LAW FIRM RISK MANAGEMENT IN AN ERA OF BREAKUPS AND LAWYER MOBILITY: LIMITATIONS AND OPPORTUNITIES

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I. INTRODUCTION

The modern era of lawyer mobility may have commenced with the 1989 decision of the New York Court of Appeals in *Cohen v. Lord, Day & Lord*.[1] At issue in the case was a partnership agreement that gave departing

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1. Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989).

lawyers a share of profits for two years after their withdrawals but denied the payouts to any of the lawyers who engaged in post-withdrawal competition with the firm.[2] Cohen, a tax partner who had withdrawn from the firm and taken with him a number of clients, took exception to the agreement's forfeiture of payments for withdrawal provision.[3] A divided court held the agreement unenforceable because of its negative effects on the ability of clients to choose their lawyers.[4]

> We hold that while the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.[5]

Although earlier cases had addressed lawyer mobility issues, *Cohen* was the first of many high-profile cases signaling a change in the culture of the profession from an environment of law firms with stable memberships to law firms with "revolving doors" populated by "grabbing and leaving" partners.[6]

Apart from its historical significance, *Cohen* is noteworthy because it illustrates the limitations of the law firm partnership agreement as a private ordering mechanism to regulate the relations of partners. In contrast with partners engaged in purely "commercial activities," lawyers associated in practice will in principle respond to a higher calling of serving the interests of their clients.[7] The professional responsibility restrictions on law firm partnerships have been articulated through a series of codes and ethics opinions that consistently emphasize the paramount importance of the right of the client to choose the lawyer.[8] The overriding principle of client choice

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2. *Id.* at 410-11.
3. *Id.* at 411.
4. *See id.* at 413.
5. *Id.* at 411.
6. *See* Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1180-83 (N.Y. 1995). The New York Court of Appeals has described the "revolving door" as a "modern-day law firm fixture." *See id.* at 1180.
7. *Cf.* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 7 (1953) (noting a profession is not "the same sort of thing as a retail grocers association . . . .").
8. *See generally* ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS, ch. 1, § 2.3.1 (Aspen Publishing) (1994) [hereinafter HILLMAN, LAWYER MOBILITY] (discussing the rise of lawyer mobility and its effect on law firms).

significantly limits the options of lawyers when they attempt to structure their relationships in ways that affect clients.[9]

To say that law firms and lawyers are restricted by the norm of client choice does not mean they are not without options in structuring their relationships in ways that may affect their positions as opposing parties should litigation or disputes develop because of breakups and lawyer mobility. This article explores risk management opportunities with a particular emphasis on avoiding litigation or, if that is not possible, affecting the outcome of litigation.[10]

II. FIRST STEPS IN RISK MANAGEMENT: THE WHO AND THE HOW OF LATERAL HIRING (OR, YOU REAP WHAT YOU SOW)

The most effective risk management techniques anticipating future breakup problems are identified and implemented at the time a lawyer is hired. This point seems obvious, but it deserves emphasis.

On the most fundamental level, should a law firm be surprised when a partner leaves with an entire practice group, when five years ago the firm lured this same lawyer from another firm under surprisingly similar circumstances? Should the firm be surprised if the departing lawyer facilitated the move by using confidential firm information, when the firm earlier solicited similar information when it recruited the partner? Should the firm be surprised when the lawyer recruits staff while still with the firm, when the firm encouraged exactly the same behavior when it was in the role of recruiter?

The questions seemingly answer themselves but illustrate a point that is sometimes forgotten—a firm that grows through aggressive lateral hiring may sow the seeds of future instability and has no standing to complain of the very practices that have been an integral part of its own hiring practices. To approach the point from a somewhat different angle, consider how fiduciary duties both reflect and define the conduct that partners reasonably expect of each other.

The duty of loyalty limits a partner's ability to compete with the partnership or act in ways that are adverse to its interests.[11] Although the loyalty obligation is so fundamental that the partnership agreement cannot waive it, an agreement may identify specific types of activities that do not

9. *See generally* Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 HOFSTRA L. REV. 65 (2008) [hereinafter Hillman, *Client Choice*] (discussing the fundamental nature of the lawyer-client relationship and the legal and moral restrictions placed on that relationship).

10. This article discusses risk management from the perspective of the law firm. For the perspective of the lawyer moving laterally, see Ronald C. Minkoff, *Poaching Lawyers: The Legal Risks*, FRANKFURT KURNIT KLEIN & SELZ, http://fgkks.com/article.asp?articleID=188# (last visited Jan. 27, 2011).

11. *See* REV. UNIF. P'SHIP ACT § 404(b) (West 2010) [hereinafter R.U.P.A.].

violate the duty of loyalty provided the permitted activities are not "manifestly unreasonable."[12] For this purpose, a partnership agreement is a broad concept that extends to oral and implied understandings among the partners.[13] Accordingly, past recruiting practices of a particular law partnership may be relevant in defining the loyalty obligations owed by partners and, by extension, what partners expect of each other when other firms seek to recruit from their number.

To be specific, a firm engaged in lateral hiring that scrupulously avoids receiving and using confidential information about another firm is making a statement concerning what it expects of its own partners in their discussions of possible affiliations with other firms. Conversely, a firm that solicits sensitive information from lateral hires should not claim a "duty" of its own partners not to provide similar information to other firms. On the points so often in contention in lawyer mobility cases—disclosure of firm information, solicitation of clients, and recruitment of staff—firm culture formed by past practices may provide important guidance on the behavior that partners in the firm can reasonably expect of each other.[14]

Equally important is the conduct of the lawyer being recruited. How that lawyer handles confidential firm and client information and the way the lawyer defines obligations to a firm while arranging a departure reveals much about what the recruiting firm may expect from the lawyer in the future. In assessing a potential hire, the answer to the following question may alert the hiring firm to the potential of future problems:

> *If the positions of the firms were reversed, and this lawyer were leaving our firm, would we be satisfied with the lawyer's candor and conduct on all matters relating to the departure?*

If the answer is equivocal or negative, the enthusiasm generated by expectations concerning what the lawyer will bring to the firm should be tempered with a dose of realism concerning the conduct that the hiring firm may expect from this same lawyer in the future.

