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

Leslie D. Corwin

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I. Introduction

I respectfully submit that no topic is more volatile and important to partners and to the modern-day law firm than the duties of partners withdrawing from law firms. I applaud the Washington and Lee School of Law and in particular, Professor Vestal, Professor Sundby, and Dean Sullivan for sponsoring such a visionary program as the *Withdrawals and Expulsions from Law Firms* Symposium. I also applaud the law students that participated in this symposium. I strongly believe that establishing programs that mentor law students on the legal and ethical issues that arise while practicing is an obligation of both the law schools and of the profession. We need more programs like this one so as to expose law students to the human side of law firm practice.

An interesting thing happened to me between the time I committed to be a participant in the symposium and my appearance at Washington and Lee – I became a withdrawing partner. I could not think of a better way to prepare to comment on the presentation of my esteemed colleague, Robert Hillman. I decided that I had to experience firsthand that which I had been litigating, writing, advising, and lecturing about in order to truly do justice to Professor Hillman. I decided actually to live through the experience of withdrawing from a law firm and to apply the principles set forth in Professor Hillman's presentation. No matter who you are, change is one of the most difficult things that any human being can go through, and I am now at the top of the list. My change took place in March of 1998. I say this because in order to truly comprehend the multifaceted framework that Professor Hillman outlined,

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* Shareholder, Greenberg Traurig Hoffman Lipoff Rosen & Quentel, New York; co-author of LESLIE D. CORWIN & ARTHUR J. CIAMPI, LAW FIRM PARTNERSHIP AGREEMENTS (1998). This paper was presented at a symposium sponsored by the Washington and Lee University School of Law on April 16-17, 1998.

we must never lose sight of the fact that the person or persons for whom these principles and duties are established are going through a psychologically-charged life experience. This is true regardless of their stature within the profession or their status within the law firm from which they are withdrawing. Furthermore, one cannot truly predict how one's colleagues at the firm will react to an event that can properly be characterized as one of abandonment and rejection.

I left Morrison Cohen Singer & Weinstein, LLP, the law firm that I helped found fourteen years ago, to join Greenberg Traurig Hoffman Lipoff Rosen & Quentel, one of the fastest growing national law firms. Greenberg Traurig solicited me through a legal recruiter. I left with clients and with matters pending in various jurisdictions. I withdrew pursuant to a written partnership agreement that I helped draft and that contained a sixty-day notice provision. I immediately resigned as a member of the firm's Executive Committee and as co-head of the firm's Litigation Department. I took client files and staff with me, and I continue to work on major matters for clients that I actively solicited while at my prior firm.

The legal profession has changed drastically in the past decade. I call this the age of attorney mobility. With so many lawyers moving laterally and with law firms operating more and more like big businesses that are ever mindful of the bottom line and of the generation of profits, it was inevitable that our profession would rely more and more upon building from without by bringing in lateral partners or by merging practices to provide growth and to increase profitability. During the current decade, the increasing number of mergers and dissolutions of law firms, the opening of more branch offices by the national firms, and the growing competition for business have led to record numbers of lawyers leaving firms, both voluntarily and involuntarily. This rush of activity indicated to me that more and more law firms are expanding in order to take advantage of the strong legal economy. I am happy to report that these are good times for the legal profession. I believe that in this age of mobility with its grass-is-greener mentality, it is more important than ever for partners and their law firms to understand the legal and ethical issues raised by partner departures and withdrawals. In order to promote such understanding, a statement of principles must be established. No one could have done a better job than Professor Hillman did in establishing these principles. I applaud and endorse his paper.

As America has changed, so has the legal profession. In this age of free agency in which star athletes will leave for more money, in which entire franchises will abandon cities, and in which instant gratification brought on by a winning team is everything, nothing is sacred. Should we be surprised then that these values have spread to the bar? Not at all. The reality is that we are an ego-driven profession, and a lawyer with portable business or a law firm with solid recession-resistant practice areas like mergers and acquisitions or intellectual property will seek greener pastures as readily as a star athlete.. For evidence of this tendency, one need only consider some of the household names that have left us: Lord, Day, & Lord; Shea & Gould; Schatz & Schatz; Ribicoff & Kotkin; Mudge Rose Guthrie & Alexander; and Gaston & Snow.

I have traveled to cities around the country consulting with law firms that were bastions of stability and professionalism when I entered the profession. I have been on both sides of partner departures and have represented law firms, individuals, and groups. I have also been involved in law firm mergers. Indeed, I just completed a merger during the last quarter of 1997 and have started the process on another this month. I have overseen reorganizations, restructurings, and liquidations and have tried cases relating to partner departures. When I entered this profession twenty-five years ago, these things were nonexistent. I have encountered Professor DeMott's partners, Amy, Bruce, and Charles, in my travels.[1]

A law firm consists of professionals, but in order to survive today, it must be run like a business. In addition, a law firm must strictly adhere to the ethical guidelines and disciplinary rules that have been established for our profession. Finally, there must be compatibility both professionally and personally between lawyers.

