

***Jumping Ship:
Ethical Considerations in Lateral Movements***

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**American Bar Association
Section of Labor and Employment Law
Seventh Annual Labor and Employment Law Conference**

**“The Business and Ethics of Hanging Out Your Shingle”
November 9, 2013**

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*Introduction*¹

The rate at which law firm partners move from one firm to another has been increasing for many years. According to NALP, 2010 and 2011 saw record breaking lateral recruiting, while 2012 saw only slight decreases from these record-breaking years.² News of prominent partners leaving their firms to join other firms has become commonplace.³ Moreover, law firms have expelled or demoted partners in increasing numbers over the past decade.⁴ These developments are part of a larger trend in attorney mobility. As far back as 1987, Chief Justice Rehnquist observed: “[p]artners in law firms have become increasingly mobile, feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them.”⁵

Practitioners and scholars have taken notice of the destabilized paths of attorneys and the legal ramifications.⁶ With increased attorney mobility—voluntary or not—comes the need to take stock of the state of the law on attorney rights and obligations. An attorney’s decision to leave a law firm involves various considerations. The departing attorney may wish to take employees and clients to the new firm. The attorney may be constrained by provisions in a

¹ This section is based in part on an articles written by Mr. Outten and Ms. Greene and published in the Law Firm Partnership & Benefits Reporter.

² “Lateral Hiring Slows in Most Markets,” *NALP Bulletin*, March 2013 (available at <http://www.nalp.org/0313research>).

³ See e.g., Nathan Koppel, *Dennis Block is on the Move*, WALL ST. J. LAW BLOG (Sept. 8, 2011, 3:12 PM), <http://blogs.wsj.com/law/2011/09/08/dennis-block-is-on-the-move>; Azam Ahmed, *Top Hedge Fund Lawyer Said to Join Paul Weiss*, DEALBOOK (Sept. 6, 2011, 7:43 AM), <http://dealbook.nytimes.com/2011/09/06/top-hedge-fund-lawyer-goes-to-paul-weiss>.

⁴ See e.g., Peter Lattman, *Mayer Brown Purging 45 Partners*, WALL ST. J. LAW BLOG, (Mar. 2, 2007, 3:46 PM), <http://blogs.wsj.com/law/2007/03/02/mayer-brown-purging-45-partners>; Jonathan D. Glater, *Law Firms Cut Partners In Slowdown*, N.Y. TIMES, <http://www.nytimes.com/2001/07/02/business/law-firms-cut-partners-in-slowdown.html>; See generally *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir 2002).

⁵ Chief Justice William H. Rehnquist, Dedicatory Address, 62 IND. L.J. 151, 152 (1987).

⁶ Jonathan R. MacBride and David J. Samlin, *The Ethical and Legal Consequences of Lateral Moves Between Law Firms*, THE BRIEF, Vol. 40, No. 2 (Winter 2011); Arthur J. Ciampi, *Lateral Partner Moves*, N.Y.L.J., Mar. 24, 2006, at 22. William Shuman, *Liabilities for Lateral Movers*, LEGAL TIMES, Vol. xxix, No. 18 (May 1, 2006); Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1 (1988).

partnership or employment agreement that purport to limit the ability to practice elsewhere. The following sections explore the rights and obligations of an attorney who chooses to leave.

A. Jumping Ship (and Taking the Crew): Can Attorneys Solicit Their Firm’s Employees?

A partner seldom leaves the firm alone; staff, associates, and even other partners often join the exodus. May a departing partner, associate, or counsel solicit others to leave without violating duties owed to the firm? At what point must a departing attorney notify the law firm of the intention to take others? In short, attorneys may solicit other attorneys and staff as long as the manner of the solicitation conforms fiduciary duties and does not amount to tortious interference.

1. The Scope of an Attorney’s Duties

Without question, law firm partners owe a fiduciary duty to the partnership. This fiduciary duty has been variously characterized as one of “the utmost good faith,”⁷ one of the “utmost good faith and honesty in all matters relating to the partnership business,”⁸ and an “obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.”⁹ Justice Cardozo’s famous statement of partners’ high fiduciary duty to one another has been repeated time and again: “Not honesty alone, but the punctilio of an honor most sensitive, is . . . the standard of behavior.”¹⁰

⁷ *Holman v. Coie*, 522 P.2d 515, 523-24 (Wash. Ct. App. 1974).