III. THE ROLE OF THE PARTNERSHIP AGREEMENT

Lawyers put great faith in contracts. Partnership law supports this belief by providing a core set of default provisions applicable only in the

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12. *Id.* § 103(b)(3)(i).

13. *See id.* § 101(7) (defining partnership agreement).

14. *Cf.* Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera, 157 Ohio Misc. 2d 1, 2010-Ohio-1677, 926 N.E.2d 375, ¶ 27 (rejecting the argument of departing lawyers that firm's past practices in lateral hiring excuse their conduct and noting, "While probably admissible, this does not insulate the defendants. Common practice for individual lawyers seeking lateral opportunities is understood to include disclosure of one's own clients, experience, salary, and benefits; that is a far cry from making such disclosures for an entire integrated group, or so a jury could reasonably conclude.").

absence of an agreement.[15] The default provisions are designed with small commercial partnerships in mind and are ill-suited for firms with large populations of partners, sophisticated professional practices, or both.[16] As one court recently observed in a case involving the departure of a practice group from a law firm, "this was no handshake business arrangement."[17]

In theory, law firms have great freedom to structure relationships of lawyers within the firm through a well-drafted partnership agreement.[18] The need to centralize management and establish orderly processes for partners' withdrawals and removals are just a sampling of the many reasons why law firms depart, necessarily, from the default norms of partnership law.[19]

A. The Partnership Agreement as Contract

As the size of a law partnership grows and as inequalities within a firm become more pronounced, the statement that the law firm partnership agreement is a "contract" may be technically correct, but also is misleading.[20] The premise underlying a contract is the presence of bargaining—a give and take representing the private ordering that culminates in an agreement. In many large partnerships, however, partners come and go and may never have participated in the bargaining of the agreement under which they jointly practice.

To be sure, the "signing" of the partnership agreement is a rite of passage associated with becoming a partner, but the occasion normally calls for the acceptance of the *whole* of a previously negotiated agreement. In this sense, the typical law firm partnership agreement serves more as a constitutional document than a contract reflecting a bargaining among equals.[21] Although the partnership agreement is a contract in the eyes of the law, it is a different type of contract than that which lawyers may draft for clients involved in commercial transactions.[22]

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15. *See, e.g.*, R.U.P.A. § 103 (stating that the partnership agreement governs the relations between partners and the partnership except with respect to a limited number of nonwaivable provisions identified in the section).

16. *See id.* § 105 off. cmt. 1.

17. *Buckingham*, 926 N.E.2d at 379.

18. *See* R.U.P.A. § 101.

19. R.U.P.A. defines a partnership agreement as an agreement "among the partners concerning the partnership." *See* § 101 author cmt. 6(b) (commenting on § 101(7) of the R.U.P.A.). This raises the question of whether the partnership as an entity is a party to the partnership agreement. For a discussion of this point, see ROBERT W. HILLMAN, ALLAN W. VESTAL AND DONALD J. WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT 22-24 (2009-10).

20. *See* Robert W. Hillman, *The Bargain in the Firm: Partnership Law, Corporate Law and Private Ordering Within Closely-Held Business Associations*, 2005 U. ILL. L. REV. 171, 181 (2005) [hereinafter Hillman, *The Bargain in the Firm*].

21. *See generally id.* at 171 (explaining the nature of partnership agreements).

22. *See id.* at 171-72.

Given the talented lawyers who populate law firms, law firm partnership agreements should represent the state of the art in thoughtful planning and legal drafting. In practice, however, law firm partnership agreements often are ill-conceived, poorly drafted, and hopelessly out of date.[23] As to why there exists such a gap between theory and practice, the reasons are several and are discussed below.

B. Limitations on Law Firm Partnership Agreements

1. Difficulties of Negotiating and Amending Partnership Agreements

The proverb *cura te ipsum*—take care of your own self—is easier to state than it is to follow. The pressures and incentives to respond to client needs may deplete lawyers of the time and energy needed to order their own relationships. As the barefoot children of shoemakers and the physicians who neglect to heal themselves may attest, the problem of neglecting one's own affairs is not unique to lawyers.

Partnership agreements covering large numbers of partners are difficult to negotiate and even more difficult to amend. Particularly, as the number of partners grows, a potentially significant obstacle to developing and amending a partnership agreement may be the diverging interests within members of a firm. Some lawyers may have interests in maintaining mobility options; others may be better served by agreements that discourage departures in the hope of stabilizing firm income.

The conflicting interests become most apparent when differences arise over the proper criteria for measuring productivity and allocating firm income among the many partners. In many firms, the best option is to manage such differences on a day-to-day basis and avoid more fundamental disagreements that would be generated by attempts to amend the partnership agreement. Just as the political world approaches constitutional conventions with caution due to outcomes that are difficult to control and predict, law firms often are most comfortable leaving partnership agreements undisturbed.

2. Centralized Management as an Agreement Substitute

A partnership agreement is a static document intended to govern dynamic relationships. In some cases, the inadequacies of the underlying agreement are offset by the development of centralized management allowing more flexible governance of the firm. Centralized management in larger firms is critical because even the best drafted agreement cannot be expected to address the myriad of issues arising in a professional services

23. *See id.* at 185.

partnership. The emergence of the management committee as a mainstay of the modern law firm *may* reduce the role of the partnership agreement in ordering the relations among partners.

Many firms vest significant discretionary authority in management committees. Important decisions on matters such as partners' shares of firm income, admission of new partners, and removal or de-equitization of existing partners may be made by the committee rather than the partners as a whole.[24] Typically, committee members are elected and thereby, in theory, are accountable to the partners,[25] but the broad discretion a committee is given to decide issues fundamental to the partnership may reduce the role of the formal agreement as the definitive statement of guidelines under which the firm operates.

3. Policy Statements

Some firms attempt to express rights and duties of firm members through policy statements.[26] Because they extend beyond partners, policy statements have broader applicability than partnership agreements.[27] Moreover, policy statements may address issues with a level of detail far greater than that which is customary in partnership agreements. A policy statement may be more important than the partnership agreement as a source of legal rights and duties when it addresses issues such as ownership of firm property and the accepted process to be followed when a lawyer leaves the firm.