It should come as no surprise that turf wars have become more common and also nastier because partners that leave firms often try to lure clients away when they leave or when they are thinking of leaving. Thus, there has been a significant amount of litigation surrounding partner departures. In fact, the courts have recognized that "[l]aw firms are under siege."[2] This environment has forced the courts to develop broad guidelines concerning the standards and obligations of departing partners and the firms they are leaving. Now, Professor Hillman has presented an actual set of principles.

A departing partner is required to act as a fiduciary with respect to his soon-to-be-former partners and not to take unfair advantage of them.[3] In other words, the playing field must be level. This is true not only for issues of

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1. *See generally* Deborah A. DeMott, *The Faces of Loyalty: A Comment on Hillman,* Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms, 55 WASH. & LEE L. REV. 1041 (1998) (providing hypothetical situations of lawyers leaving law firms involving partners named Amy, Bruce, and Charles).

2. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 151 (N.J. 1992) (quoting ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING 3 (1990)).

3. *See* Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989) (stating that departing partners have fiduciary obligations).

accounting, but also for the manner and timing of notification of firm clients. In searching for the "standard for general guidelines as to what partners are entitled to expect from each other concerning their joint clients on the division of the practice," Informal Opinion 1457 of the ABA Committee on Ethics and Professional Responsibility is an appropriate declaration of the ethical standards of attorneys announcing a change in professional association.[4]

One of the issues of greatest import is whether departing partners may solicit clients for their new firm. In these situations, the principles governing a fiduciary relationship between the firm and the withdrawing partner are applicable.[5] If the partner who is leaving has not yet informed the firm of his resignation, the courts have determined that the answer to the above question is a resounding "no." As stated by New York's highest court:

> [A]s a matter of principle, preresignation 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.[6]

The issues raised in a case of a departing partner may focus on whether there is (1) a breach of fiduciary duty when a withdrawing partner, prior to announcing his resignation, solicits firm clients, (2) a contractual requirement among partners requiring an attorney to try to integrate or institutionalize clients into the firm that is legally enforceable, and (3) a cause of action for fraud when an allegation is made that a promisor, at the time of making certain representations, lacked any intention to perform.[7] Although the judiciary has not fully addressed these issues, the courts have offered some guidance on the issue of informing the client about an attorney's departure so that the client can make an informed choice either to stay with the firm or to move on with the partner who is leaving.[8]

Clearly, the fiduciary obligations between partners and their firms exist even as their relationship is coming to an end and in some instances, even

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4. *Id.* at 1265 (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980) (allowing lawyers to provide information to clients stating newly changed associations in letter format and delineating appropriate content of such letters)). *See generally* Redman v. Walters, 152 Cal. Rptr. 42 (Ct. App. 1979) (discussing standards and requirements of notice to firm clients when partner withdraws in order for withdrawing partner to avoid future liability for firm's actions).

5. *See* Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1193 (N.Y. 1995) (setting forth parameters of fiduciary duties regarding solicitation of clients).

6. *Id.* at 1183.

7. *Id.* at 1182.

8. *Id.* at 1182-84.

afterwards. With this in mind, both departing partners and the law firm must avoid acting out of pure self-interest and must remember that, as partners, they are guided by this "punctilio of an honor the most sensitive" until the bitter end.[9] Under the law, partners have the right to withdraw, although they may not do so free from obligation.[10] In some respects, voluntary or involuntary withdrawal is similar to retirement, death, or disability. Like retirements, withdrawals may be friendly. Like involuntary terminations, withdrawals may be acrimonious.

It is crucial for partnerships to analyze and prepare for the economic and professional impact of changes in the relationship of partners. Given the impact of the Model Rules of Professional Conduct, it is essential in today's climate that the firm's partnership agreement address the law regarding the relationship between partners and the law firm. Outright restrictions in the partnership agreement on the right of a withdrawing partner to practice law, such as a noncompetition procedure and an agreement not to solicit firm clients, are prohibited unless they are made within the context of retirement and the receipt of benefits.[11] The general principals discussed above apply whether the law firm is a partnership, a professional corporation, a limited liability company, or some other variation.

II. Forfeiture for Competition: Noncompete Clauses

The ethical rules are clear – clients have the right to choose or to change their counsel, and it is improper for any lawyer to enter into an agreement that restricts his or any other lawyer's right to practice.[12] Both the Model Code of Professional Responsibility Disciplinary Rule 2-108 and Rule 5.6 of the Model Rules of Professional Conduct, adopted by the American Bar Associa-

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9. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

10. *See* Hinshaw v. Wright, 412 S.E.2d 138, 144 (N.C. Ct. App. 1992) (finding that withdrawing partner breached his fiduciary duty to remaining partners by purposely failing to deliver important insurance papers in timely fashion).

11. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(a) (1980) ("A lawyer shall not . . . restrict[ ] the right of a lawyer to practice law . . . except as a condition to payment of retirement benefits.").