⁸ *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 244-45 (Ill. App. Ct. 1996).

⁹ *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998).

¹⁰ *Meinhard v. Salmon*, 249 N.Y. 458, 463-64 (1928).

Under traditional agency law, a partner may not benefit at the expense of the partnership, nor may the partner use the resources of the partnership for his or her own gain.¹¹ Furthermore, a partner may not compete with the partnership.¹² Nonetheless, these principles do not preclude partners from leaving firms, taking clients, or competing against the former firm.¹³

Non-partner attorneys, whether associates, counsel, or contract attorneys, also have certain duties to their firms, namely the duty of loyalty.¹⁴ This means that they must not “(1) actively exploit their positions within the [law firm] for their own personal benefits, or (2) hinder the ability of the [law firm] to conduct the business for which it was developed.”¹⁵

2. An Attorney’s Right To Solicit Employees

Generally, it is not a breach of the fiduciary duty or duty of loyalty for a partner or associate to solicit other members of the firm to leave the firm.¹⁶ In fact, law firms that try to limit the ability of attorneys to “raid” their ranks through non-solicitation agreements or that impose non-competition agreements on their partners or associates in an attempt to insulate them from solicitation may find themselves in violation of ethics rules.¹⁷

¹¹ See Rest. (Second) of Agency § 387 (1958).

¹² See *id.* at § 393.

¹³ See Robert W. Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms*, 26 J. CORP. L. 1061, 1070 (2001). Non-compete agreements are discussed at length in Part I(C) *infra*.

¹⁴ See, e.g., *Burke v. Lakin Law Firm*, No. 07-cv-0076, 2008 WL 64521, *4 (S.D.Ill. Jan. 3, 2008) (“While lawyers are not necessarily bound by the same fiduciary constraints that apply to nonlawyer officers and directors, lawyers do owe fiduciary duties to their employers.”) (internal citations omitted).

¹⁵ *Id.*

¹⁶ See *Nixon Peabody L.L.P. v. de Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher Associes*, 873 N.Y.S.2d 235 (Sup. Ct. 2008) (“partners may not be restrained from inviting qualified personnel to change firms with them” (quoting *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578, 583 (App. Div. 2000))); *Custard Ins. Adjusters v. Nardi*, No. CV980061967S, 2000 WL 562318, at *22 (Conn. Super. Ct. April 20, 2000) (“it is normally permissible for employees of a firm, or for some of its partners, to agree among themselves, while still employed, that they will engage in competition with the firm . . .”); *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646, 1996 WL 438777, at *6 (Fla. Cir. Ct. July 23, 1996) (partner who solicited associates to join him at new firm did not breach his fiduciary duty) *aff’d in part and rev’d on other grounds*, 728 So. 2d 253 (Fla. Dis. Ct. App. 1998).

¹⁷ See Part I(C) *infra*.

Model Rules of Professional Conduct Rule 5.6 prohibits all agreements that “restrict the right of a lawyer to practice.” The American Bar Association (“ABA”), along with several state and local bar associations, has determined that non-solicitation agreements violate the ethical rules because they indirectly restrict attorneys’ abilities to practice law.¹⁸ As the ABA explained, “Although the agreement . . . does not restrict the right of an individual lawyer to practice law directly, by restricting the right of association between attorneys it restricts such right indirectly and so falls within the prohibition of [the rule].”¹⁹

In *Jacob v. Norris, McLaughlin Marcus*, one of the few cases to address the issue, the court held that the ethical rule is implicated, not just by non-solicitation agreements concerning attorneys, but also by those limiting a departing attorney’s ability to solicit paraprofessional staff. “Paraprofessionals, no less than lawyers, should not have their career mobility inhibited, especially when the inhibition derives from an agreement to which they were not a party.”²⁰

3. Limits on Solicitation

Nevertheless, depending on the manner and timing of a partner’s solicitation, the partner may still breach his or her fiduciary duty to the partnership by soliciting attorneys and support staff to leave.²¹ As Professor Robert W. Hillman has explained,

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.²²

¹⁸ See ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1417 (1978); D.C. Bar Assoc. Op. 181 (1987) (cited in *Jacob v. Norris, McLaughlin Marcus*, 607 A.2d 142, 146-47 (N.J. 1992)).

