). One ethics opinion assumed, incorrectly, that these provisions are authority for retaining liens but warned: "The availability in the District of Columbia of retaining lien against client files is substantially narrower than under the ABA Model Rules of Professional Conduct." D.C. Bar Legal Ethics Comm., Op. 273 (1997).

98. Ethics opinions issued by bar associations seem particularly hostile to retaining liens. For a list and discussion of such opinions, see LAWYER MOBILITY, *supra* note 1, § 2.3.2.2.

99. *See, e.g.*, Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir. 1983) (involving papers needed to defend criminal prosecution); D.C. Bar Legal Ethics Comm., Op. 273 (1997) ("A retaining lien may be asserted against client files only in the narrowest of circumstances . . . where the client is able to pay and where the assertion of the lien will not risk irreparable harm

Moreover, a few courts have ruled files must be surrendered when adequate security for fees and expenses is offered,[100] a result entirely sensible given that the retaining lien exists solely for the purpose of securing such sums.

On the whole, case law and ethics opinions display an increasing hostility towards retaining liens. The hostility is well captured by commentary in the draft *Restatement of the Law Governing Lawyers*:

> While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers .... [T]he very point of a retaining lien, if accepted at all, is to coerce payment by withholding papers the client needs.[101]

Although the retaining lien has been recognized for centuries,[102] its days as a means of extracting payment from clients may be numbered.

V. Recruitment of Staff

A. Recruitment Prior to Notice of Withdrawal

A partner planning to withdraw from a firm may not recruit (that is, persuade to leave) staff of the firm prior to giving the partnership notice of withdrawal.

B. Recruitment After Notice of Withdrawal but Prior to Withdrawal

Prior to withdrawal from the firm but after notice of withdrawal has been given, a partner withdrawing from a firm may not recruit staff of the firm except to the extent reasonably necessary to provide services to clients likely to remain with the lawyer, and then only if the firm is notified in advance of the identity of individuals to be recruited.

C. Recruitment After Withdrawal

Following withdrawal from a firm, a former partner of the firm is free to recruit staff of the firm.

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to the client." (footnote omitted)).

100. *See, e.g.*, Smith v. Patton, 562 So. 2d 859, 860 (Fla. Dist. Ct. App. 1990) (explaining that attorney may retain file "until such time as the fee dispute is resolved, or security posted for payment of that fee").

101. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 55 cmt. b (Proposed Final Draft, Mar. 29, 1996).

102. The retaining lien dates at least to 1734. *See Ex parte* Bush, 22 Eng. Rep. 93 (Ch. 1734).

In providing services to a client, a lawyer is often supported by a "team" that may include (in addition to other partners) associates, paralegals, and a variety of other staff assistants. Commonly, some or all of the supporting staff move with an attorney who departs from a firm. This raises questions concerning the extent to which a partner's duties to the partnership may restrict the partner's attempts to recruit staff of the firm experienced in handling client affairs.

The *Restatement (Second) of Agency* offers the following general guidance when addressing the propriety of soliciting employees in anticipation of competition with the principal:

> The limits of proper conduct with reference to securing the services of fellow employees are not well marked. An employee is subject to liability if, before or after leaving employment, he causes fellow employees to break their contracts with the employer. On the other hand, it is normally permissible for employees of a firm, or some of its partners, to agree among themselves, while still employed, that they will engage in competition with the firm at the end of the period specified in their employment contracts. However, a court may find that it is a breach of duty for a number of the key officers or employees to agree to leave their employment simultaneously and without giving the employer an opportunity to hire and train replacements.[103]

The comment is generic in that it is directed to the duties of an agent in general and does not address how the duties should be defined in the setting of a firm providing professional services to clients.

There is relatively little reported litigation concerning the recruitment of law firm staff. The New Jersey Supreme Court decision *Jacob v. Norris, McLaughlin & Marcus*[104] is a notable exception. In *Jacob*, a law firm's partnership agreement imposed economic penalties on any withdrawing partner who "solicits other professional and /or paraprofessional employees of the Law Firm to engage in the practice of law with the departed Member."[105] In striking down the contractual restraint on the raiding of staff, the court emphasized the interests of both lawyers and nonlawyers in career mobility.[106] Particularly interesting was the court's conclusion concerning paraprofessionals: "It is important that non-lawyer employees have as much mobility in employment opportunity as possible consistent with the protection of clients' interests. [A]ny restrictions on the nonlawyer's employment should be held to the minimum necessary to protect confidentiality of client information."[107]

103. RESTATEMENT (SECOND) OF AGENCY § 393 cmt. e (1958).

104. 607 A.2d 142 (N.J. 1992).

105. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 145 (N.J. 1992).

106. *See id.* at 153.

107. *Id.* (citation omitted). As to associates, the court reasoned that the agreement "unduly

Jacob addressed the enforcement of an anti-raiding contract rather than the extent to which recruitment of staff is consistent with a partner's status as a fiduciary. The case does serve as a useful reminder, however, that externalities may be associated with the application of fiduciary standards to restrain solicitation of staff.

Some parallels may be drawn between the solicitation of clients, discussed above,[108] and the recruitment of staff. On the one hand, both activities raise difficult questions concerning the loyalty obligations running from the lawyer to the partnership. On the other hand, both solicitation of clients and recruitment of staff may seem essential to the smooth transition of a lawyer from one firm to another. There are distinctions, however, between the two activities that may justify imposition of tighter restrictions on the solicitation of staff than on the solicitation of clients. As discussed above, the right of a client to the lawyer or firm of her choice is an important right protected by norms of legal ethics and by substantial case law. Further, the fiduciary duties that run between partners are defined, and even limited, by the fiduciary duties that run between lawyer, or law firm, and client.

The relationship between lawyer and client has strong fiduciary overtones. Clients often view their relationships with particular lawyers as transcending the lawyers' firm affiliations. In contrast, a lawyer does not stand in a fiduciary relationship to employees of the firm. This is true even if the employees have worked closely with the lawyer over extended periods of time. It is true that feelings of loyalty may extend on a reciprocal basis between a lawyer and employees of the firm, but the relationship is not of a type that would limit the fiduciary duty owed by the lawyer to partners in the firm. For these reasons, recruitment of firm employees is permissible on a more limited basis than is solicitation of clients.

Generally, recruitment of firm employees should not occur until after the lawyer has left the firm. If applied inflexibly, however, a pre-withdrawal ban on recruitment of firm employees may impair the ongoing representation of clients by disrupting, at least temporarily, staffing to provide services to clients. Once again, the overriding value of protecting the interests of clients serves to temper fiduciary duties that run between law partners. Here, the conflicting duties to clients and law partners may be accommodated by allowing pre-withdrawal recruitment of employees to the extent reasonably necessary to avoid disruption in the representation of clients. This is allowed only after the firm has been given notice of the lawyer's intention to withdraw. No justification exists for surreptitious recruitment. The firm should

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constricts the right to practice of those attorneys who would have liked to have accompanied a departing partner, but who were not informed of that partner's interest due to an agreement creating a disincentive against their being contacted." *Id.*

108. *See supra* Part II.

be told the identity of employees to be so solicited so that it has a reasonable opportunity to persuade the employees to remain with the firm.

A partner's fiduciary duty of loyalty generally ends at the point of withdrawal from the partnership, at least insofar as competition with the partnership is concerned. Accordingly, restraints on the recruitment of employees of the firm no longer apply.[109] The generality of this statement, however, is somewhat misleading. The use of information taken from the firm to advance the recruitment of firm employees may constitute an improper taking of information from the firm.[110] In addition, some of the targets of recruitment are themselves restricted by obligations imposed on fiduciaries, inducement of a breach of those duties or other duties arising under contract may be actionable as unfair competition,[111] if damages can be proven.[112]

VI. Post-Withdrawal Income

A. In General

Following the withdrawal of a partner, the firm and its former partner have a duty to account to each other for income derived from cases pending at the time of withdrawal.

B. Overhead Expenses

In accounting for post-withdrawal income, the firm and its former partner may make allowance for reasonable overhead expenses chargeable to the production of the income.

That income is shared from the completion of unfinished business existing at the time of withdrawal is a straightforward application of partnership law principles that have been in effect for decades. Under the UPA, the withdrawal of a partner causes a dissolution of the partnership,[113] which continues in existence for the purpose of winding up business pending on the date of dissolution.[114] RUPA complicates the matter somewhat by allowing partner-

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109. *See, e.g.*, RUPA (1994) § 603(b)(2) (stating that dissociation terminates partner's duty of loyalty); *cf.* RESTATEMENT (SECOND) OF AGENCY § 396(a) (1957) (stating that duty not to compete with principal ends with termination of agency).