12. *See generally* Howard v. Babcock, 7 Cal. Rptr. 2d 687, 690 (Ct. App.), *superseded in part*, 832 P.2d 587 (Cal. 1992), *aff'd in part, rev'd in part*, 863 P.2d 150 (Cal. 1993) (finding agreement limiting withdrawing partners' rights to practice invalid as violation of public policy); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 155 (N.J. 1992) (finding one-year restriction on withdrawing partner's practice of law for firm client impermissible); Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 998 (N.Y. 1993) (finding financial disincentives against competition in practice of law invalid because provisions restrict client's choice of counsel); Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983) (finding agreement precluding payment of withdrawing partner's interest in firm if partner resumed practice of law in violation of Model Code of Professional Responsibility DR 2-108(a)).

tion in 1983, provide that a partnership or employment agreement that "restricts the rights of a lawyer to practice law after the termination of a relationship created by the agreement" is improper.[13] In addition, both rules provide that no such restriction may be imposed as part of a settlement of a controversy between the partnership and a departing or withdrawing partner.[14] Thus, even if a law firm's partnership agreement has such a clause, one cannot rely upon it being enforced.

As Professor Hillman noted in his presentation on notification and solicitation of clients, it is well-settled that noncompete clauses are unenforceable.[15] The reason for this rule is that you cannot restrict the rights of attorneys to practice law and to service clients because that would constitute a restriction on the client's right to counsel of his choice. In addition to my counseling of lawyers, I lecture extensively to accountants and investment bankers, two professions that have had restrictive covenant clauses upheld continually by the courts.[16] When I bring this issue to their attention, the first thing I hear is "there go those lawyers protecting themselves again." I believe, however, that the answer I give them is logical and something to which they can relate. I tell them that the United States Constitution and, specifically, the Bill of Rights, offer everyone a sacred right – the right to counsel of his own choice. I also tell them that this right is fundamental to our rich heritage and is the reason why courts have protected and will continue to protect the right of a client to stay with counsel of his choice when a partner departs. Indeed, it is why courts have overwhelmingly refused to enforce those provisions in partnership agreements that restrict the practice of law through financial disincentives to the withdrawing partner and why it is easier today for a partner to withdraw from a law firm than from any other professional service firm or practice.[17]

In the leading case of *Cohen v. Lord, Day & Lord*,[18] New York's highest court invalidated a provision in a law firm's partnership agreement that

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1980); *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1997) (prohibiting use of agreement that "restricts the right of a lawyer to practice after termination of the relationship").

14. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1997).

15. Robert W. Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 997, 1014 (1998).

16. *See, e.g.*, Arthur Young & Co. v. Galasso, 538 N.Y.S.2d 424, 427-29 (Sup. Ct. 1989) (acknowledging validity of restrictive covenant against accounting firm).

17. *See* ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY 2:47 (1998) ("The prohibition against anticompetition clauses sets lawyers apart from members of other professions.").

18. 550 N.E.2d 410 (N.Y. 1989).

deprived a partner, who was moving from one Wall Street firm to another, of the net profits and legal fees earned prior to and subsequent to his departure.[19] An Oregon Court of Appeals case, *Gray v. Martin*,[20] served as precedent for *Cohen*.[21] In *Gray*, the court prohibited a law firm from depriving a withdrawing partner, who was competing with his former firm, of a percentage of profits otherwise payable to a departing partner who had no intention of continuing to practice law.[22]

Recently, an Illinois Appellate Court in Stevens v. Rooks Pitts and *Poust*[23] and the Supreme Judicial Court of Massachusetts in *Pettingell v. Morrison, Mahoney & Miller*[24] ruled that a law firm cannot withhold income from a partner who leaves the firm and then practices law in the same geographical area.[25] Siding with William Stevens, a former partner with Chicago's Rooks Pitts and Poust, the Illinois court determined that the law firm violated that state's Code of Professional Conduct by withholding twenty percent of Stevens's entitlements when he withdrew.[26] Thus, Illinois and Massachusetts have joined Iowa, New Jersey, New York, Ohio, and Tennessee, all of which have similarly ruled that such forfeiture for competition clauses are unenforceable.[27]

III. Continuation of the Partnership

Perpetuity of the partnership upon the change in the relationship of its partners is probably the single most important issue for a law firm to address today. The proper place to address this issue is in the firm's partnership

19. Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989).

20. 663 P.2d 1285 (Or. Ct. App. 1983).

21. *See Cohen*, 550 N.E.2d at 412 (citing Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983)).

22. Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983).

23. 682 N.E.2d 1125 (Ill. App. Ct. 1997).

24. 687 N.E.2d 1237 (Mass. 1997).

25. Stevens v. Rooks Pitts and Poust, 682 N.E.2d 1125, 1132 (Ill. App. Ct. 1997); Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1239-40 (Mass. 1997).

26. *Stevens*, 682 N.E.2d at 1132.