¹⁹ ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1417 (1978).

²⁰ *Jacob v. Norris, McLaughlin Marcus*, 607 A.2d 142, 153 (N.J. 1992).

²¹ See, e.g., *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754, 758 (Ill. App. Ct. 2004) (Departing partners breached their fiduciary duty by engineering a “mass exodus” of employees).

²² 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, 999 (1998).

To comply with fiduciary duties, a departing partner must consider (1) whether and when to give notice to the firm of the intention to leave and solicit others and (2) whether to use the firm's confidential and proprietary materials to aid the solicitation.

In *Reeves v. Hanlon*²³, the court considered whether departing lawyers (a partner and an associate) could be liable for tortious interference with contractual relations for enticing their old firm's at-will employees to join them at their new firm. The court held that the attorneys were liable because they recruited the employees while the attorneys were still employed by their old law firm and they did so with the intent "to cripple the [old firm's] ability to provide legal services...."²⁴ Notably, the court found that the departing attorneys had "mounted a campaign against the [old] firm involving destruction of computer records, misuse of confidential information, and unethical conduct, of which the cultivation of employee discontent was only a component. This campaign unfairly impaired the Reeves firm's ability to retain its employees."²⁵

a. Notifying the Firm

Most courts to consider the issue agree that an attorney has a right to confer with others in secret regarding plans to leave a firm.²⁶ Nonetheless, when a partner is asked by the firm or another partner about his or her intentions or plans, the partner has a fiduciary duty to answer honestly and fully.²⁷

²³ 33 Cal.4th 1140, 95 P.3d 513 (2004).

²⁴ *Id.* at 1154.

²⁵ *Id.* at 1147-48.

²⁶ See, e.g., *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179, 1183 (N.Y. 1995) ("That this may be a delicate venture, requiring confidentiality, is simple common sense . . ."); *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646, 1996 WL 438777, at *6 (Fla. Cir. Ct. July 23, 1996) (partner did not breach fiduciary duty by secretly soliciting three associates); but see *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578, 583 (App. Div. 2000) (finding that partners who conferred together secretly regarding a move did not violate their duty by doing so, but finding that they did violate their fiduciary duty by recruiting employees of the firm prior to serving notice and while still members of the firm and by using confidential information to further their recruitment efforts).

²⁷ *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1264 (1989) ("A partner has an obligation to render on demand true and full information of all things affecting the partnership to any partner.") (citing MASS. GEN. LAWS ch. 108A §

Also, a partnership agreement may require notice of a partner's intent to solicit firm employees.²⁸ Even if not formally required by the partnership agreement, however, a partner who fails to provide sufficient notice of a planned migration of key attorneys and staff may breach fiduciary duties.²⁹ This is especially true where secrecy is maintained to garner an unfair business advantage.³⁰ Obviously, after leaving the firm, the partner may solicit former partners and other firm employees with impunity and without notice, because no fiduciary duty remains.³¹

b. Using Confidential and Proprietary Materials

A departing partner has access to an array of materials about the firm's attorneys and staff (e.g., confidential salary information, partners' "black books" of clients, and billing reports) that can be exploited to solicit and hire the most able and lucrative employees. *Gibbs v. Breed, Abbott & Morgan* should serve as a cautionary tale, however, for those who might be tempted to use their firm's confidential and proprietary information to assist in solicitation efforts.³² In *Gibbs*, a departing partner circulated information contained in the personnel files of the staff and associates he wished to bring with him, including salary lists, billing rates, and average billable hours, to prospective competitors in an attempt to assist their recruitment efforts. The court

20) (internal quotations omitted); *see also* Unif. P'ship Act (1914) § 20; *but see* Revised Unif. P'ship Act ("RUPA") (1994) § 403(c) (creating affirmative obligation for partners to furnish information concerning the partnership's business and affairs).

