

CHAPTER 1

An Overview of Law Firm Partnerships

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§ 1.01 Partnership Defined

Throughout American history,¹ the most common form of business organization for attorneys has been the general partnership.² Despite its ubiquitous nature, a partnership is not necessarily susceptible to easy definition.³

Fundamental to the partnership relationship is that its members owe one another a fiduciary duty of utmost loyalty. As Judge Benjamin Cardozo, then Chief Judge of the New York Court of Appeals, stated:

“Many forms of conduct permissible in a workaday world for those acting at arm’s lengths, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor

¹ For a historical analysis of the sources of the partnership law, see *Bromberg and Ribstein on Partnership*, §§ 1.02 *et seq.* (1996). See: Internal Revenue Services, Statistics of Income, 1978-82 Partnership Returns (1985); Wheeler, “Partnership Returns, 1992,” 13 Statistics of Income Bull. 75 (Fall 1994), as discussed in Bromberg and Ribstein, *supra*, § 1.01(I).

² In addition to the general partnership, numerous states include some version of the limited liability partnership within their definition of partnership. See Chapter 2 *infra*. Also, law firms are sometimes organized as Professional Corporations, Limited Liability Companies, or Professional Limited Liability Companies.

³ As one of the drafters of the Uniform Partnership Act wrote:

“By no human ingenuity would a Partnership Act which does not abolish common law partnerships enable the person who reads it to tell in every supposable case whether there is or is not a partnership.”

See Lewis, “The Uniform Partnership Act,” 24 Yale L.J. 616, 621 (1915).

the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.”⁴

Despite the importance of a well drafted, detailed law firm partnership agreement and the admitted sophistication of mega firms with billions of dollars in revenue, thousands of lawyers, and offices throughout the world, at is best, the relationship among law firm partners is one of trust.^{4.1}

The Uniform Partnership Act and the Revised Uniform Partnership Act define a partnership simply as “an association of two or more persons to carry on as co-owners a business for profit.”⁵ Similarly, *Black’s Law Dictionary* defines a partnership as:

⁴ *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). See also, In the Matter of Cupples, 952 S.W.2d 226, 335 (Mo. 1997), commenting that the *Meinhard* standard “still controls” in defining the duty of law partners.

^{4.1} See Donald, *Lincoln*, 100 (1995).

“Lincoln took a new partner. One fall morning in 1844 he came dashing up the stairs to the third floor of the Tinsley Building, where he found William H. Herndon busily studying. ‘Billy,’ he asked breathlessly, ‘do you want to enter into a partnership with me in the law business?’ Herndon managed to stammer, ‘Mr. Lincoln this is something unexpected by me—it us an undeserved honor; and yet I say I will gladly and thankfully accept the kind generous offer.’ Sensing that the young man was flustered with gratitude, Lincoln remarked easily, ‘Billy, I can trust you, if you can trust me,’ and the partnership came into being.”

Despite Lincoln’s political career and ultimate election to the presidency, the partnership of Lincoln and Herndon lasted for twenty-one years until Lincoln’s death on April 15, 1865. After being elected president, Lincoln instructed Herndon to not remove their law firm sign, saying: “I am going to come back sometime, and then we’ll go on practicing law.” See Dirck, *Lincoln the Lawyer*, 151 (2007).

⁵ U.P.A. § 6 (1996); R.U.P.A. § 101(6). Either the Uniform Partnership Act or the Revised Uniform Partnership Act has been adopted by every state except Louisiana. The definition has been quoted with approval in many jurisdictions. See, e.g.:

Second Circuit: *Wild v. Commissioner of Internal Revenue*, 62 F.2d 777 (2d Cir. 1933); *Schumacher v. Davis*, 1 F. Supp. 959 (E.D.N.Y. 1932).

Tenth Circuit: *Crest Construction Co. v. Insurance Co. of North America*, 417 F. Supp. 564 (W.D. Okla. 1976).

State Courts:

Alaska: *Wigger v. Olson*, 533 P.2d. 6 (Alaska 1975).

California: *Magan Medical Clinic v. California State Board of Medical Examiners*, 57 Cal. Rptr. 256 (Cal. App. 1967); *Kersch v. Taber*, 67 Cal. App.2d 499, 154 P.2d 934 (1945); *Smith v. Grove*, 47 Cal. App.2d 456, 118 P.2d 324 (1941).

Illinois: *Horne v. Bennett*, 241 Ill. App. 134 (1926); *Bleck v. Soeffing*, 241 Ill. App. 40 (1926).

Maryland: *Townsend v. L.J. Appel Sons, Inc.*, 164 Md. 255, 164 A. 679 (1933).

Massachusetts: *Boyer v. Bowles*, 310 Mass. 134, 37 N.E.2d 489 (1941).

Michigan: *McIntosh v. Detroit Savings Bank*, 247 Mich. 10, 225 N.W. 628 (1929).