27. *See* Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601-02 (Iowa 1990) (finding forfeiture for withdrawal unenforceable); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 148-49 (N.J. 1992) (finding that restriction on competition impermissibly restricted practice of law); Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 998-1000 (N.Y. 1993) (same); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 410 (N.Y. 1989) (same); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 531 (Tenn. 1991) (same); *see also Stevens*, 682 N.E.2d at 1132 (finding noncompetition and withdrawal provisions invalid); *Pettingell*, 687 N.E.2d at 1239-40 (same).

agreement. A successful law firm today must be structured to survive the withdrawal of a partner.

Although a partnership agreement may state a term of years as its life, more often than not the agreement has no stated term. According to Section 31 of the Uniform Partnership Act, the voluntary withdrawal of a partner or withdrawal via death, disability, retirement, or expulsion will terminate the partnership unless the firm's partnership agreement contains a clause to the contrary.[28] Such a clause should bind the partnership to continue and allow for the remaining partners to close ranks, reform, and go forward with the reconstituted firm without the withdrawing partner. Absent a continuation provision, a partnership may terminate merely by a partner ceasing to carry on the business of the firm when he withdraws.[29] The partnership agreement should be designed so that the partnership can survive the statutory mandates of dissolution upon withdrawal, death, and disability. To accomplish this, the partnership agreement should set forth an undertaking by the remaining partners that the partnership entity shall continue notwithstanding the exiting of a certain partner or partners.

IV. Enforceability of the Notice Requirement

Because the withdrawal of a partner can be a traumatic event in the life of a law firm, the partnership agreement should require a significant notice period. This period will provide the remaining partners with the time necessary to regroup, to determine whether to continue the partnership, to decide in what form to continue, and to take steps to protect themselves against the loss of clients. Adequate notice may also provide the time needed to determine the cause of the withdrawing partner's unhappiness, if that is the case, and to make the necessary corrections to retain that partner or to prevent other partners from also wanting to leave.

The notice provisions in some partnership agreements may provide for an unusually long period of notice prior to the time when a partner may be able to withdraw, and the law firm may attempt to hold the departing partner to that specified period of notice. If the partner were to attempt to leave before the agreed upon date, the firm might very well claim breach of the agreement and withhold a portion of the partner's capital from him, as well as a percentage of other payments to which the withdrawing partner may be entitled under the agreement. I believe that such clauses are enforceable, although no case concerning law firms is specifically on point.[30] One might

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28. UNIF. PARTNERSHIP ACT (1914) § 31 [hereinafter UPA].

29. *See id.* § 29 (stating that dissolution occurs whenever partner leaves firm).

30. Specified notice provisions can, of course, be shortened. *See, e.g.*, Meehan v.

argue that if the notice period called for under the agreement is unusually long, it may violate Rule 5.6 of the Model Rules of Professional Conduct and Model Code of Professional Responsibility Disciplinary Rule 2-108 regarding the restriction on the right of an attorney to practice.[31] It is my position, however, that such notice clauses are enforceable because they ensure clients that the firm will continue to attend to their matters and will wind up their matters prior to the time that the partner departs. It also assures the law firm of the profits on those matters for a sufficient period of time and allows the firm time to prepare for life after the partner's withdrawal, which could involve dissolution, lateral hires, or merging with another firm.

As previously discussed, courts have typically maintained that such notice provisions are enforceable in other professions.[32] There is, however, no case on all fours involving departing attorneys. Recently, in a New York case cited by Professor Hillman, *Willard v. Cowen & Co.*,[33] the court held that petitioner Miriam C. Willard, a health care analyst for the investment banking firm of Cowen & Co. (Cowen) was obligated to remain employed at the firm for four months after giving notice that she had accepted an offer to work for a competitor, Donaldson Lufkin & Jenrette (DLJ).[34] Arriving at Cowen the day after giving notice, the firm barred Willard from entering her office or gaining access to her files, but still required her to remain at the firm for four months pursuant to the firm's written partnership agreement.[35] Rather than do nothing for 120 days, Willard left and petitioned the court to enjoin Cowen from taking any action to interfere with her employment at DLJ.[36] She argued that by employing her only in a technical sense, Cowen was intentionally keeping her out of the loop so that her skills would get stale.[37] Meanwhile, she filed an arbitration claim with the New York Stock Exchange, claiming that the lockout annulled the partnership agreement and the notice provision contained therein.[38]

Shaughnessy, 535 N.E.2d 1255, 1258 (Mass. 1989) (noting that withdrawing partners chose to provide less notice than that required in partnership agreement).

31. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1980).

32. *See supra* note 17 (distinguishing these provisions in other professions).

33. No. 10755/97 (N.Y. Sup. Ct. Apr. 10, 1997).

34. Willard v. Cowen & Co., No. 10755/97, slip op. at 8 (N.Y. Sup. Ct. Apr. 10, 1997).

35. *Id.* at 3.