²⁸ *See* Arthur J. Ciampi, *Lateral Partner Moves: Law Firm Partnership Law*, N.Y.L.J., March 24, 2006, at 22 (proposing sample partnership provision requiring that partners submit lists of other partners or employees he or she wishes to solicit).

²⁹ *See* Rest. (Second) of Agency § 393, Comment (e) (1958) ("a court may find that it is a breach of duty for a number of key officers or employees to leave their employment simultaneously and without giving the employer an opportunity to hire and train replacements.").

³⁰ *See Sperry Rand Corp. v. Rothlein*, 241 F. Supp. 549 (D. Conn. 1964) (finding that employees who subsequently started their own business violated the duty of loyalty owed to their employer).

³¹ *See* Revised Unif. P'ship Act § 603(b)(2) (partner's duty of loyalty ends with disassociation).

³² *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578 (App. Div. 2000).

found that the information was confidential and that the partner breached his fiduciary duty by accessing and disseminating the information.³³

All courts and commentators agree that a departing partner may solicit other partners and employees after giving notice of departure, but no clear guidelines exist on whether the partner can solicit before giving notice of departure. Therefore, a departing partner (or a lawyer advising a departing partner) should ascertain whether the law of the applicable jurisdiction provides any guidance and should review the partnership agreement for any notice provisions. Under a conservative approach, a departing partner should limit solicitation of anyone until after giving notice of departure; under a less conservative though generally safe approach, the partner may solicit other partners, but not employees, before giving notice. In all instances, a departing partner should not use confidential or proprietary information. Following these guidelines will reduce the risk of a departing partner violating any fiduciary duties.

B. Clients: To Whom Do They Belong?³⁴

One of the most important factors driving a partner's decision to make a lateral move can be whether clients will follow. But clients belong to nobody. They alone decide whether to remain with the firm, to leave with the departing partner, or to choose another attorney. Both law firms and departing partners have an ethical obligation to handle these situations in a way that is consistent with the principle of client choice.

1. The Client's Right to Choose

Clients have an absolute right to choose their attorneys, including the right to end attorney-client relationships without cause. “[T]he right to change attorneys, with or without

³³ *Id.* at 583-84.

³⁴ This section was adapted from an article written by Wayne N. Outten and Douglas James and published in the *Law Firm Partnership & Benefits Reporter*, with updating by Beccah Golubock Watson.

cause, has been characterized as universal;” it finds its origins in the English common law.³⁵

This unfettered right necessarily includes the right to select a departing partner over the remaining partnership or, in the event of partnership dissolution, one partner over another.³⁶

Under common law, the client’s right to choose his or her attorney has been regarded as necessary to ensure zealous representation. “It is unquestioned that a client has the right to terminate the relationship of attorney and client at any time, with or without cause. That right is afforded him by the law because of the peculiar nature and character of the relationship, which in its very essence is one of trust and confidence. It is a right for the benefit of the client, and is intended to save him from representation by an attorney whose services he no longer desires....”³⁷ This absolute right to choose is not without conditions. It is limited by, for example, conflicts of interest, the client’s ability to pay for services, and the attorney’s right to decline engagement.³⁸ Moreover, while a client may terminate the attorney-client relationship for any reason, that right is conditioned on, among other things, the right of the terminated attorney to recover the value of services already rendered.³⁹

2. Tortious Interference with Contractual Relationship

Notwithstanding the majority view prohibiting non-compete clauses, a departing attorney may be liable for breach of fiduciary duty and/or tortious interference with contractual

³⁵ *Echlin v. Super. Ct. of San Mateo Cnty.*, 90 P.2d 63, 65 (Cal. 1939) (internal citations omitted).

³⁶ *See Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989).