New York: *Hanlon v. Melfi*, 102 Misc.2d 170, 423 N.Y.S.2d 132 (N.Y. Sup. 1979); *Keen v. Jason*, 19 Misc.2d 538, 187 N.Y.S.2d 825 (N.Y. Sup. 1959), *aff’d* 11 A.D.2d

“A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional share of the profits and losses between them.”⁶

The partnership form provides firm members with the flexibility to structure their relationship in the manner they perceive to be the most beneficial. This is so because a basic concept underlying the law of partnerships is that the parties' partnership agreement will govern their relationship⁷ unless a particular provision is deemed to be violative of public policy⁸ or, in the case of the Revised Uniform Partnership Act, deemed to be an unalterable provision.⁹ The partnership form also has advantageous tax ramifications that provide for so-called “flow through” tax liability. The partnership is viewed as a conduit, or merely a reporting entity, under which the tax obligations of the partnership are borne by the individual members and not by the partnership itself.

Generally, members of a partnership share the profits and losses of the enterprise and participate in the management of the firm. This voluntary sharing of profits and losses can be informal, with a simple or no written agreement, as is often the case in small law firm

1039, 207 N.Y.S.2d 1001 (1960); *Patrikes v. J.C.H. Service Stations*, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. Civ.), *aff'd* 180 Misc. 927, 46 N.Y.S.2d 233 (N.Y. Sup.), *appeal denied* 266 App. Div. 924, 44 N.Y.S.2d 472 (1943); *Brandenburger & Marx v. Heimberg*, 178 Misc. 411, 34 N.Y.S.2d 935 (N.Y. Mun. 1942).

South Carolina: *Buffkin v. Strickland*, 280 S.C. 343, 312 S.E.2d 579 (1984).

Tennessee: *H.T. Hackney Co. v. Robert E. Lee Hotel*, 156 Tenn. 243, 300 S.W. 1 (1927).

Texas: *Gutierrez v. Yancy*, 650 S.W.2d 169; (Tex. App. 1983); *State v. Houston Lighting & Power Co.*, 609 S.W.2d 263 (Tex. Civ. App. 1980).

Wisconsin: *Schleicker v. Krier*, 218 Wis. 376, 261 N.W. 413 (1935).

⁶ *Black's Law Dictionary* 1009 (5th ed.). See also:

Oregon: *Preston v. State Industrial Accident Commission*, 174 Ore. 553, 149 P.2d 957 (1944).

Texas: *Burr v. Greenland*, 356 S.W.2d 370, 376 (Tex. Civ. App. 1962).

⁷ *Illinois*: *Meyer v. Sharp*, 341 Ill. App. 431, 94 N.E.2d 510 (Ill. 1950).

New York: *In re Witkind's Estate*, 167 Misc. 885, 4 N.Y.S.2d 933 (N.Y. Sup. 1938).

⁸ The Model Code of Professional Responsibility and the Model Rules of Professional Conduct (referred to as “States Code of Professional Responsibility”), which are the basis for the ethical rules of forty-nine states, prohibit, with the exception of retirement, attorneys from making agreements restricting their right to practice law following the termination of employment. See:

Maryland: *Attorney Grievance Commissioner of Maryland v. Hyatt*, 302 Md. 683, 490 A.2d 1224 (1985) (restrictive covenant made partnership agreement invalid).

Missouri: *White v. Medical Review Consultants, Inc.* 831 S.W.2d 662 (Mo. 1992) (noncompetition agreement void).

⁹ R.U.P.A. § 103.

partnerships and, surprisingly, in some midsize partnerships as well. It can also, as is the case in many larger law firms, be complex and manifested in a detailed written agreement akin to a corporate shareholder's agreement that sets forth a multi-tiered committee structure for management, detailed withdrawal and retirement provisions, and complicated formulae for the calculation of partner compensation.

Regardless of the size or complexity of the law firm's practice, however, a partnership agreement is the governing document by which its lawyer-partners are bound. Accordingly, great care should be given to the partnership agreement's drafting and periodic revision in order that it serve its purpose well and clarify and protect the interest of the partners and the partnership.

(Text continued on page 1-5)

§ 1.02 Characteristics of a Partnership

Because partnerships can be formed without the formalities associated with other business entities, such as corporations which require the filing of a certificate of incorporation for their existence, it is possible for there to be a legitimate dispute as to whether attorneys practicing together are legally functioning as partners or whether they are merely employees.¹ One court has held, for example, that a contract partner who did not share in the losses of the partnership was not a partner and could not be held liable for partnership liabilities.² Moreover, a promise to create a partnership in the future is insufficient to the establishment of a partnership.³

The issue of whether partnership status exists turns on various factors, including sharing of profits and losses, exercising joint control over the business, making a capital investment and possessing an ownership interest in the partnership. Courts have delineated five significant indicia of partnership:

“(1) the *pro rata* sharing of profits and losses of the enterprise, (2) the *pro rata* contribution to the capital of the enterprise, (3) the joint ownership and interest in the enterprise’s assets by all investors, (4) the intention of the parties that they be partners, and (5) the partners all having some voice in the management of the enterprise.”⁴

¹ M.I.F. Security Co. v. R.C. Stamm & Co., 94 A.D.2d 211, 463 N.Y.S.2d 771, 774 (1983), *aff’d* 60 N.Y.2d 936, 471 N.Y.S.2d 771, 459 N.E.2d 193 (1983). See also, Moses v. Savedoff, 96 A.D.3d 466, 947 N.Y.S.2d 419, 423 (2012) (no requirement of a written agreement to form a partnership but partnership did not exist because, *inter alia*, there was no proof of capital contribution; “in determining whether parties forged such an oral partnership agreement, a court will consider the intent of the parties, whether the parties shared joint control in the management of the business, whether the parties shared profits and losses and the existence of capital contribution”).

² Zito v. Fischbein Badillo Wagner Harding, 809 N.Y.S.2d 444 (N.Y. Sup. 2006).

³ Perry v. Stanton, 20 Mass. L. Rep. 376 (Mass. Super. 2005).

⁴ ACLI Government Securities, Inc. v. Rhoades, 813 F. Supp. 255, 256 (S.D.N.Y.), *aff’d* 14 F.3d 591 (2d Cir. 1993), quoting Tenney v. Insurance Co. of North America, 409 F. Supp. 746 (S.D.N.Y. 1975). See also, Roca v. Lytal & Reiter, Clark, Roca, Fountain & Williams, 856 So.2d 1, 4 (Fla. App. 2003).

“Florida’s Revised Uniform Partnership Act . . . defines a ‘partnership’ as ‘the association of two or more persons to carry on as coowners a business for profit’ and specifically provides that such an association results in a ‘partnership’ ‘whether or not the persons intend to form a partnership.’ . . . In other words, formation of a partnership does not require a showing that the parties subjectively intended to create a partnership, only that they intended to do the things that constitute a partnership. . . .”

In addition, the Uniform Partnership Act sets forth the following criteria:

“In determining whether a partnership exists, these rules shall apply:

“(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

“(2) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

“(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

“(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

“(a) As a debt by installments or otherwise,

“(b) As wages of an employee or rent to a landlord,

“(c) As an annuity to a widow or representative of a deceased partner,

“(d) As interest on a loan, though the amount of payment vary with the profits of the business,

“(e) As the consideration for the sale of a good-will of a business or other property by installments or otherwise.”⁵

The application of the various criteria is far from clear. Applying these principles to a law firm, one court stated:⁶

⁵ U.P.A. § 7. See also:

California: Sandberg v. Jacobson, 253 Cal. App.2d 663, 61 Cal. Rptr. 436 (1967) (partnership agreement is just a factor to consider in analyzing if partnership exists, court must also look at acts and words of parties).

Iowa: Hameed v. Brown, 530 N.W.2d 703 (Iowa 1995) (identifying four elements of partnership: intent of parties; a business; earnings of profits; co-ownership of profits, property and control).

The R.U.P.A. sets forth similar criteria. See R.U.P.A. § 202, which largely mirrors the language of U.P.A. § 7. Nonetheless, there are important differences, the most significant of which may be making profit sharing *prima facie* evidence of the existence of a partnership. See R.U.P.A. § 202(c)(3). Compare U.P.A. § 7 with R.U.P.A. § 202.

⁶ Ehrlich v. Howe, 848 F. Supp. 482 (S.D.N.Y. 1994).

“The test for distinguishing a partner from an employee requires consideration of all elements of the work relationship. Among the most important factors to be considered is the purported partner’s ‘ability to control and operate the business.’ ‘The title “partner” is not normally applied to an individual whose employment duties are unilaterally dictated by another member of a business.’

“The next important consideration is whether the purported partner receives his or her compensation as a percentage of the firm’s profits, rather than in the form of a fixed hourly wage or weekly salary.

“The third important consideration is whether the purported partner has a ‘relatively high level of job security.’ The typical firm may not fire a partner or otherwise terminate his employment merely because of disappointment with the quantity or quality of his work, but may only remove the partner in extraordinary circumstances.”⁷

The title “partner,” therefore, is plainly not determinative of whether an attorney will be considered a partner in a firm. This is particularly true today, as more and more firms have utilized two-tier partnerships comprising equity and non-equity partners, the later of which do not fit within the legal definition of partners.

[1]—Controlling and Operating a Business

With respect to the ability to control and operate a business, one court found that an attorney with 10.7% share of the total partnership

⁷ *Id.* See also, *Caruso v. Peat, Marwick, Mitchell & Co.*, 717 F. Supp. 218 (S.D.N.Y. 1989) (partner status determined by three factors: (1) the extent of the individual’s ability to control and operate his business; (2) the extent to which an individual’s compensation is calculated as a percentage of business profits; and (3) the extent of the individual’s employment security).