36. *Id.* at 1.

37. Marcia Vickers, *How Tight is the Knot in Partnership Pacts?*, N.Y. TIMES, June 8, 1997, § 3, at 9.

38. *Willard*, No. 10755/97, slip op. at 3.

Cowen opposed the petition and cross-petitioned for an injunction prohibiting Willard from the following: working for DLJ, soliciting any Cowen employees to go there, and refusing to fulfill her duties prior to the expiration of the 120 day notice period.[39] Cowen also sought a declaratory judgment declaring that Willard's efforts to resign immediately constituted a material breach of the notice provisions of the partnership agreement and that her abrupt departure constituted a breach of her fiduciary duty to the partnership.[40]

The court noted that Willard tendered her resignation on March 25, 1997 and commenced working for DLJ on March 31, 1997 despite what the court described as the "plain language of the Partnership Agreement."[41] Willard argued that the notice provision was unenforceable as applied to her.[42] She reasoned that the firm effectively stripped her of her partner status by locking her out of her office.[43] This action was "tantamount to termination of the Partnership Agreement," she continued, and "[c]onsequently, she had no choice but to commence working with DLJ."[44] Cowen responded that it had not locked out Willard and that she breached the partnership agreement by working for DLJ.[45]

The trial court had to decide whether to grant a preliminary injunction pending the outcome of arbitration.[46] The court deferred Willard's claim that the notice requirement of the partnership agreement was unenforceable as to her for final determination by the arbitrator.[47] On Cowen's cross-petition that the notice provision of the partnership agreement was enforceable, the court held:

> The 120 days notice provision in the Partnership Agreement is a crucial element in the Agreement. There is no question that this provision was designed to allow Cowen to adjust to the departure of an important partner. Both parties vouch for the importance of the services of Willard in her field. Both parties agree that she is ranked among the top three experts in her field nationwide. This court takes note . . . that; "the purpose of the provision in the Partnership Agreement is to give the firm a window of opportunity to prepare for the departure of a partner." Given this fact,

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39. *Id.* at 1-2.
40. *Id.* at 1.
41. *Id.* at 2.
42. *Id.* at 3.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 6-7.

> this . . . Court concludes that an award to Cowen by an arbitrator "may be rendered ineffectual without provision[al] relief."[48]

Accordingly, the court granted the relief sought by Cowen.[49] I see no reason why a court would not apply this same rationale and grant similar relief to a law firm regarding the enforceability of a specified notice provision.

I agree wholeheartedly with the following four factors enumerated in Professor Hillman's presentation for evaluating whether a notice is reasonable or not:

(1) Past practices concerning withdrawals from the firm;
(2) Compliance with notice provisions of partnership agreement;
(3) The possibility of retribution from the firm that may directly or indirectly harm clients; and
(4) The promptness with which a partner discloses an intent to withdraw after that intent has been formed.[50]

I would, however, add two additional factors to the equation:

(5) If the law firm is about to make a material decision or commitment of resources in reliance on the partner's continued membership in the law firm, that is, hire new practice groups, lease new space, obtain a line of credit, open a branch office, or purchase office equipment, the partner may be compelled to give notice.
(6) A partner's position in the firm, that is, whether he or she is involved in "Management" or is a "Mushroom Partner" (one who is kept in the dark), are other factors that need to be considered in evaluating when the actual duty to give notice of withdrawal arises.

Now that the legal and ethical barriers to a sale of a law firm have been removed,[51] our profession will assuredly see an increased incidence of purchases, sales, and mergers of law practices, as well as more buying and selling of client matters. Against this backdrop and with law firm breakups and

48. *Id.* at 7-8 (citation omitted).

49. *Id.* at 8.

50. Hillman, *supra* note 15, at 1004-05.

51. *See* Dawson v. White & Case, 672 N.E.2d 589, 593 (N.Y. 1996) (stating that "the ethical constraints against the sale of a law practice's goodwill by a practicing attorney no longer warrant a blanket prohibition against the valuation of law firm goodwill when those ethical concerns are absent"). Prior to the *Dawson* decision, the four Appellate Divisions of the State of New York had adopted DR 2-111 ("Sale of Law Practice"). *See* Edward A. Adams, *State Allows Sale of Law Practice*, N.Y. L.J., May 30, 1996, at 1, 7. In so doing, New York joined a dozen other states that allow for the sale of a law practice and that have modeled their statutes on Rule 1.17 of the ABA Model Rules of Professional Conduct. *Id.* at 1.

lateral partner hirings and departures now commonplace, the New York Court of Appeals has fortunately provided some broad parameters for attorneys soliciting clients before departing from their law firms. In July 1995, in *Graubard Mollen Dannett & Horowitz v. Moskovitz*,[52] the New York Court of Appeals ruled that attorneys owe a fiduciary duty to their clients before leaving their firms.[53] The *Graubard* decision, together with the decision in *Cohen* concluding that forfeiture for competition clauses are unenforceable because they restrict the right of attorneys to practice[54] and the decision in *Dawson v. White & Case*,[55] in which the court ruled that goodwill was a distributable asset of a law firm,[56] offers a general view of what New York Chief Judge Judith Kaye has termed "a modern day law firm fixture; the revolving door."[57]