³⁷ *Gordon v. Mankoff*, 261 N.Y.S. 888, 889-90 (1931). *See also Sohn v. Brockington*, 371 So.2d 1089, 1093 (Fla. Dist. Ct. App. 1979); *Herman v. Prudence Mut. Cas. Co.*, 235 N.E.2d 346 (Ill. App. Ct. 1968); *MacLeod v. Vest Transp. Co.*, 235 F. Supp. 369 (N. D. Miss. 1964); *State ex rel. Seifert, Johnson & Hand v. Smith*, 110 N.W.2d 159 (Minn. 1961); *De Korwin v. First Nat’l Bank of Chi.*, 155 F. Supp. 302 (N.D. Ill. 1957); *In re Lachmund’s Estate*, 170 P.2d 748 (Or. 1946).

³⁸ *Howard v. Babcock*, 863 P.2d 150, 159 (Cal. 1994).

³⁹ *Marshall v. Romano*, 10 N.J. Misc. 113, 114 (C.P. 1932). For a discussion of a departing partner’s financial rights, see Part I(D) *infra*.

relationships by improperly inducing clients to breach their contracts with the law firm prior to departing.⁴⁰

3. Notice to Clients

Blanket restrictions on client contact are impermissible under the ethics rules, since the client must be free to choose whether to stay with the firm or leave with the departing attorney and must be given sufficient time/notice to make the decision.⁴¹ When a partner leaves a firm, both the firm and the departing partner have an obligation to give appropriate notice to clients, so as to give effect to the principle of client choice. ABA Formal Opinion 99-414 provides specific guidelines for client notices. Among other things, ABA Formal Opinion 99-414 proposes specific methods, times, and content for communicating to clients the departure of a partner. These guidelines emphasize client choice. Although the Ethics Opinion does not specifically address Model Rule 5.6 or the prohibition against non-competition clauses (discussed later), it presumes that all departing partners have the right to engage clients of their former firms and expressly directs departing attorneys and law firms to inform clients of their right to choose the departing partner as their counsel. Many state bars have adopted similar guidelines.⁴²

⁴⁰ See *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004) (Departing partners breached their fiduciary duty by soliciting a major client before resigning); *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30, 47 (Ind. App. 2002) (Partner's "fiduciary duty also includes the duty to abstain from pre-departure "surreptitious solicitation" of firm clients for personal gain."); *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179, 1183 (N.Y. 1995) ("[P]reresignation surreptitious "solicitation" of firm clients for a partner's personal gain--the issue posed to us--is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation."). See also Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary and Disciplinary Liability*, 50 U. PITT L. REV. 1, 99-106 (1988).

⁴¹ See *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 61-300 ("Clients are not merchandise[,] [l]awyers are not tradesmen," and restrictive covenants inappropriately "barter in clients."); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 68-1072.

⁴² See, e.g., Alaska Bar Op. 2005-2 (2005), Ky. Bar Ass'n Op. E-424 (2005), Or. State Bar Op. 2005-70 (2005), Joint Op. 2007-300 (2007) of the Penn. and Philadelphia Bar Associations, S. C. Bar Op. 02-17 (2002), Va. Legal Ethics Op. 1822 (2006). Available at http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html#states (scroll down to find opinions listed by each state's bar association).

The guidelines in ABA Formal Opinion 99-414 are intended not only to preserve client choice, but also to prevent violation of other ethical guidelines and laws regarding lawyer conduct. These include the following: preventing conflicts of interest; protecting client files and property; preventing clients from being adversely affected by an attorney's withdrawal; avoiding dishonesty, fraud, deceit, or misrepresentation in connection with the planned withdrawal; and maintaining confidentiality. A joint communication in the form of a letter from the firm and the departing partner is strongly preferred.⁴³

Although client identity may be confidential information under the pertinent ethics rules, and may be proprietary information for purposes of partnership law, it may be permissible for a departing attorney to give a limited client list to their new firm prior to giving notice, in order to facilitate a conflicts check.⁴⁴ In fact, hiring firms may have an obligation to request certain confidential information to identify any disqualifying conflicts of interests. While this creates a danger of improper disclosure of client information and breach of fiduciary duty, it is also necessary to protect the clients of both law firms. Generally, the departing attorney does not violate her ethical obligations by supplying confidential information for this limited purpose.⁴⁵ Thus, disclosing client names and the types of cases the lawyer handles for that client, in order to check for possible conflicts, likely would not violate any ethical duties.⁴⁶ However, anything

⁴³ See Appendix A for a model joint letter.