It is interesting that the plaintiff-attorney in *Ehrlich*, N. 6 *supra*, who was dismissed from the firm sought the court to declare him an employee, since as a partner he would not be entitled to the ERISA benefits he was claiming.

Partners, because they are not “employees,” are also not entitled to protection pursuant to Title VII of the federal Civil Rights Act of 1964. See:

Supreme Court: *Hishon v. King & Spaulding*, 467 U.S. 69, 79, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (Powell concurring; although female associate’s claim was actionable under Title VII, such protection does not extend to firm’s partner).

Seventh Circuit: *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) (because partners manage and control the business and share in profits and losses, they are not considered employees under Title VII).

Tenth Circuit: *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied* 484 U.S. 986 (1987) (Title VII’s definition of employee does not extend to partners).

Nor are partners protected under the Age Discrimination in Employment Act (ADEA). *Hyland v. New Haven Radiology Associates*, 794 F.2d 793, 797 (2d Cir. 1986) (“benefits of antidiscrimination statutes . . . do not extend to those who are properly classified as partners”).

shares and a right to vote on partnership matters combined with the fact that the affirmative vote of 85% of the partnership was required to adopt all firm decisions militated in favor of being viewed as a partner. “[B]y combining his vote with, at most, one other partner, [plaintiff-attorney] had the power to veto . . . management decisions.”⁸

Other indices of control of a law firm partnership include bringing clients to the firm and performing work for them, writing firm checks, signing counsel agreements with retiring partners, being a member of firm committees, participating in interviewing of associates and paralegals, and holding oneself out to the public as a partner.⁹

[2]—Compensation as Percentage of Firm Profit

A law firm’s written partnership agreement which states that partners, “share in all net profits (computed on a cash basis) and all losses of the firm on the basis of the units of participation held by each partner” provides a strong indicator of partnership when an attorney’s compensation is based on the provision. Similarly, an attorney in the firm responsible for making good any firm loss on a pro rata basis and executing a continuing guaranty to a bank on behalf of the firm is more than likely in a partnership position.¹⁰ In fact, it is the sharing of losses that is often the most definitive test of partnership.¹¹

[3]—Employment Security

Whether a person enjoys greater job security than others in the firm is one of the factors to be taken into account in determining partnership status. An attorney not subject to performance evaluations who can only be fired by a unanimous vote of all other partners is one who probably enjoys partnership status. The ability to maintain one’s position at a firm by having just one other partner vote not to terminate or just abstain in the vote reflects a high degree of job security, which may lead to the conclusion that there is a partnership.¹²

Ultimately the determination as to the existence of a partnership will turn on a totality of factors and not on a bright line test. Naturally, the legal criteria set forth above should be incorporated into the partnership agreement so as to minimize the likelihood of confusion.

⁸ Ehrlich v. Howe, N. 6 *supra*, 848 F. Supp. at 487.

⁹ *Id.*, 848 F. Supp. at 488.

¹⁰ *Id.*

¹¹ See, e.g., Zito v. Fischbein Badillo Wagner Harding, 809 N.Y.S.2d 444 (N.Y. Sup. 2006).

¹² Ehrlich v. Howe, 848 F. Supp. 482, 489 (S.D.N.Y. 1994).

§ 1.03 Consequences of Partnership

[1]—Partners’ Fiduciary Obligations to Each Other

Partners, among themselves, and vis-à-vis their partnership, are fiduciaries,¹ and the courts recognize and safeguard the duties owed among fiduciaries.² Principles governing fiduciary duties apply regardless of the structure of the firm, whether it is a general partnership or structured in corporate form, such as a limited liability company.^{2.1} In contrast, a fiduciary relationship does not usually arise

¹ Section 21 of the Uniform Partnership Act codifies the rule that partners are fiduciaries. See also, e.g.:

District of Columbia: D.C. Code Ann. § 41-120.

Georgia: Ga. Code Ann. § 14-8-21.

Idaho: Idaho Code § 53-321.

Maryland: Md. Code Ann. § 9-404.

Michigan: Mich. Comp. L. § 20.21.

Nebraska: Neb. Rev. Code § 67-321.

New Mexico: N.M. Stat. Ann. § 54-1-21.

New York: N.Y. Prtnrshp. L. § 43.

Tennessee: Tenn. Code Ann. § 61-1-120.

Washington: Wash. Rev. Code § 25.04.210.

² Second Circuit: Ehrlich v. Howe, 848 F. Supp. 482 (S.D.N.Y. 1994).

State Courts:

Alabama: National Soil Services, Inc. v. Hurst, 630 So.2d 3 (Ala. 1981).