Chief Judge Kaye's statement, probably more than any other, establishes why partner withdrawal is such an important issue. Amidst charges and countercharges of faithless, deserting partners and a vindictive abandoned firm, the key question in *Graubard* became whether departing partners could solicit the clients of the firm.[58] A unanimous court ruled that the plaintiff law firm's allegations of breach of fiduciary duty, breach of contract, and fraud were sufficient to withstand summary dismissal – the same conclusion reached by the trial and the intermediate courts.[59]

V. Solicitation of Clients and Tortious Interference with Firm Clients

When partners move laterally from one law firm to another, issues usually arise as to the exact point in the process when a departing partner may contact clients about changing law firms. With rare exception, a client retaining the services of a law firm is hiring the firm to represent him, with the understanding that client matters may be handled by one or more partners. Accordingly, deciding who will continue to represent a firm's clients is perhaps the most difficult and volatile aspect of a partner's withdrawal.

Starting with the proposition that before leaving their firms, attorneys owe a fiduciary duty to their clients, the New York Court of Appeals in *Graubard*

52. 653 N.E.2d 1179 (N.Y. 1995).

53. Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1182-83 (N.Y. 1995).

54. Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 410 (N.Y. 1989).

55. 672 N.E.2d 589 (N.Y. 1996).

56. Dawson v. White & Case, 672 N.E.2d 589, 592-93 (N.Y. 1996).

57. *Graubard*, 653 N.E.2d at 1180.

58. *Id.*

59. *Id.*

examined the "spectrum" of permissible and impermissible acts with respect to client solicitation by withdrawing partners.[60] According to the court:

> At one end of the spectrum . . . departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice . . . . Ideally, such approaches would take place only after notice to the firm of the partner's plans to leave . . . .
>
> At the other end of the spectrum, secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties . . . .[61]

As should be self-evident, these standards are intended primarily to protect clients. In my experience, the courts will always protect the client. The client always comes first. If you find yourself in a situation concerning a client and the solution is unclear, you should determine the answer by asking yourself, "What is best for the client?" A departing partner has a fiduciary responsibility and a duty to be open and honest with the partnership. Failure to meet those requirements can have dire economic consequences for the departing partner.[62] In *Meehan v. Shaughnessy*,[63] on several occasions, partners in a successful Boston litigation firm confronted two partners who planned to leave about their plans, and the two partners denied that they were leaving.[64] Surreptitiously, these same partners notified the firm's clients, obtained consent to have certain matters transferred, and otherwise acted in their own self-interest in order to gain an unfair advantage.[65] The court held that the departing partners breached their fiduciary duties to their partners.[66] Provisions in the firm's partnership agreement provided withdrawing partners the benefits of all fees generated on matters taken with them.[67] When calculating damages, however, the *Meehan* court ordered the departed partners to pay to the law firm the fees generated on matters they took with them, unless they could prove that the clients would have left without the unfair tactics.[68]

60. *Id.* at 1183-84.

61. *Id.*

62. *See* Meehan v. Shaughnessy, 535 N.E.2d 1255, 1265-67 (Mass. 1989).

63. 535 N.E.2d 1255 (Mass. 1989).

64. Meehan v. Shaughnessy, 535 N.E.2d 1255, 1259 (Mass. 1989).

65. *Id.*

66. *Id.* at 1264.

67. *Id.* at 1261.

68. *Id.* at 1267.

In my experience, courts will not tolerate the breach of a withdrawing partner's fiduciary responsibility to be open and honest with the law firm partnership. A partner who denies that he is leaving the firm, while surreptitiously arranging to have the firm's clients consent to transfer their matters to a new firm, is a partner acting in his own self-interest in order to gain an unfair advantage.[69] Even when the partnership agreement allows a withdrawing partner to receive the benefit of all fees generated on matters taken with him, the withdrawing partner should repay all fees generated on these matters, unless he can prove that the clients would have switched firms in the absence of his unfair tactics.[70]

To protect clients and to avoid a breach of fiduciary duty by the departing partner, the partnership agreement should provide that upon the withdrawal of a partner, the partnership and the partners agree on the contents of a joint letter to the clients. The ABA Committee on Ethics and Professional Responsibility has drafted an informal opinion setting forth the ethical standards for attorneys announcing a change in professional association and providing the following guidelines for notice to clients:

> (a) the notice is mailed; (b) the notice is sent only to persons with whom the lawyer had an active lawyer-client relationship immediately before the change in the lawyer's professional association; (c) the notice is clearly related to open and pending matters of which the lawyer had direct professional responsibility to the client immediately before the change; (d) the notice is sent promptly after the change; (e) the notice does not urge the client to sever a relationship with the lawyer's former firm and does not recommend the lawyer's employment (although it indicates the lawyer's willingness to continue responsibility for the matters); (f) the notice makes it clear that the client has the right to decide who will complete or continue the matters; and (g) the notice is brief, dignified, and not disparaging of the lawyer's former firm.[71]

VI. Access to Client Files and Confidential Information by a Withdrawing Partner

Generally, when a client retains an attorney who is a partner in a law firm, the presumption is that the client has retained the firm as a whole, unless there is an agreement to the contrary.[72] Usually, a retainer agreement with the client establishes this fact.