⁴⁴ See *Meehan v. Shaughnessy*, 404 Mass. 419, 435-36, 535 N.E.2d 1255, 1264 (1989) (finding moving attorneys' preparation and use of a list of clients expected to leave former firm was a logistical arrangement to establish a physical plant for the new firm, which was permissible); see also *Graubard Mollen Dannett & Horowitz v. Moskowitz*, 86 N.Y.2d 112, 120 (1995) (an attorney who takes steps to find alternative space and establish affiliations prior to notifying the partnership does not violate the fiduciary duty); 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, 1023 (1998) ("The information that may be disclosed [to another firm] 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.").

⁴⁵ See ABA Comm. on Ethics & Prof'l Responsibility, Formal Ethics Op. 99-414, at *6 FN 12.

⁴⁶ See ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 09-455 ("any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the

beyond that minimal information could give rise to ethical questions and confidential client information should be used only for this limited purpose.⁴⁷

Conclusion

An attorney in a law firm has multiple, sometimes overlapping duties, including potential fiduciary duties to the firm, contractual duties under the partnership or employment agreements, and fiduciary duties to clients. A departing attorney may find that these duties, which had previously coexisted peacefully, have suddenly come into conflict. Yet no bright line rules exist for how a departing attorney should handle potentially competing duties. As the court observed in *Graubard Mollen Dannett & Horowitz v. Moskovitz*, “[i]t is unquestionably difficult to draw hard lines defining lawyers' fiduciary duty to partners and their fiduciary duty to clients. That there may be overlap, tension, even conflict between the two spheres is underscored by the spate of literature concerning the current revolving door law firm culture.”⁴⁸ With greater attorney autonomy and freedom comes a host of legal and ethical issues. Attorneys and firms need to understand applicable statutory, common law, and ethical standards. And they need to proceed cautiously.

purpose of detection and resolution of conflicts of interest”); N.Y. State Bar Ass’n Eth. Op. 720 (August 27, 1999) (“When a lawyer moves from Firm A to Firm B... the moving lawyer may disclose, the names of clients represented and, depending upon the size of Firm A, the name of all clients of Firm A for a reasonable period of time, as long as such information is not protected as a confidence or secret of the clients of Firm A and disclosing this information does not violate any contractual or fiduciary duties of the lawyer to Firm A.”)⁴⁶; N.Y. City Bar Ass’n Eth. Op. 2003-03 (Oct. 2003) (Checking For Conflicts of Interest).⁴⁶

⁴⁷ The information should not, for example, be used for the purposes of recruiting staff or clients from the departing attorney’s former firm. Such conduct has been found to constitute a clear breach of fiduciary duty, and liability has been imposed on the hiring firm as well as the departing attorneys. *See Dowd & Dowd v. Gleason*, 693 NE 2d 358, 379 (1998); *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578 (N.Y. App. Div. 2000) (“preparation and sending of [confidential information], combined with the subsequent hiring of certain of defendant's trusts and estates personnel, constituted an egregious breach of plaintiffs' fiduciary duty to defendant”). The recruiting firm should carefully document the information it receives, to help counter later claims that it received more. *See* “Withdrawal and Termination,” 24 Law. Man. Prof. Con. 366 (2009) (citing cases).

⁴⁸ *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 NY2d 112, 119 (1995).

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Appendix A
Model Joint Letter

Dear Client:

This is a joint letter from [Name of Firm] (“the Firm”) and [Name of Departing Attorney] (“the Attorney”) about your matter.

Effective [Date], the Attorney, who has worked on your matter, will be leaving the Firm and setting up his own law practice. The Attorney’s new contact information, effective [Date], will be as follows: [New Address] telephone number, XXX-XXX-XXXX; facsimile number, XXX-XXX-XXXX; email, XXXXXXXXXXXX. Between now and then, he can be reached at the Firm.

You may choose to continue having the Firm represent you, or you may choose to have the Attorney continue to represent you through his new firm; the choice is entirely yours. If you choose the former, the Firm will designate a successor attorney to work on your matter; any other attorney of the Firm who has worked on your matter in the past will continue to do so, assuming that this is your preference, of course. If you choose the latter, the Attorney will continue to represent you on your matter.