110. *See* RESTATEMENT (SECOND) OF AGENCY § 396(b) (stating that after termination of agency, agent has duty "not to use ... in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use" and that "agent is entitled to use general information . . . retained in his memory, if not acquired in violation of his duty as agent").

111. *See, e.g.*, Bancroft-Whitney v. Glen, 411 P.2d 921, 926 (Cal. 1966) (en banc).

112. *See supra* Part II.C.

113. *See* UPA (1914) §§ 29, 31.

114. *See id.* § 30.

ships formed for a term to survive the withdrawal of a partner without dissolution.[115] Most law partnerships, however, are at-will rather than term partnerships,[116] which means that, even under RUPA, dissolution of the law partnership remains the normal consequence of the withdrawal of a partner.[117]

Dissolution's principal impact is in the accounting for income.[118] Under both the UPA and RUPA, income generated from the winding up of a dissolved partnership is partnership income, to be shared among all partners (including the partner whose withdrawal caused a dissolution of the partnership).[119] Apart from partner compensation, discussed below, most modern opinions allow adjustment to income attributable to winding up to reflect overhead expenses associated with producing the income.[120]

Although RUPA continues the basic dissolution model of the UPA for at-will partnerships, one little-noticed change of RUPA may substantially affect the division of post-withdrawal income. Under the UPA's "no compensation rule," no partner is entitled to special compensation for completing

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115. *See* RUPA (1994) §§ 801(1), 801(2) (distinguishing between partnership at will and partnership for definite term or particular undertaking). A primary goal of RUPA was to modify the UPA's dissolution provisions to accord partnerships an entity status that would allow them to survive, without dissolution, the withdrawals of their members. *See generally* Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427, 435-36 (1991).

116. On the "at will" nature of most law partnerships, see LAWYER MOBILITY, *supra* note 1, § 4.3.4. The consequences under RUPA of establishing a term or undertaking for a law firm are not addressed in this Article.

117. RUPA does include an option to revoke the dissolution of a partnership that is winding up if all partners, including the partner who has withdrawn, so consents. *See* RUPA § 802(b). Presumably, the necessary consent will be grounded on an agreement concerning the division of income among partners.

118. The idea that a partnership dissolves by operation of law with the withdrawal of a single partner may seem at odds with perceptions of stability commonly associated with larger law firms consisting of hundreds of partners. The conflict, however, is a false one. To say that a partnership dissolves is not to suggest that the firm through which it operates suffers the slightest amount of instability. When a partner leaves, the partnership is simply replaced by a successor partnership consisting of the original partners but excluding the partner who has withdrawn. For a time, the original partnership exists side by side with the successor partnership. The operative distinction between the two partnerships essentially is one of accounting for income. For a given firm, the partnership may dissolve and reform tens or even hundreds of times without any apparent effects or disruption on the continuity of the firm.

119. *See generally* LAWYER MOBILITY, *supra* note 1, §§ 4.6-4.7.

120. *See* Jewel v. Boxer, 203 Cal. Rptr. 13, 19-20 (Ct. App. 1984); Beckman v. Farmer, 579 A.2d 618, 640 (D.C. 1990); *see also* Flynn v. Cohn, 607 N.E.2d 1236, 1240 (Ill. 1992) (relying on expert testimony and using overhead of firm prior to dissolution as means of calculating postdissolution expenses). *But see, e.g.*, Hawkesworth v. Ponzoli, 388 So. 2d 299, 301 (Fla. Dist. Ct. App. 1980) (applying no-compensation rule to deny reimbursement of overhead expenses).

cases pending at the time of dissolution.[121] In theory, compensation is not required because burdens will be proportionate as each partner continues to work to bring matters to completion.[122] As a predictor of behavior, the theory seems questionable.[123] In reality, the effect of the no-compensation rule is to favor those attorneys whose clients generated a steady flow of new matters at the expense of attorneys whose clients generate sizable matters that extend over lengthy periods of time.[124]

The no-compensation rule has been subject to much criticism[125] and does not survive in RUPA, which expressly creates an entitlement to "reasonable compensation for services rendered in winding up the business of the partnership."[126] RUPA actually may promote law firm instability by providing an incentive to take active cases from a law firm.[127] Under RUPA, the spoils will go to the victor who controls the client.