California: Heckmann v. Ahmanson, 168 Cal. App.3d 119, 214 Cal. Rptr. 177 (1985).

Delaware: Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939).

Georgia: Clement A. Evans & Co. v. Waggoner, 197 Ga. 857, 30 S.E.2d 915 (1944).

Illinois: Bernstein and Grazian, P.C., v. Grazian and Volpe, P.C., 931 N.E.2d 810, 823 (Ill. App. 2010) (“To prevail on a claim for breach of fiduciary duty, [plaintiff is] required to prove the existence of such a duty between he and [defendant law firm], that [defendant] breached this duty, and that [plaintiff] suffered damages proximately caused by that breach”).

Massachusetts: Johnson v. Witkowski, 30 Mass. App. 697, 573 N.E.2d 513 (1991).

New Jersey: Konsuvo v. Netzke, 91 N.J. Super. 353, 220 A.2d 424 (1966).

New York: Ginsberg v. Broome, 2011 WL 5295005 (N.Y. Sup. Oct. 24, 2011) (breach of fiduciary duty may exist when, while negotiating with plaintiff partner to revise the partnership agreement, defendant partner held secret negotiations to join another law firm).

Ohio: Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera, 157 Ohio Misc.2d 1, 926 N.E.2d 375 (Ohio Com. Pl. 2010) (whether managers of a law firm breached their fiduciary duty is a question of fact that cannot be decided on a motion for summary judgment).

Pennsylvania: Seaboard Industries, Inc. v. Monaco, 442 Pa. 256, 276 A.2d 305 (1971).

^{2.1} Fox v. Abrams, 163 Cal. App. 3d 610, 617, 210 Cal. Rptr. 260 (1985) (“There is no reason to hold that when lawyers decide to practice together in corporate form rather than partnership, they are relieved of fiduciary obligations toward each other with respect to the corporation’s business”). See also, Heller Ehrman LLP v. Arnold & Porter, 2011 Bankr. LEXIS 1497, at *14 (Bkrcty. N.D. Cal. April 22, 2011).

between employer and employee, even when there is an employment contract between them, and the fact that a partner in a law firm changes status to of counsel under an employment agreement does not mean there continuation of the former fiduciary relationship.^{2,2} Although the concept of fiduciary duty which binds partners is rigidly enforced by the judiciary, the precise definition of “fiduciary duty” is broad and occasionally elusive.³

In its principal fiduciary provisions, the Uniform Partnership Act (UPA) provides that “[p]artners shall render on demand true and full information of all things affecting the partnership to any partner.”⁴ The Revised Uniform Partnership Act (RUPA), on the other hand, departs from the UPA and attempts to create affirmative disclosure obligations under certain circumstances. It provides:

“Each partner and the partnership shall furnish to a partner (1) without demand, any information concerning the partnership’s business and affairs reasonably required for the proper exercise of the partner’s rights and duties under the partnership agreement or this [Act]; and (2) on demand, any other information concerning the partnership’s business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.”⁵

^{2,2} *Lawrence v. Kennedy*, 936 N.Y.S.2d 487, 496 (N.Y. Sup. 2011).

“[P]laintiff has failed to plead or otherwise set forth facts demonstrating that the arms-length, employer-employee relationship at issue here gave rise to a fiduciary between the parties. . . .

“Although the complaint conclusively claims that a special relationship between the parties arose by virtue of the plaintiff’s former status as founding partner and the sale of his stock to the Firm . . . , neither of the parties’ two agreements establishes the existence of a post-agreement fiduciary or ‘agency’ relationship. . . . Rather, a review of the employment contract confirms that after plaintiff conveyed his stock to the Firm, the Firm’s obligation to pay him thereafter was contractual and commercial—not fiduciary or confidential in nature . . . , *i.e.*, the agreement does not reflect that plaintiff reposed a particularly ‘high level of confidence and reliance in * * * [the Firm, which], thereby exercise[d]s control and dominance over him uniquely.’ . . . Similarly, there is nothing in the subsequent employment relationship which supports the existence of a heightened duty of care or any sort of confidential relationship with respect to the discharge of Firm’s payment duties and obligations.”

³ Cooter, Robert, Freedman and Bradley, “The Fiduciary Relationship: Its Economic Character and Legal Consequences,” 66 N.Y.U.L. Rev. 1045, 1046-1047 (1991) (“There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.”). See also, *Patton v. Shelton*, 328 Mo. 631, 40 S.W.2d 706, 712 (1931).

⁴ U.P.A. § 20.

⁵ R.U.P.A. § 403(c).