Compared with partnership agreements, policy statements are easier to develop and revise.[28] Care should be taken, however, to ensure that the development of a policy statement intended to have legal effect is supported by the partnership agreement, an established management structure, or a majority of partners. Note in this regard that differences as to matters in the ordinary course of business may be decided by a majority of partners, but an act outside the ordinary course of business requires unanimous consent.[29]

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24. *See, e.g.*, Douglas R. Richmond, *Expelling Law Firm Partners*, 57 CLEV. ST. L. REV. 93, 131 ("Many decisions on which partners used to vote are now delegated to law firms' elected leadership.").

25. There exist occasional exceptions to elections as the means of selecting management committee members. For example, Sidley Austin L.L.P. has been managed by an unelected executive committee established by the partnership agreement. *See* E.E.O.C. v. Sidley Austin Brown & Wood, 315 F.3d 696, 699 (7th Cir. 2002).

26. *See, e.g.*, Kamaka v. Goodsill, Anderson, Quinn & Stifel, 176 P.3d 91, 119 (Haw. 2008) (stating that the firm used policy statements to define the duties of its members).

27. *Cf.* R.U.P.A. § 103(a) (constricting the extent of a partnership agreement to only partners).

28. *Cf. id.* § 103(b) (detailing the changes that cannot be made to partnership agreements).

29. *See id.* § 401(j).

4. *Past Practices as Agreement Waivers*

Even as to issues on which a partnership agreement is specific and clear, application of the agreement may be inconsistent to an extent that calls into question the enforceability of key provisions. Consider, for example, provisions requiring specified notice of withdrawal. Reasonable notice of a planned departure (e.g., sixty days) may seem a sensible means of giving the firm an opportunity to adjust and mitigate the consequences of a withdrawal. In practice, however, firms often wish to sever expediently their relationships with departing partners in order to minimize divided loyalties, recruitment of staff, and the other unpleasantries commonly associated with departures. Notice provisions routinely are waived, raising the question of whether any life remains in a provision requiring notice when past practices are inconsistent with enforcement of the provision.[30]

Also of concern in the enforcement of partnership agreements are so-called implied agreements that modify the terms of written agreements.[31] A recent unreported California case provides an apt illustration of the problem.[32] In *Kuist v. Hodge*, the court found an implied agreement to pay a former partner $4 million, representing ten percent of a contingent fee case completed after the partner left the firm, without regard to the written partnership agreement that seemingly limited the partner's rights in fees after his withdrawal.[33] The court found the partnership agreement had been abandoned and replaced by a new, implied partnership agreement providing for sharing of the fee when collected.[34] The facts of the case are unusual and somewhat extreme, but the finding of an implied agreement is not unusual in partnership law and should remind law firm managers of the need to follow the terms of partnership agreements and proceed with caution when departing from their provisions.

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30. Similar concerns arise with mandatory retirement provisions, which often are waived. *See, e.g.*, David Rosenberg, *Venture Capital Limited Partnerships: A Study in Freedom of Contract*, 2002 COLUM. BUS. L. REV. 363, 368-69 (2002).

31. *See* R.U.P.A. § 101(7) ("'Partnership Agreement' means the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement."). The Texas Business Organizations Code defines partnership agreement somewhat more narrowly as "any agreement, written or oral, of the partners concerning a partnership." TEX. BUS. ORGS. CODE ANN. § 151.001(5) (West 2007).

32. Kuist v. Hodge, No. B19-3863, 2008 WL 510075, at *1 (Cal. App. 2d Dist. Feb. 27, 2008) (unpublished opinion), *as modified by denial of reh'g* (Mar. 25, 2008), *reh'g denied* (Mar. 28, 2008), *rev. denied* (May 21, 2008).

33. *Id.*

34. *Id.* at *7. The managing partner's repeated disregard of provisions of the partnership agreement was a key fact supporting the finding that the agreement had been abandoned. *Id.* at *8.

5. Ethics Norms and Partnership Agreements

Agreements are constrained by ethics norms requiring lawyers to put their clients' interests above their own. The norms have developed in ways that limit sharply the ability of lawyers to include in their partnership agreement provisions limiting the ability of present partners to engage in future competition with the firm.[35] The most notable example is the restrictive covenant, which has long been denied a role in law firm partnership agreements even as it continues to find use in the agreements of other professionals, most notably accountants and physicians.[36] Even comparatively mild economic disincentives to competition, such as discounted account settlements for departed partners who compete with firms they have left, do not fare well under the client protection standards of the legal profession.[37] Lawyers as a group are uniquely disadvantaged when attempting to order their relationships through contracting activities.

6. Enforcement Challenges

Finally, even if we set aside the above limitations on law firm partnership agreements, there still exists an important obstacle to the contract as a basis of regulating law firm partners' relationships. Most provisions of law firm partnership agreements are not self-executing and, instead, require affirmative steps to enforce.[38] Damages for breach of agreement may be difficult to prove.[39] Litigation among former law partners is expensive, unseemly, sometimes embarrassing, and almost always unwelcomed by courts. Equally important is the reality that even though most disagreements are usually directly or indirectly related to client loyalties, dragging clients into lawyer squabbles may not be the best strategy for enhancing a book of business and developing long-term relationships.

These are some of the reasons why lawyers who have made careers excelling in an environment of adversarial confrontation are sometimes reluctant to litigate when their own actions and interests are at issue.

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35. *See* Hillman, *Client Choice*, *supra* note 9, at 72.

36. For further discussion of this point, see HILLMAN, LAWYER MOBILITY, *supra* note 8, at § 2.3.3.

37. *Cf.* Op. Tex. Ethics Comm'n No. 590 (2009) ("[A] law firm may not seek to enter into an agreement with a member of the firm that would require, if the lawyer left the firm, that the lawyer would not solicit the firm's clients and would pay to the firm a percentage of any fees collected by the lawyer from the firm's clients for work after the lawyer left the firm.").