If you choose to stay with the Firm, your retainer arrangements will remain as they are. If you choose to go with the Attorney, you will need to make retainer arrangements with his new firm. In that event, you would be expected to fulfill your obligations to the Firm through the transition date; after that, you would have no further obligations to the Firm.

Both the Firm and the Attorney are committed to making this transition as smooth as possible and will cooperate with each other to facilitate a transition that has the least possible impact on you.

We would be grateful if you would contact [Managing Partner] of the Firm and/or the Attorney as soon as possible to discuss this matter further, to raise any questions you might have, and to facilitate and coordinate the handling of your matter during this transition period.

Thank you for your cooperation and understanding.

Sincerely,

The Firm

The Attorney

By: _____
The Managing Partner

Appendix B

Checklist For Attorney Partnership Withdrawal

**Cara E. Greene, Esq., 2013
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PRE-NOTIFICATION

DO:

- Prepare written notification of withdrawal — DO NOT SEND.
- Prepare comprehensive client list with complete contact information.
- Prepare joint email to send to partners, associates, and staff notifying them of withdrawal — DO NOT SEND.
- Prepare joint client-notification letter and election form and list of clients to whom the documents should be sent — DO NOT SEND. This list should include clients whose business you brought with you to the firm, client business you generated while at the old firm, and clients on whose matters you have been the primary or significant professional contact.
- Undertake conflicts check with new firm.

DO NOT:

- Use old firm resources (whether electronic or physical, *e.g.* firm email, servers, letterhead, equipment, including firm issued cell phone), firm non-public confidential information, or firm) to prepare to compete.
- Provide confidential or proprietary old firm information to the new firm, outside what is necessary to conduct an adequate conflict check.
- Recruit staff or other attorneys prior to providing notification of withdrawal to the old firm.
- Participate as an officer or partner in important or substantive decision-making at the old or new firm.

NOTIFICATION:

DO:

- Notify the partnership that you are withdrawing from the partnership and executive leadership roles, effective _____. Present written notification of withdrawal.
- Assure the partnership that you have not contacted any firm clients or made any effort to recruit firm clients or staff.
- Discuss earlier withdrawal date.
- Present joint email to send to partners, associates, and staff notifying them of withdrawal for approval.
- Present joint client notification letter, election form, and list of clients to whom they should be sent for approval.
- Discuss clients whose status demands immediate notification (either because of imminent deadlines, ongoing work, or because they are particularly lucrative/desirable) and make clear your intent to contact these clients after the joint notification letter has gone out. Discuss agreeing to a set number of days after the letter has been sent before either side will make additional contact with the client.
- Discuss how Election Forms will be handled — who will handle them, how notice will be provided to you and the time frame for doing so, what is the process for transferring client files (including invoice statements) and the time frame for doing so.
- Discuss docketing and calendaring information for clients and reach an early agreement with the old firm regarding how this information will be shared so that neither of you miss important deadlines.
- Indicate that, if necessary and requested, you will provide assistance related to matters that stay with the old firm, including, providing a written file status memo prior to your departure or being available to provide information to the subsequent attorney.

POST-NOTIFICATION:

DO:

- Send out authorized notice of withdrawal to partnership, attorneys, and staff.
- Reach agreement on financial arrangements for payment of capital interest, bonuses, and profit draws.
- Prepare new retainer agreements for clients who are transferring their matters to the new firm.
- Make arrangements with old/new firm as to fee structures/liens for ongoing matters.
- Prepare and file substitution of counsel forms where necessary.
- Prepare notice of withdrawal with respect to clients for whom you are withdrawing as counsel.
- Make arrangements with the old/new firms regarding which one will store your closed files.
- File a change of address form with the postal service, the Bar, courts and opposing counsel.
- Reach agreement with the old firm regarding forwarding mail, redirecting incoming email communications, and forwarding telephone calls.

DO NOT:

- Disparage the old firm or make comparative assessments of your abilities to service client matters going forward.