C. Effect of Agreement

The division of post-withdrawal income is subject to agreement among the partners, provided that the agreement does not operate to prevent clients from choosing their counsel.

The requirement that income must be shared from the completion of matters pending at the time of a partner's withdrawal is a default provision of

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121. A limited exception, applicable in the case of a death of a partner, allows reasonable compensation for a surviving partner who winds up partnership affairs. *See* UPA (1914) § 18(f).

122. *See, e.g.*, Fox v. Abrams, 210 Cal. Rptr. 260, 265 (1985) ("On balance, the allocation of fees according to each partner's interest in the former partnership should not work an undue hardship as to any partner where each partner completes work on the partnership's cases which are active upon dissolution.").

123. *See, e.g.*, Comment, *Dissolution of a Law Partnership – Goodwill, Winding Up Profits, & Additional Compensation*, 6 J. LEGAL PROF. 277, 290 (1981) ("Surely, the effect of the no additional compensation rule is a decrease in the quality and amount of time expended by attorneys for left over clients since they are certainly better compensated for their efforts on behalf of their new clientele.").

124. This point is developed more fully in LAWYER MOBILITY, *supra* note 1, § 4.6.4.

125. *See generally* LAWYER MOBILITY, *supra* note 1, § 4.6.1; Comment, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CAL. L. REV. 1597 (1985).

126. RUPA (1994) § 401(h).

127. *Cf.* Jewel v. Boxer, 203 Cal. Rptr. 13, 18 (Ct. App. 1984).

> The [no compensation] rule prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain those cases should the partnership dissolve. It also discourages former partners from scrambling to take physical possession of files and seeking personal gain by soliciting a firm's existing clients upon dissolution.

Id.

the partnership statutes. This means that partners are free to reach agreements concerning how post-withdrawal income will be shared. Such understandings are commonly included in partnership agreements.

Agreements concerning the division of post-withdrawal income should be given effect unless they serve to undermine the right of clients to choose their lawyers.[128] Of particular concern are one-sided fee sharing agreements that require a former partner to share fees with the firm on cases taken from the firm but relieve the firm of any obligation to share its fees with the former partner on matters pending at the time of withdrawal. Although such an agreement may make it financially difficult or even impossible for a withdrawing partner to represent clients of the firm, some reported decisions support one-sided fee sharing agreements without regard to their potentially negative effects on clients.[129] Most courts, however, consider significant financial disincentives to competition as the operative equivalent of covenants not to compete,[130] which are prohibited under norms of professional responsibility.[131]

Conclusion

This Article offers a set of principles that may operate as a framework for defining the duties of partners withdrawing from a law firm. It addresses the many questions left unanswered by the multiplicity of statutes purporting to modernize the law of business associations. Law reform keyed to developing new forms of business associations has expanded associational choices for participants in business and professional ventures. The proliferation of statutes, however, has extended the margins of law at the expense of ignoring the core. Basic questions concerning loyalty and candor obligations as well as the extent to which competition with present or former partners is allowed are inadequately addressed by the new legislation.

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128. *See supra* notes 54-58 and accompanying text.

129. *See, e.g.*, Howard v. Babcock, 863 P.2d 150, 159 n.8 (Cal. 1993) (stating that agreement effectively providing compensation to former partners at rate of $5.10 per hour for 15,917 billable hours on cases they took from firm may be enforceable). *But cf.* Kelly v. Smith, 611 N.E.2d 118, 121 (Ind. 1993) (interpreting contract in way that avoided "inequitable" result of one-sided fee sharing). For a discussion of one-sided fee sharing, see LAWYER MOBILITY, *supra* note 1, § 2.3.4.4.

130. *See* Jacob. v. Norris, McLaughlin & Marcus, 607 A.2d 142, 148 (N.J. 1992); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411-12 (N.Y. 1989); *cf.* Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1240 (Mass. 1997) (stating that forfeiture for competition clauses are generally unenforceable except under limited circumstances, such as when "departing partner leaves the firm with onerous partnership debts, threatening the financial integrity of the firm").

131. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1980).

To take but one example, consider the priorities suggested by RUPA, the first major overhaul of partnership law in more than seven decades. The uniform act devotes greater attention and space to such new issues as conversion of partnerships into limited partnerships,[132] conversion of limited partnerships into partnerships,[133] partnership mergers,[134] and the execution, filing and recording of statements[135] than it does to a statement of the "General Standards of Partner's Conduct."[136] Along the same line, an entire article of RUPA claims to address the "Nature of Partnership."[137] This intriguing title is at best misleading for surely the drafters of RUPA did not mean to suggest that the nature of the partnership may be defined in four short provisions that simply describe a partnership as an entity distinct from its members,[138] state how a partnership is formed,[139] define property acquired by the partnership as partnership property,[140] and declare when property is partnership property.[141]

Extending limited liability, expanding constructive notice through the expansion of public filings, developing complicated control structures to affect tax treatment of income, and creating a new associational vehicle that allows professionals to incorporate their practices for the purpose of gaining tax advantages are among the driving forces behind statutory reform in the second half of the twentieth century and may very well be appropriate aims of law reform. Further reform efforts, however, should more carefully define and refine the law governing the relationships that exist among individuals associated in business and professional activities. In this regard, the American Law Institute's project to develop the *Restatement (Third) of the Law of Agency*, which is still in its early stage, offers much promise.

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132. *See* RUPA (1994) § 902.
133. *See id.* § 903.
134. *See id.* §§ 906, 907.
135. *See id.* § 105.
136. *See id.* § 404.
137. *See id.* art. 2.
138. *See id.* § 201.
139. *See id.* § 202.
140. *See id.* § 203.
141. *See id.* § 204.

Appendix

General Principles on the Duties of Partners Withdrawing from Law Firms

I. Planning for Withdrawal

A. Contemplation of Withdrawal. A partner generally has no duty to disclose to other partners in a firm that the partner is considering withdrawal from the firm.

B. Disclosure of Intent to Withdraw

1. Notice of Withdrawal. A partner should provide reasonable notice of intent to withdraw from a firm. Relevant factors in evaluating the reasonableness of notice include:
   (a) Past practices concerning withdrawals from the firm;
   (b) Compliance with notice provisions of a partnership agreement;
   (c) The possibility of retribution from the firm that may directly or indirectly harm clients; and
   (d) The promptness with which a partner discloses an intent to withdraw after that intent has been formed.
2. Disclosure of the Possibility of Withdrawal. A partner seriously considering withdrawal should so advise other partners if they are about to make a material decision or commitment of resources in reliance on the partner's continued membership in the firm.
3. Responding Truthfully to Inquiries. A partner should respond truthfully to good faith inquiries made by other partners concerning the partner's plans for withdrawal.

C. Making Logistical Arrangements in Anticipation of Withdrawal. A partner may make plans to leave a firm prior to announcing the withdrawal to the other partners. Such plans may include logistical predeparture arrangements such as arranging bank financing or locating alternative space and affiliations.

II. Notification and Solicitation of Clients

A. Notification and Solicitation of Clients Prior to Announcement of Departure. A partner planning to withdraw from a firm should not solicit clients (that is, attempt to secure their commitments to retain the lawyer or a new firm) before informing the firm of the partner's intent to withdraw.

B. Notification and Solicitation of Clients After Announcement of Plans to Withdraw

1. Following a partner's announcement of plans to withdraw from a firm, the partner may solicit clients of the firm with whom the partner

has a professional relationship if each of the following conditions is satisfied:

(a) Sufficient time has elapsed following the announcement to allow the firm an equal opportunity to compete for clients;
(b) The solicitation is not done in secret; and
(c) The client is advised or otherwise aware that it is free to choose the current firm or the partner's new firm (or any other lawyer or firm).

2. Both the firm and the withdrawing partner have a duty to ensure that clients for whom the withdrawing partner is providing representation are informed of the withdrawal and have an opportunity to make an informed choice of counsel.
3. When possible and appropriate, a law firm and withdrawing partner should cooperate to the end of providing joint notice of the withdrawal to clients.