38. *See* Charles E. Cantu & Jared Woodfill, *Upon Leaving a Firm: Tell the Truth or Hide the Ball*, 39 VILL. L. REV. 773, 777 n.18 (1994).

39. *See, e.g.*, Rosenthal v. Sonnenschein Nath & Rosenthal, L.L.P, 985 A.2d 443, 454 (D.C. 2009).

IV. FIVE RISK MANAGEMENT SUBJECTS FOR PARTNERSHIP AGREEMENTS IN THE NEW ERA OF LAWYER MOBILITY

Although limited by the factors discussed above, partnership agreements are important mechanisms for ordering the relations among members of a law firm. The following discussion considers five subjects that law firms seeking to control risks associated with lawyer departures may wish to address in a partnership agreement:

A. Intellectual Property
B. Departure Process and Restrictions on Payouts
C. Partner Removals and De-Equitizations
D. Winding Up and Anti-Dissolution Provisions
E. Dispute Resolution

The list is *selective* rather than exhaustive and is only a partial set of considerations relevant to evaluating or improving an existing agreement. Nevertheless, these five subjects address risk management issues associated with lawyer mobility that are often inadequately treated, if treated at all, in law firm partnership agreements.[40]

A. Intellectual Property

The existence of considerable intellectual property associated with law practice is beyond dispute. The problem lies in identifying what that property is and who owns it.

Even in simpler times when attention centered on hard copies, duplicating machines, and rights of possession of tangible materials, the law never effectively rationalized the competing rights of law firms, lawyers, and clients to intellectual property ranging from document templates to client lists.[41] Such a seemingly straightforward concept as the "client file" reveals itself on close examination to be "an amorphous and vaguely defined entity."[42] If the client file defies precise meaning, it is unsurprising

40. A few years ago, converting a law firm partnership to a limited liability partnership (or its equivalent) would have been at the top of the list. The vast majority of firms have made this conversion, so the point no longer needs emphasis. *See* Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW. 1387, 1394-95 (2003).

41. *See* Gibbs v. Breed, Abbott & Morgan, 710 N.Y.S.2d 578, 582 (App. Div. 2000) (stating that a lawyer's removing or copying of documents that belong to the firm, without permission and with the intent to use the documents as templates, is professional misconduct); Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets, and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767, 773 (2003) (explaining that trade secret precepts apply to client lists by state statute or case law).

42. Nat'l Sales & Serv. Co., Inc. v. Superior Court, 667 P.2d 738, 740 (Ariz. 1983).

that issues of attorney work product and the status of informal documents such as drafts and sticky notes remain unresolved.

Alongside the development of digital information, the uncertainties surrounding intellectual property rights of firms, lawyers, and clients increase dramatically.[43] The status of metadata (data about data), the proliferation of files in which authorship is difficult to identify, and the large and sometimes sprawling quantities of data facilitated by digital storage technology present issues that have only begun to be addressed and will occupy the attention of courts and ethics committees for decades to come.

In the lawyer mobility context, one of the more important aspects of digital files is the ease with which they may be duplicated and transported. A world of hard copies introduces a certain discipline and transparency to the process of lawyer mobility because critical files must be identified, copied, and moved. When an attorney's work product, client information, and firm proprietary data can be downloaded quickly and quietly to a thumb drive, the ability of firms and clients to protect whatever rights they may have in digital data is diminished.

There are two responses a firm may wish to consider in protecting its rights in intellectual property and related information. The first is to implement information management mechanisms that require systematic creation and maintenance of digital information and that address the creation, modification, and transfer of files. For example, any document created by an attorney in the firm should be cataloged and filed in a way that facilitates cataloging the information and allowing its discovery through well-designed search processes available to authorized firm members. Second, a record of downloaded information should be maintained, and access to files by attorneys who have announced plans to depart should be restricted consistent with procedures, discussed below, established to provide for orderly transitions when attorneys depart.

Beyond establishing information management systems, firms may wish to consider addressing intellectual property issues in partnership agreements and, when possible, engagement letters. Here, both substance and process are important. Partnership agreements not only may define substantive rights in work product and intellectual property but also may prescribe notice and procedures to be employed when a departing lawyer seeks to copy or remove files in which the lawyer claims some proprietary interest, directly or on behalf of a client.

Finally, legal protections accorded trade secrets may be available to some types of information developed by law firms. The most likely type of

43. For a full discussion of these issues, see Allison D. Rhodes & Robert W. Hillman, *Client Files and Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility*, 43 SUFFOLK U. L. REV. 897 (2010) [hereinafter Rhodes & Hillman, *Client Files and Digital Law Practices*].

information to enjoy such protection is information relating to a firm's clients or so-called "client lists;"[44] trade secret status may extend to other types of confidential information as well, such as a firm's internal financial information.[45] Normally, a firm claiming trade secret protection must establish that it has taken reasonable steps to protect the confidentiality of the information.[46] One such step may be to include in the partnership agreement provisions addressing information the firm regards as trade secrets or otherwise proprietary and confidential.

B. Departure Process and Restrictions on Payouts

1. Process of Withdrawal

Apart from required notice of departure and file management issues, discussed above, partnership agreements may address the process of withdrawal and expectations concerning conduct of withdrawing partners. Indeed, an important function of the partnership agreement is to set forth the process by which lawyers withdraw from the firm.

Some provisions dealing with withdrawal should be relatively noncontroversial. For example, procedures for joint notification of clients affected by an attorney's departure are sensible and often recommended by ethics authorities;[47] joint notification is not always practical, but may be reasonably expected as the norm and, therefore, is appropriately addressed in the partnership agreement. Similarly, a partnership agreement should require notice of withdrawal to be in writing to reduce ambiguities that may arise in determining when and if a partner has withdrawn from the firm.[48]

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44. Reeves v. Hanlon, 95 P.3d 513, 522 (Cal. 2004) (stating that a law firm's client list may be a trade secret); Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 862 (Ohio 1999) (same).