This provision creates an affirmative duty to disclose without demand, a duty which the UPA limits to access to the partnership's books. Nevertheless, the RUPA continues the UPA rule of on demand access to information concerning the partnership, but adds that the information need not be provided if the demand is unreasonable with the burden of proof being on the party refusing to provide the information.⁶

Arguably, the RUPA also creates an affirmative duty to disclose under a provision which states that “[a] partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.”⁷

Perhaps the most famous statement on the nature of fiduciary duty is:

“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”⁸

Although life in the marketplace may well be made up of fear, greed and money, life in a partnership is not so composed.⁹ If the legal profession is not “the same sort of thing as a retail grocer’s association,”¹⁰ the distinction lies in the fiduciary obligations which bind partners. This rigid duty cannot be compromised by self-dealing, or other conflicts of interest. In the law firm context, it has been held that failure or refusal of a partner to record his time, fees due for collection, and billable hours constitutes a breach of fiduciary duty.^{10.1}

⁶ See Official Comment 3 to R.U.P.A. § 403(c), which states that the duties to provide information under this provision are waivable because they are not specifically subject to the limitation of R.U.P.A. § 103(b).

⁷ R.U.P.A. § 404(d).

⁸ *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928). (Citations omitted.) See also, *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237, 245 (1954).

⁹ *Beasley v. Cadwalader, Wickersham & Taft*, 1996 WL 438277 (Fla. Cir. 1996).

¹⁰ Pound, *The Lawyer from Antiquity to Modern Time*, 7 (1953).

^{10.1} *Weir v. Holland & Knight, LLP*, 34 Misc.3d 1207A, 2011 N.Y. Misc. LEXIS 6422, at **31 (N.Y. Sup. 2011).

On the other hand a law firm partner who did not inform his partner about a business deal he was involved in with a client, but which had nothing to do with the practice of law was found not to have breached his fiduciary duty to the partner or the partnership.^{10,2}

The relationship among fiduciaries is governed by the duty of loyalty.¹¹ The obligations comprising this duty restrict the permissible scope of a fiduciary's behavior in the event that conflicts of interest arise.¹² This duty, and the behavior it proscribes, has been described by the Supreme Court as being:

“well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.”¹³

“It is well settled that law partners are bound by a fiduciary duty. . . . As a fiduciary, a partner must consider his or her partners' welfare, and refrain from acting for purely private gain. . . . A partner breaches his fiduciary duty where that partner diverts for non-partnership purposes monies belonging to the partnership. . . . A law firm partner may thus breach his or her fiduciary duty by failure to record, or to facilitate the firm's collection of fees for, billable hours for work performed while a partner at the firm.” (Citations and internal quotation marks omitted.)

^{10,2} *White v. Blackwell*, 2011 Miss. App. LEXIS 775, at *17-*19 (Miss. App. 2011) (no breach of fiduciary duty as a result of one law partner's real estate venture with client which was not disclosed to law partner because transactions were not adverse to law partner).

¹¹ *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928). See also, Cooter, Robert, Freedman and Bradley, “The Fiduciary Relationship: Its Economic Character and Legal Consequences,” 66 N.Y.U.L. Rev. 1045, 1053-1054 (1991).

¹² Cooter, Robert, Freedman and Bradley, “The Fiduciary Relationship: Its Economic Character and Legal Consequences,” 66 N.Y.U.L. Rev. 1045, 1053-1054 (1991). For a detailed discussion of specific conflicts of interest, see generally, Bromberg and Ribstein, 2 *Partnership*, § 6.07 (1996).

¹³ *Latta v. Kilbourn*, 150 U.S. 524, 541, 14 S.Ct. 201, 37 L.Ed. 1169 (1893). See also, *Bakalis v. Bressler*, 1 Ill.2d 72, 115 N.E.2d 323, 327 (1953) (fiduciary relationship prevents “all forms of trickery, secret dealings and preference of self in matters relating to and connected with a partnership and joint venture”).

Thus, the fiduciary duty prohibits any type of conflict of interest. As indicated, such conflicts include: (1) using partnership assets for the fiduciary's own benefit;¹⁴ (2) acquiring solely for the fiduciary any profit or secret advantage in connection with the common enterprise;¹⁵ or (3) denying another full, fair and open disclosure of everything affecting the relationship.¹⁶

The UPA codifies this common law duty, stating:

“Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the

¹⁴ *Alabama*: *Fulton v. Callahan*, 621 So.2d 1235 (Ala. 1993).

California: *Davis v. Heubeck*, 2012 Cal. App. Unpub. LEXIS 4462, at *14-*15 n.6 (Cal. App. June 14, 2012) (“A business opportunity is not available to the partnership when the offeror of the opportunity is unwilling to deal with the partnership. For such business opportunities, the partner who was offered the business opportunity may pursue the opportunity independent of the partnership”).

New Jersey: *McGlynn v. Schultz*, 90 N.J. Super. 505, 218 A.2d 408, *aff'd* 95 N.J. Super. 412, 231 A.2d 386 (1966), *cert. denied* 50 N.J. 409, 235 A.2d 901 (1967).