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69. *See id.* at 1263 (stating that partners may not act in their own self-interest).

70. *See id.* at 1267 (placing burden of proof on party improperly removing clients before fees may be kept pursuant to partnership agreement).

71. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1466 (1981) (extending Informal Opinion 1457 to departing associates as well as to partners).

72. Burton v. Estrada, 501 N.E.2d 254, 259 (Ill. App. Ct. 1986).

A client's files are the property of the law firm,[73] at least until the client directs to the contrary. When the client directs, the client's files must be turned over to a successor firm in an orderly and professional manner.[74] Until the firm receives that instruction, however, the client remains a client of the firm, and the client's files properly remain in the partnership's possession with the attorneys of record.

Although these issues are complex, the consideration of ethics and fiduciary and agency principles during the drafting of an appropriate clause in a partnership agreement may address these issues. A partnership agreement may provide that a withdrawing partner is not entitled to take or have access to client files without the client's permission. If the departing partner possesses the files before receiving that permission, he will have breached the partnership agreement.

VII. The Withdrawing Partner's Interests in Unfinished Assignments

Without a specific provision in the partnership agreement, a departing partner may find that the fees generated from client matters that he takes with him belong to his prior law firm, regardless of the fact that he originated the business for the prior firm and performed substantial work on these matters long after his withdrawal.[75] Without a provision in the partnership agreement as guidance, the courts will look to the fiduciary responsibilities of both the withdrawing partner and of the firm. The court will then allocate the post-departure work in a manner that levels the playing field between the withdrawing attorney and the firm.[76] This rule applies whether the law firm is a

73. *See* Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92, 95 (Mo. Ct. App. 1992) (finding that client possesses right of access to file and that firm retains ownership); Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP, 689 N.E.2d 879, 882-83 (N.Y. 1997) (finding that client was entitled to inspect and copy client's file).

74. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58(3) (Proposed Final Draft No. 1, 1996) (mandating that attorneys deliver client files once representation is terminated).

75. *See* Jewel v. Boxer, 203 Cal. Rptr. 13, 19 (Ct. App. 1984) (finding that absent agreement provisions to contrary, court may allocate income to former partners according to their percentage interest in partnership).

76. *See* Meehan v. Shaughnessy, 535 N.E.2d 1255, 1269-70 (Mass. 1989) (setting forth method to allocate cases properly removed and those improperly removed between withdrawing partners and firm); *see also Jewel*, 203 Cal. Rptr. at 19-20 (allocating post-dissolution income in absence of partnership agreement in accordance with interests in former partnership); Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 192 (Ct. App. 1983) (finding that duty of loyalty forbids withdrawing partner from removing unfinished business that existed during term of partnership for his own benefit); Ellerby v. Spiezer, 485 N.E.2d 413, 417 (Ill. App. Ct. 1985) (stating that contingency cases taken by partner after law firm dissolved were unfinished law firm business and belonged to partnership in dissolution).

partnership or a professional corporation.[77]

In a seminal case, *Jewel v. Boxer*,[78] a partnership of four attorneys split into two separate, new partnerships, and the court ordered that the firm divide the fees generated from clients prior to the dissolution according to the partners' respective interests in the original partnership.[79] In reaching its decision, the court relied heavily on the sound reasoning applied in *Rosenfeld, Meyer & Susman v. Cohen*,[80] another California case.[81] The approach in *Jewel* and *Rosenfeld* "prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain these cases should the partnership dissolve."[82] Partners are free to include provisions in their partnership agreements regarding the completion of unfinished business, and the courts encourage them to do so because "[t]he absence of a written partnership agreement [is] an invitation to litigation upon [a] dissolution of a partnership."[83] Allowing a partner to retain post-dissolution fees following a bad faith withdrawal would reward him for such conduct. The holdings of *Jewel* and its progeny discourage partners from absconding with files in the middle of the night and from profiting from unscrupulous behavior.[84]

Two fairly recent decisions have had far-reaching effects by clearly establishing that law firms must honor their fiduciary obligations, as well as the covenant of good faith and fair dealing implied in every contract, in dealing with and fixing the compensation of withdrawing partners.[85] In *Stuart v. Lane & Mittendorf*,[86] the court precluded the law firm of Lane & Mittendorf from hiding behind a subjective decision-making process when artificially deflating a withdrawing partner's compensation while simultaneously improp-

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77. *See* Fox v. Abrams, 210 Cal. Rptr. 260, 265 (Ct. App. 1985).