45. *See, e.g.*, Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera, 157 Ohio Misc. 2d 1, 2010-Ohio-1677, 926 N.E.2d 375, ¶ 25 ("[S]ignificant steps were taken to maintain Buckingham's closed compensation system, including confidentiality of financial records, income- and business-production numbers, and similar data. This closed system contrasts with the more open system used in some businesses and law firms. Against this backdrop, a jury might find it significant that beginning in February 2008 some internal financial information (such as work production for Buckingham shareholders and income partners and perhaps also associates) was shared with Ulmer & Berne and other firms . . . . It is not clear if client names were discussed with Ulmer & Berne for conflict checks or other purposes. So, as to these points, there are genuine disputes of material fact under the trade-secret and fiduciary-duty claims.").

46. *See* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 665-69 (S.D. Tex. 2010) (recognizing consulting firm's client list as a form of information entitled to trade secret protection and noting that "Texas courts consider three factors to determine whether a customer list is a trade secret: (1) what steps, if any, an employer has taken to maintain the confidentiality of a customer list; (2) whether a departing employee acknowledges that the customer list is confidential; and (3) whether the content of the list is readily ascertainable."); *see generally* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 3.5 (discussing clients as assets).

47. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999).

48. RUPA limits the ability of partners to restrict the power of a partner to dissociate but does allow an agreement to require that notice of dissociation be in writing. *See* R.U.P.A. § 103(b)(6); *see*

On a more controversial note, firms are well advised to restrict the use of confidential firm information—especially financial information—by firm members discussing employment opportunities with other firms.[49] It would be highly unusual for a lawyer to change firms without first revealing to the new firm information concerning the lawyer's existing firm and clients. Indeed, certain information concerning clients is essential for the hiring firm to identify and address potential conflicts of interest arising because of its own clients. Often, however, disclosed information goes further and reveals sensitive data such as a firm's revenues, billings by client, and payroll information. Although breach of fiduciary duty claims may exist for improper disclosures of confidential information even in the absence of a partnership agreement provision, a firm's position is strengthened to the extent that the partnership agreement asserts the confidentiality of firm information and identifies the parameters of this information.

Lawyer mobility once was limited to isolated departures but has evolved so that the movement of entire practice groups is common. Although fiduciary duties provide some restrictions on the recruitment of other staff and attorneys by an attorney who has announced departure plans but has not yet left the firm, the law largely is undeveloped.[50] Particularly troublesome are clandestine recruiting activities by departing attorneys who have not yet left their firms. Given the uncertainties, a firm may be well advised to include in its partnership agreement provisions addressing generally whether, when, and how departing attorneys may recruit staff and attorneys, and specifically whether the firm must be given advance notice of these activities.[51]

Lawyers are allowed to make significant logistical arrangements relating to planned withdrawals, including signing office leases and arranging bank financing, without notifying their present firms of their intentions to leave.[52] In rare cases, a partner may be obligated to reveal departure plans if the firm is about to make a commitment on the assumption that the partner will be remaining with the firm, but generally

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also TEX. BUS. ORGS. CODE ANN. § 152.002(b)(7) ("A partnership agreement or the partners may not . . . restrict rights of a third party . . . except for a limitation on an individual partner's liability in a limited liability partnership . . . .").

49. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999).

50. *See generally* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 4.8.4 (discussing departing attorneys' secret competition with the firm).

51. *But see id.* at § 4.89-.90 (proposing that mandated disclosure may not completely protect the firm).

52. *See, e.g.*, Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989) (noting that negotiation of a lease, acquisition of financing, and other related logistical arrangements in anticipation of departure are necessary to provide ongoing representation of clients who follow the lawyers); HILLMAN, LAWYER MOBILITY, *supra* note 8, § 4.8.1.

notice obligations are limited and firms are the last to know of the departures of key lawyers or entire practice groups.[53]

For firms willing to explore potent but untested departure process provisions, consideration should be given to requiring notice that is triggered by specified activities signaling a serious possibility of departure.[54] An example of such an activity might be a lawyer providing information on clients to another firm for a conflicts check.[55]

2. Restricting Payouts

As noted, restrictive covenants in law firm partnership agreements are not enforceable, and there is little, if any, chance that this basic norm of legal ethics will warrant consideration in the future.[56]

The fate of some types of clauses that "discourage" without prohibiting competition by withdrawing partners is *slightly* more promising in a few jurisdictions.[57] For example, carefully drafted payout clauses that provide for reduction of payouts to reflect damage to a firm caused by competition from former partners may be enforceable in a small but growing minority of jurisdictions;[58] the lack of such clauses in the partnership agreements in these jurisdictions may be a testament to the above discussed difficulties of crafting partnership agreements that restrain opportunistic behavior.

A more widely accepted reduction of payouts triggered by competition is the retirement benefits exception to the ban on restrictive covenants.[59] Both the Model Code of Professional Responsibility and the more recent Model Rules of Professional Conduct allow an agreement providing that retirement benefits are conditioned on noncompetition.[60] This potentially

53. *Cf.* Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 729 n.10 (Ariz. 2006) (suggesting that even in the absence of post-departure competition, it may be appropriate to impose a financial penalty on withdrawing partners if the firm undertook capital expenditures or hired associates on the mistaken assumption that the former partners would continue to be members of the firm).

54. *See* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 4.31-.32 (discussing notice of withdrawal and the difficulty in determining the date).

55. Even if such a provision is enforceable, the issue remains whether breach would lead to provable damages. Still, the risk to the firm of asking for this notice is minimal, and the benefits to the firm include improved information on future departures (assuming lawyers comply with the agreements they have signed).

56. *See supra* Part III.B.5.

57. *See* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 2.3.4.

58. The leading case is *Howard v. Babcock*, 863 P.2d 150, 157 (Cal. 1993) (suggesting a "reasonable toll" on competition by a withdrawing lawyer). For a discussion of *Howard* and cases that have followed its lead, see HILLMAN, LAWYER MOBILITY, *supra* note 8, § 2.3.4.

59. *See generally* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 2.3.4; Robert W. Hillman, *Ties That Bind and Restraints on Lawyer Competition: Restrictive Covenants as Conditions to Payments of Retirement Benefits*, 39 IND. L. REV. 1 (2005) (discussing firms' attempt to discourage competition through retirement penalties).

60. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108(A) (1986) ("A lawyer shall not be a party to or participate in [a covenant not to compete] . . . , except as a condition to payment of retirement

important exception to the prohibition of restrictive covenants may serve as a significant disincentive to competition applicable to some of the more senior lawyers at a law firm. Unfortunately, relatively little guidance exists to aid in distinguishing forfeiture-for-competition clauses relating to true retirement benefits from those relating to other types of departure payments (principally account settlement arrangements).[61]

Even though the meaning of "retirement" is unclear, a number of criteria may be useful in evaluating whether the retirement benefits exception is available.[62] The most important criteria are the presence of minimum age and service conditions; payments made without regard to a partner's age or period of affiliation with the firm can hardly be denominated payments made on account of "retirement." Additional criteria include: (1) the existence of distinct withdrawal provisions governing non-retirement payouts, (2) the payment of benefits over an extended period of time, and (3) the payment or availability of ancillary benefits (primarily insurance and staff support). Some courts have suggested that payouts forfeitable under the retirement benefits exception must be sourced in future firm revenues rather than contributions previously made by the retired partner.[63]

Uncertainties aside, firms may wish to consider including in their partnership agreements payout adjustments that come within the retirement benefits exception to the ban on restrictive covenants. For reasons discussed above, however, amending a partnership agreement to include such a provision may be difficult given the opposing interests of lawyers most clearly affected.[64]

C. Partner Removals and De-Equitizations

At least in theory, partners are co-owners rather than employees and generally may not be "terminated" without court approval absent a provision in the partnership agreement allowing partner expulsions.[65] This

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benefits."); MODEL RULES OF PROF'L CONDUCT R 5.6 (2009) ("A lawyer shall not participate in offering or making [a covenant not to compete] . . . , except an agreement concerning benefits on retirement.").

61. *See* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 2.3.5.

62. The criteria suggested here have been applied by some courts. *See, e.g.*, Borteck v. Riker, Danzig, Scherer, Hyland & Perletti, 844 A.2d 521 (N.J. 2004); Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C., 599 N.W.2d 677, 682 (Iowa 1999) (Ternus, J., concurring); Neuman v. Akman, 715 A.2d 127, 135-36 (D.C. 1998). They also have been accepted in a recent ABA ethics opinion. *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-444 (2006).

63. *See, e.g.*, Schoonmaker v. Cummings & Lockwood, P.C., 747 A.2d 1017, 1032 (Conn. 2000) (defining retirement payments as benefits payable from future firm revenues).

64. *See supra* Part III.B.1.

65. *See generally* HILLMAN, LAWYER MOBILITY, *supra* note 8, ch. 5 (discussing downsizing the law partnership). One of the more permissive expulsion cases is *Bohatch v. Butler & Binion*,

has long been a feature of partnership law but sometimes is forgotten by law firms. At least one prominent firm learned an expensive lesson in this regard when it closed a branch office by executive decision and without proper authorization in the partnership agreement.[66] Every partnership agreement should include provisions on partner removal that address the process for removal, standards for expulsion, and the method by which the account of the expelled partner is settled.[67]

In contrast with expulsions, de-equitizations of partners are a recent development.[68] The process of reducing or eliminating a partner's equity raises a number of questions under partnership law, not the least of which is whether a de-equitization should be evaluated under the same standards as an expulsion.[69] The absence of statutory guidelines means the subject of de-equitization should be addressed with specificity in the partnership agreement.[70] Without authorization in the agreement, a law firm may assume considerable legal risk when materially changing the status of a partner.[71] Here, the lessons of the expulsion cases should not be forgotten.

Once again, ambiguous partnership agreements make risk management difficult. In one recent case, the withdrawal of a partner within days of his de-equitization for failure to sign a personal guarantee was treated as an "involuntary withdrawal" under the partnership agreement, with the consequence that the former partner received a higher payout than would have occurred if the withdrawal had been voluntary.[72] The court emphasized that the meaning of involuntary withdrawal under the

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977 S.W.2d 543, 547 (Tex. 1998), where the Texas Supreme Court found unobjectionable the expulsion of a partner who complained about overbilling a client; note the partnership agreement authorized expulsions and did not limit the grounds for the action. For an evaluation of *Bohatch*, see HILLMAN, LAWYER MOBILITY, *supra* note 8, § 5.3.4.

66. *See* Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ", 1996 WL 438777 (Fla. Cir. Ct. July 23, 1996), *aff'd in part and rev'd in part*, 728 So. 2d 253, 257-60 (Fla. 1998) (awarding approximately $4 million in damages). For an interesting case, not involving a law firm, where a general partner was expelled following an amendment of the limited partnership agreement to allow an expulsion, see *Aztec Petroleum Corp. v. MHM Co.*, 703 S.W.2d 290, 291 (Tex. App.—Dallas 1985, no writ).

67. RUPA also allows expulsion by judicial decree or by unanimous vote of the other partners, but in each case the Act sets forth narrow grounds to support an expulsion action. *See* R.U.P.A. §§ 601(4)-(5). Texas follows a similar approach, although it reduces the bar for expulsion by partner vote from unanimity to a majority-in-interest. *See* TEX. BUS. ORGS. CODE ANN. §§ 152.501(4)-(5).

68. *See* Robert W. Hillman, *Law, Culture, and the Lore of Partnership: Of Entrepreneurs, Accountability, and the Evolving Status of Partners*, 40 WAKE FOREST L. REV. 793, 812-17 (2005) [hereinafter Hillman, *Law, Culture, and the Lore of Partnership*].

69. More broadly, the legal status of non-equity partners is unclear and raises a number of uncertainties. *See generally id.* (expanding on this point); Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-Equity Partners*, 58 U. KAN. L. REV. 507 (2010) [hereinafter Richmond, *The Partnership Paradigm*] (same).

70. *See* Richmond, *The Partnership Paradigm*, *supra* note 69, at 534.

71. *See id.*

72. *See* Kehoe v. Wildman, 899 N.E.2d 1177, 1186-87 (Ill. App. Ct. 2008).

partnership agreement was ambiguous, which means that the firm had the capacity to change this result by more clearly defining the critical terms in the agreement.[73]

D. Winding Up and Anti-Dissolution Provisions

1. Winding Up Provisions

Partnership agreements typically address payouts to withdrawing partners but often do not specify the method of dividing work and income in the case of a dissolution of the firm.