New York: *Kantor v. Bernstein*, 225 A.D.2d 500, 640 N.Y.S.2d 40, 41 (1996) (breach of fiduciary duty occurs when defendant partner, prior to dissolution, went to defendant law firm and offered them virtually all of plaintiff's class action arbitration practice in exchange for making him a partner in the defendant firm); *Schneidman v. Tollman*, 190 A.D.2d 524, 525, 593 N.Y.S.2d 23, 24 (1993); *Crane v. Scott*, 50 A.D.2d 884, 377 N.Y.S.2d 521 (1975), *appeal dismissed* 38 N.Y.2d 909 (1976).

Pennsylvania: *Clement v. Clement*, 436 Pa. 466, 260 A.2d 728 (1970).

¹⁵ *Second Circuit*: *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir. 1977), *cert. denied* 434 U.S. 1035 (1978).

Fourth Circuit: *Spinelli Hehiayan-Berkman, S.A. v. Imas Gruner, A.I.A. & Associates*, 602 F. Supp. 372 (D. Md. 1985), *aff'd* 843 F.2d 1388 (4th Cir. 1988).

State Courts:

Delaware: *J. Leo Johnson, Inc. v. Carmer*, 38 Del Ch. 579, 156 A.2d 499 (1959).

Kentucky: *Chambers v. Johnston*, 180 Ky. 73, 201 S.W. 488 (1918).

Maryland: *Dixon v. Trinity Joint Venture*, 49 Md. App. 379, 431 A.2d 1364 (1981).

Michigan: *Schmude Oil Co. v. Omar Operating Co.*, 184 Mich. App. 574, 458 N.W.2d 659 (1990), *appeal denied* 437 Mich. 879 (1990); *Van Stee v. Ransford*, 346 Mich. 116, 77 N.W.2d 346 (1956).

New York: *105 East Second Street Associates v. Bobrow*, 176 A.D.2d 483, 484, 573 N.Y.S.2d 503, 504 (1991).

¹⁶ *Second Circuit*: *Reid v. Bickel & Brewer*, 1990 WL 200540 (S.D.N.Y. Dec. 6, 1990).

District of Columbia Circuit: *Day v. Sidley & Austin*, 394 F. Supp. 986 (D.D.C. 1975), *aff'd* 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied* 431 U.S. 908 (1977).

State Courts:

Colorado: *Steeby v. Fial*, 765 P.2d 1081 (Col. 1988).

Michigan: *Band v. Livonia Associates*, 176 Mich. App. 95, 439 N.W.2d 285, *appeal denied* 433 Mich. 920 (1989).

Washington: *Bovy v. Graham, Cohen & Wampold*, 17 Wash. App. 567, 564 P.2d 1175 (1977).

consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.”¹⁷

In some jurisdictions, the fiduciary duty owed by a partner may be limited by statute.¹⁸ Although the UPA touches vaguely on partners’

(Text continued on page 1-13)

¹⁷ U.P.A. 21(1).

¹⁸ Official Comment 1 to R.U.P.A. § 404. See, e.g., *White. v. Blackwell*, 2011 Miss. App. LEXIS 775, at *16-*17 (Miss. App. Dec. 13, 2011) (“The Uniform Partnership Act (UPA), codified at [Miss. Code Ann. § 79-13-404], limits the fiduciary duties that a partner owes to a partnership to two categories: duty of care and duty of loyalty”).

fiduciary duties,¹⁹ it leaves the definition of the duty to case law and is arguably broad in scope.²⁰ The RUPA limits the definition of fiduciary duty by setting forth specific and exclusive fiduciary duties owed in a partnership.²¹

A concept unique to the RUPA is that fiduciary duty does not include dealing fairly and in good faith, as these are regulated to an “obligation” instead.²² Another concept unique to the RUPA is that the duty to disclose is not a fiduciary duty.²³

Instead, the RUPA limits fiduciary duty to the duty of loyalty and the duty of care. The duty of loyalty and the duty of care are as defined in the Act as follows:²⁴

“(b) A partner’s duty of loyalty to the partnership and the other partners is limited to the following:

“(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;²⁵

“(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

“(3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

¹⁹ See: U.P.A. §§ 4(3), 21.

²⁰ See Official Comment 1 to R.U.P.A. § 404.

²¹ R.U.P.A. § 404(a).

“The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).”

²² *Id.* See R.U.P.A. § 404(d), which specifically states:

“A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.”

²³ Hillman, Vestal and Weidner, *The Revised Uniform Partnership Act* at p. 194 (2005).

²⁴ R.U.P.A. § 404(b)-(c).

²⁵ *Compare*, U.P.A. § 21(1). If a partner violates this provision of the R.U.P.A., the partnership can seek to impose a constructive trust. See, e.g.:

New Jersey: Fortugno v. Hudson Manure Co., 51 N.J. Super. 432, 144 A.2d 207 (1958).

Oregon: Harestad v. Weitzel, 272 Ore. 199, 536 P.2d 522 (1975).