C. *Causation of Loss as an Element of the Claim for Improper Solicitation*

1. To be actionable as a breach of fiduciary duty, improper solicitation activities must cause harm to the firm. If clients would have remained with the departing lawyer in spite of any improper solicitation activities, an actionable claim does not exist.
2. The burden of proving that each client decision in this regard was unaffected by improper solicitation activities is on the departing lawyer.

III. Disclosures of Firm/Client Information to Third Parties

A. *In General.* Nonpublic firm-specific information pertaining to the finances, practice, and operations of a firm may not be disclosed by a partner to third parties in competition with or to the injury of the partner's present firm.

B. *Disclosures to Parties Other than Law Firms*

1. A partner may make limited disclosures of nonpublic information concerning the firm and its clients to third parties, other than law firms, for the purpose of facilitating contractual relationships necessary to support the partner's post-withdrawal practice.
2. Such information must directly relate to the lawyer's practice and be of the type customarily provided in similar transactions.
3. Reasonable steps should be taken to insure that the third parties maintain the confidentiality of the information.

C. *Disclosures to Law Firms.* Limited items of confidential firm information and client-specific information may be disclosed by a partner to another firm in connection with that partner's exploration of possible affiliation with the firm.

1. The information that may be disclosed to another firm is the *minimum necessary* to allow the parties to assess, with generality rather than specificity:
   (a) The general nature of the partner's practice;
   (b) The firm's interest is accommodating that practice;
   (c) The financial and personnel resources that would be needed to support the practice;
   (d) Any limitations that may exist (for example, conflict of interest and imputed disqualification rules) that may limit the firm's ability to represent clients of the partner; and
   (e) An appropriate range of compensation.
2. Reasonable care should be taken to insure that the firm to which the information is disclosed maintains the confidentiality of the information.

D. *Disclosure of Client-Specific Information.* Client-specific information (that is, information that relates in detail to a particular client and the services provided by the firm to that client) may be disclosed by a partner to another firm in connection with the partner's exploration of possible affiliation with that firm if each of the following conditions is satisfied:

1. The information relates directly to a client of the firm and the legal services provided by the firm to that client;
2. The information is available to the client, the client is under no independent duty to the firm to maintain the confidentiality of the information, and the client would itself be free to disclose it to another firm;
3. The partner reasonably believes the client is likely to follow the lawyer to a new firm; and
4. The client consents to the disclosure (before or after the fact).

IV. Client Files

A. *In General.* Upon authorization by the client, a lawyer withdrawing from a firm may take files of the client reasonably related to representation of the client.

B. *Notice and Opportunity to Make Copies.* Client files should not be taken from the firm by a departing lawyer without prior notice to the firm, which should be afforded an opportunity to copy, at its expense, the contents of any files to be removed.

C. *Client Authorization.* Absent client authorization, a withdrawing lawyer should not remove client files from the firm without the consent of the firm.

D. *Retaining Liens.* The firm's obligation to release client files to a withdrawing lawyer pursuant to directions from the client is subject to the firm's limited right (recognized in some jurisdictions) to assert a retaining lien to secure payment of fees and sums advanced to the client by the firm.

V. Recruitment of Staff

A. *Recruitment Prior to Notice of Withdrawal.* A partner planning to withdraw from a firm may not recruit (that is, persuade to leave) staff of the firm prior to giving the partnership notice of withdrawal.

B. *Recruitment After Notice of Withdrawal but Prior to Withdrawal.* Prior to withdrawal from the firm but after notice of withdrawal has been given, a partner withdrawing from a firm may not recruit staff of the firm except to the extent reasonably necessary to provide services to clients likely to remain with the lawyer, and then only if the firm is notified in advance of the identity of individuals to be recruited.

C. *Recruitment After Withdrawal.* Following withdrawal from a firm, a former partner of the firm is free to recruit staff of the firm.

VI. Post-Withdrawal Income

A. *In General.* Following the withdrawal of a partner, the firm and its former partner have a duty to account to each other for income derived from cases pending at the time of withdrawal.

B. *Overhead Expenses.* In accounting for post-withdrawal income, the firm and its former partner may make allowance for reasonable overhead expenses chargeable to the production of the income.

C. *Effect of Agreement.* The division of post-withdrawal income is subject to agreement among the partners, provided that the agreement does not operate to prevent clients from choosing their counsel.