The application of partnership law's winding up principles may have unintended effects for partnerships that do not have agreements altering the statutory norms. In the absence of an agreement, income derived from the completion of work in progress at the time of dissolution is partnership income against which all partners have a claim as the income is generated.[74] Winding up a law firm may be a protracted process that extends for several years, particularly when the business being wound up includes complex litigation or contingent fee cases.[75] Reasonable compensation is allowed for services performed in winding up activities; it is not clear, however, whether reasonable compensation includes the entire fee collected or is some lesser amount based on an hourly rate, with any excess over this amount shared by all partners as winding up income of the partnership.[76]

The case most often cited to illustrate sharing of winding up income is *Jewel v. Boxer*, where the court reached the unsurprising conclusion that income derived from cases pending on the date of dissolution is shared by all partners without regard to who performed the services generating the fees.[77] To avoid this result, a firm may include in its partnership agreement a so-called "anti-*Jewel*" provision, which awards income for winding up services to the partners who perform the services. Of course, the effect of such a provision may be to encourage opportunistic behavior by those who seek dissolution as a means of controlling cases and avoiding income-sharing.[78]

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73. *See id.* at 1186.

74. *But cf.* Bader v. Cox, 701 S.W.2d 677, 682 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) ("We are not unmindful, however, of the many factors—many outside the remaining partners' control—that may extend the length of a lawsuit into many years. These contingency fee cases need not be concluded as part of the winding-up process, but rather may be given a present value.").

75. *See id.*

76. *See* R.U.P.A. § 401(h); TEX. BUS. ORGS. CODE ANN. § 152.203(c). RUPA departs from the UPA in allowing reasonable compensation for winding up services.

77. Jewel v. Boxer, 203 Cal. Rptr. 13, 15 (Cal. Dist. Ct. App. 1984).

78. For further discussion of anti-*Jewel* agreements, see HILLMAN, LAWYER MOBILITY, *supra* note 8, § 4.6.1.

More broadly, partnership agreements should address winding up management issues, providing at a minimum for an orderly method and management structure for dividing work on matters unfinished at the time of dissolution and establishing the basis for compensating partners (and their new firms) for winding up services. Uncertainties may remain despite such agreements; a recent decision offers a good example of these uncertainties by suggesting that a division of fees among lawyers of a dissolved firm may be attacked on fraudulent conveyance grounds if the firm is insolvent.[79] Nevertheless, partnership agreements may function effectively as risk management tools by narrowing the range of risks likely to arise in winding up a law firm.

2. *Anti-Dissolution Provisions*

RUPA allows partnerships to limit the circumstances of dissolution and enjoy a measure of entity stability that did not exist under the UPA. Under the UPA, a partnership dissolves and enters the winding up phase of its existence each time a partner withdraws from the firm.[80] RUPA continues the dissolution standard for at-will partnerships but limits dissolution in cases of partnerships that are formed for a definite term or particular undertaking.[81]

Although RUPA's entity stabilization provisions for fixed-term partnerships represent significant changes in partnership law, they will have relatively little effect on most law firm partnerships. Few law firm partnerships operate under agreements that define partnership life in terms of a fixed number of years or a particular undertaking.[82] The more common practice is to provide for continued partnership existence until a majority of partners vote to dissolve; partnerships operating under such agreements run the risk of being treated under RUPA as at-will partnerships (where withdrawal triggers dissolution) rather than partnerships formed for a *definite* term or *particular* undertaking.[83]

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79. *See In re* Brobeck, Phleger & Harrison L.L.P., 408 B.R. 318, 334-37 (Bankr. N.D. Cal. 2009).

80. *See* R.U.P.A. § 31; *see generally* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 4.3 (discussing the dissolution process and the winding up phase therein).

81. *See* R.U.P.A. § 801.

82. *See, e.g.*, BPR Group Ltd. P'ship v. Bendetson, 906 N.E.2d 956, 959 (Mass. 2009) (discussing four possible ways to end the agreement that do not require a fixed-term of years); Congel v. Malfitano, 877 N.Y.S.2d 441, 442-43 (N.Y. App. Div. 2009) (discussing dissolution of agreement only upon a majority partnership vote).

83. *Cf.* Harshamn v. Pantaleoni, 741 N.Y.S.2d 348, 349 (N.Y. App. Div. 2002) (discussing the perpetual nature and limitless duration of partnerships). Indeed, the court noted the UPA decision:

> As stated in the partnership agreement here, the only purposes of the partnership are "to purchase, hold, operate, improve, lease and rent the real property . . . and also . . . to engage in the lumbering and farming thereof, and to lease fishing, hunting, and sporting rights thereto." These objectives are perpetual in nature, and place no time limitation on the duration of the partnership . . . . Under these circumstances, [the] Supreme Court correctly

An alternative path to firm entity stability may be found in RUPA's allowance of contractual waivers of many of the default provisions of the statute.[84] Specifically, even partners in at-will partnerships should be able to include in their agreements waivers of the ability of a single partner to cause a partnership dissolution by withdrawing from the firm.[85] Particularly for larger firms, explicit anti-dissolution provisions in partnership agreements are advisable.[86] When such agreements exist, adequate account settlement provisions are critical if RUPA's statutory buyout provisions, applicable when a withdrawal occurs without dissolution and winding up, are to be avoided.[87]

A few states, including Texas, have rejected the RUPA provisions providing for dissolution of an at-will partnership when a single partner withdraws.[88] The Texas statutes eschew use of the term "dissolution" in favor of a similar concept: "an event requiring a winding up of a partnership business."[89] More importantly, the statutes depart from RUPA in excluding withdrawal from an at-will partnership from events requiring winding up.[90] The net effect is that dissolutions (or in the Texas framework, events

> found the partnership to have no definite term and to be, therefore, an at-will partnership terminated by plaintiffs' unequivocal election to dissolve it.