78. 203 Cal. Rptr. 13 (Ct. App. 1984).

79. Jewel v. Boxer, 203 Cal. Rptr. 13, 19-20 (Ct. App. 1984).

80. 194 Cal. Rptr. 180 (Ct. App. 1983).

81. *Jewel*, 203 Cal. Rptr. at 19-20.

82. *Id.* at 18.

83. *Id.* at 15.

84. *See id.* at 19-20 (requiring distributions based on interest in former partnership). For further guidance on this topic, see generally Dowd & Dowd, Ltd. v. Gleason, 672 N.E.2d 854 (Ill. App. Ct. 1996); Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989). The *Dowd* court prohibited various pre-notice actions that the *Meehan* court specifically approved. *Compare Dowd*, 672 N.E.2d at 862-63 *with Meehan*, 535 N.E.2d at 1263-64.

85. Starr v. Fordham, 648 N.E.2d 1261, 1265-67 (Mass. 1995); Smith v. Brown & Jones, 633 N.Y.S.2d 436, 442 (Sup. Ct. 1995), *aff'd sub nom.* Stuart v. Lane & Mittendorf, 652 N.Y.S.2d 951 (App. Div. 1997).

86. 633 N.Y.S.2d 436 (Sup. Ct. 1995), *aff'd sub nom.* Stuart v. Lane & Mittendorf, 652 N.Y.S.2d 951 (App. Div. 1997).

erly boosting the compensation of the remaining partners.[87] The decision mandates that, although a partnership agreement may allow the partnership to fix retrospectively compensation for a withdrawing partner, an unfair allocation of profits to a withdrawing partner will constitute self-dealing and will not be tolerated.[88] The court based its decision on the law firm's fiduciary obligations and the requirement that it must deal fairly and equitably with partners.[89] The court found that the law firm breached its fiduciary obligation and the implied covenant of good faith and fair dealing to the withdrawing partner by unfairly determining his compensation for the year when he withdrew as a partner.[90] It awarded the departing partner a substantial money judgment.[91] The court supported its decision to award damages with the determination in *Starr v. Fordham*.[92]

VIII. Conclusion

For my last observation, I would like to stress the critical importance of a carefully considered and well-crafted *written* partnership agreement that addresses the withdrawal of partners. Time after time, I have found that courts will construe strictly law firm partnership agreements and will continue to hold attorneys and law firms to their precise provisions.[93] Three recently decided cases have conclusively upheld the sanctity of a law firm's written partnership agreement.[94]

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87. *See Smith*, 633 N.Y.S.2d at 441 (finding it improper to recharacterize withdrawing partner's client to deny that partner fees).

88. *Id.*

89. *Id.* at 441-42.

90. *Id.*

91. *Id.* at 442.

92. *See* Starr v. Fordham, 648 N.E.2d 1261, 1265-67 (Mass. 1995) (binding partners to duties of good faith and fair dealing when allocating profits to withdrawing partner).

93. Generally, courts will not disturb a partnership agreement in the absence of extenuating circumstances. *See* Spayd v. Turner, Granzow & Hollenkamp, 482 N.E.2d 1232, 1240 (Ohio 1985) ("A partnership agreement will generally not be disturbed by the courts in the absence of extenuating circumstances."); Blount v. Smith, 231 N.E.2d 301, 305 (Ohio 1967) (finding presumption that contract was executed without misunderstanding or imposition).

94. *See* Barna, Guzy & Steffen, Ltd. v. Beens, 541 N.W.2d 354, 356 (Minn. Ct. App. 1995) (deciding that provision for withdrawing partners in written partnership agreement mandating 50% split of contingency cases does not violate law against forfeiture for competition clauses); Schrempp and Salerno v. Gross, 529 N.W.2d 764, 770-71 (Neb. 1995) (finding breach of contract when withdrawing partner violated partnership agreement regarding division of fees on pending matters); Dawson v. White & Case, 672 N.E.2d 589, 592 (N.Y. 1996) (finding that no goodwill is distributable as asset to departing partner because partnership agreement states that goodwill has no value for asset valuation purposes).

When assessing whether withdrawing partners have fulfilled their duties to the firm, review your own law firm's partnership agreement and ask yourself the following three questions: (1) Has the withdrawing partner violated any provisions of the firm's partnership agreement – that is, proper notice?; (2) Has the withdrawing partner complied with his or her fiduciary duties in anticipation of withdrawal?; and (3) Have client interests been compromised? The answer to these questions and the precedents Professor Hillman and I have discussed will hopefully serve as a warning of the hazards that law firms and withdrawing partners may face when partners withdraw or are expelled. They should help partners to complete a self-examination of their own law firm's partnership agreement to see if it addresses the issues posed by these cases. Additionally, partners must admonish strict compliance with the procedures set forth in those written agreements – no matter who shows whom to the door.