See id. But see Bendetson, 906 N.E.2d at 959 (discussing the UPA case involving dissolution of real estate joint ventures and concluding that ventures were not at-will when agreement specified four circumstances under which they could be dissolved, including by mutual agreement of the members); *Congel*, 887 N.Y.S.2d at 442-43 (stating that a real estate partnership and concluding partnership that was to continue until the majority voted to dissolve was a fixed-term partnership). *See generally* R.U.P.A. § 801(1) author cmt. 2(a)-(b) (discussing notice of express will to dissolve at-will partnership according to § 801).

84. *See* R.U.P.A § 103(b) off. cmt. 1 (detailing the extent to which waivers can be applied to the default provision). Specifically:

> Only the rights and duties listed in Section 103(b), and implicitly the corresponding liabilities and remedies under Section 405, are mandatory and cannot be waived or varied by agreement beyond what is authorized. Those are the only exceptions to the general principle that the provisions of RUPA with respect to the rights of the partners inter se are merely default rules, subject to the modification by the partners.

See id.

85. *See* R.U.P.A. § 801(1) off. cmt. 4, author cmt. 2(a)-(b). For this purpose, the distinction between dissolution and dissociation is important. *See id.* §§ 601-603 (discussing the general principles of dissociation); *see also id.* §§ 801-807 (discussing the general principles of dissolution). Although RUPA makes clear the power to withdraw is absolute and cannot be waived by agreement, it does not limit the contractual waivers of dissociation by express will as a cause of dissolution. *See* § 103(b).

86. *See* R.U.P.A. § 801(1); *see also* Robert W. Hillman, *RUPA and Former Partners: Cutting the Gordian Knot with Continuing Partnership Entities*, 58-SPG LAW & CONTEMP. PROBS. 7, 12 (1995) ("By seemingly giving life to anti[-]dissolution agreements, RUPA allows the creation of at-will partnership that will survive the withdrawals of individual members and enjoy continuity of life.").

87. *See* R.U.P.A. § 701.

88. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 152.001(2) (West 2008).

89. *See id.* Early drafts of RUPA did not use the term "dissolution" because of the confusion it caused under the UPA. *See* Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427, 435-36 (1991).

90. *See* TEX. BUS. ORGS. CODE ANN. §§ 11.051, 11.057.

requiring winding up) will occur less frequently in Texas than in RUPA jurisdictions.

By the same token, the diminishment of winding up increases the role of statutory buyouts applicable "automatically" absent an agreement to the contrary when a winding up does not occur;[91] under such circumstances, it is all the more important that law firm partnership agreements adequately address the terms and conditions for the settlement of withdrawing partners' accounts.

E. Dispute Resolution

Disputes between law firms and former partners are common and are popular subjects of discussion in the legal press. Invariably, the publicity is negative and does little to inspire the confidence of present and potential clients. Moreover, judges often signal their distaste for making room on crowded dockets and expending limited judicial resources to address disputes among lawyers.[92] As the number of reported cases grows, one wonders why so many law firms and lawyers opt for litigation as a dispute resolution mechanism when the monetary costs and reputational harm typically outweigh the benefits of litigation even when outcomes are favorable.

Arbitration is a decent alternative to litigation for law firm disputes.[93] Admittedly, in costs and delays the differences between litigation and arbitration are narrowing, but arbitration offers the considerable advantage of confidentiality, at least when appropriate protective orders are in place.[94] Confidentiality may be important, not only to protect the interests of clients, but also to avoid embarrassment to the firm or specific lawyers in the resolution of disputes internal to a law firm; an example of the latter circumstance arises when the partnership seeks to remove a partner through a tribunal decree when the partnership agreement lacks expulsion provisions.[95]

Many law firm partnership agreements include arbitration provisions; the reasons why some do not are far from clear. When confidentiality and publicity concerns are nonexistent, litigation may offer some strategic and

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91. *See* TEX. BUS. ORGS. CODE ANN. § 152.601.

92. *See* Stuart A. Summit, *Alternative Dispute Resolution and Risk Management: Controlling Conflict and Its Costs, in* LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 197, 214-17 (1987).

93. *See* HILLMAN, LAWYER MOBILITY, *supra* note 8, § 2.4.

94. *Cf.* Nimkoff v. Tanner Propp & Farber, 141 F. Supp. 2d 420 (S.D.N.Y. 2001) (giving an award to former partners of less than $20,000 following twenty-two days of hearings).

95. *See supra* Part IV.C. RUPA allows removal of a partner through "expulsion by judicial determination," which may include an arbitration award to this effect. *See* R.U.P.A. § 601(5) cmt. 6 ("The phrase 'judicial determination' is intended to include an arbitration award, as well as any final court order or decree.").

tactical advantages that make it a more attractive option than arbitration for dispute resolution. In the context of contract drafting, however, dispute resolution choices are made in a relatively benign atmosphere long in advance of actual disputes that arise, and under these circumstances, the potential for confidentiality and publicity problems attendant to future disputes should not be dismissed lightly. Litigation may be the preferred option for particular disputes, but when a dispute resolution mechanism is selected for all disputes that arise under the partnership agreement, arbitration will normally be the more attractive option, at least from the perspective of the law firm.

V. CONCLUSION

Now in its third decade of development, the law regulating the movement of lawyers among firms remains ill defined and indeterminate in many key areas. As an Ohio judge recently observed, "Essentially the only black-letter rule easily drawn from the case law is that there is an absence of hard lines defining lawyers' fiduciary duty to their partners and firm when these situations arise."[96]

The legal uncertainty associated with lawyer mobility increases the need for risk management through self-help measures such as partnership agreements that address the key issues raised when lawyers depart and compete with the firm. A well-drafted law firm partnership agreement is a first and necessary step in managing the numerous risks firms face in an era of lawyer mobility. Although there are limitations on the partnership agreement as a tool of lawyer mobility risk management, the alternative of foregoing the agreement in the hope that poorly defined legal norms will provide adequate protection is not an effective means of addressing lawyer mobility concerns.

96. Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera, 157 Ohio Misc. 2d 1, 2010-Ohio-1677, 926 N.E.2d 375, ¶ 5.