“(c) A partner’s duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”

The duties set forth in these provisions may not be waived,²⁶ but the partnership agreement, if there is one, may specifically delineate the conduct and standards to measure whether they are met.²⁷

The duty of care is innovative in the area of partnership law, and was not included in the U.P.A.²⁸ The R.U.P.A. has incorporated it, but only in limited circumstances of grossly negligent, reckless, intentional, or knowing conduct,²⁹ though these standards may be reasonably reduced.³⁰ The R.U.P.A. also recognizes that a partner may act in self-interest without violating his fiduciary duties of loyalty and care.³¹

Whether defined broadly or narrowly, the fiduciary duty in partnerships may be breached by the conduct of a partner or the partnership itself. The remedy for breach of fiduciary duty may be an accounting.³² A cause of action to recover damages for breach of fiduciary duty requires that there be an actual monetary loss; merely alleging or proving unscrupulous acts without showing actual damages is insufficient to sustain the lawsuit.^{32.1} The measure of damages for a breach of fiduciary duty includes any profits earned as a result of the breach,³³ and may include lost opportunities for profit,³⁴ as

²⁶ See Official Comment 1 to R.U.P.A. § 404.

²⁷ See R.U.P.A. § 103(b)(3)-(5).

²⁸ See Official Comment 3 to R.U.P.A. § 404.

²⁹ See *Rosenthal v. Rosenthal*, 543 A.2d 348, 352 (Me. 1988).

³⁰ See R.U.P.A. § 103(b)(4).

³¹ See R.U.P.A. § 404(e).

“A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest.”

The Official Comment to this provision states, for example, that “a partner who, with consent, owns a shopping center may, under subsection (e), legitimately vote against a proposal by the partnership to open a competing shopping center.”

³² *Georgia*: *Williams v. Tritt*, 262 Ga. 173, 415 S.E.2d 285 (1992).

Illinois: *Kerasotes v. Estate of Kerasotes*, 238 Ill. App.3d 1020, 605 N.E.2d 643, 651 (1992).

Michigan: *Gilroy v. Conway*, 151 Mich. App. 628, 391 N.W.2d 419 (1986).

^{32.1} *Kasowitz v. Pitcock*, 2009 WL 3240385 (N.Y. Sup. Sept. 29, 2009).

³³ *Second Circuit*: *Curley v. Brignoli, Curley & Roberts*, 746 F. Supp. 1208 (S.D.N.Y. 1989), *aff’d* 915 F.2d 81 (2d Cir. 1990), *cert. denied* 499 U.S. 955 (1991); *Jennison v. Bierer*, 601 F. Supp. 1167 (D. Vt. 1984) (applying Vermont law).

well as forfeited compensation for services rendered by a partner during periods of disloyalty.³⁵

Some courts view the breaching fiduciary as holding the ill-gotten gains as trustee, and will impose a constructive trust on the proceeds.³⁶ To that end, a constructive trust may even be imposed on interests that the faithless fiduciary possesses in non-party entities.³⁷

State Courts:

California: Prince v. Harting, 177 Cal. App.2d 720, 2 Cal. Rptr. 545 (1960).

Michigan: Penner v. De Nike, 288 Mich. 488, 285 N.W. 33 (1939).

New York: In re Kohn's Estate, 26 Misc.2d 659, 116 N.Y.S.2d 167 (N.Y. Sup.), *aff'd* 282 App. Div. 1045, 126 N.Y.S.2d 897 (1953).

New Jersey: Notch View Associates v. Smith, 260 N.J. Super. 190, 615 A.2d 676 (1992).

Texas: Bohatch v. Butler & Binion, 905 S.W.2d 597 (Tex. 1995); Veale v. Rose 657 S.W.2d 834 (Tex. Civ. App. 1983).

Washington: In re Wilson's Estate, 50 Wash. 2d 840, 315 P.2d 287 (1957).

³⁴ 105 East Second Street Associates v. Bobrow, 176 A.D.2d 483, 484, 573 N.Y.S.2d 503, 504 (1991).

³⁵ St. James Plaza v. Notey, 95 A.D.2d 804, 806, 463 N.Y.S.2d 523, 526 (1983), citing Lamdin v. Broadway Surface Advertising Corp., 272 N.Y. 133, 5 N.E.2d 66 (1936).

³⁶ *Eleventh Circuit:* In re Monetary Group, 2 F.3d. 1098 (11th Cir. 1997).

State Courts:

California: Leff v. Gunter, 33 Cal.3d 508, 189 Cal. Rptr. 377, 658 P.2d 740 (1983).

Colorado: Yoder v. Hooper, 695 P.2d 1182 (Col. App. 1984), *aff'd* 737 P.2d 852 (Col. 1987).

Kentucky: O'Bryan v. Bickett, 419 S.W.2d 726 (Ky. App. 1967).

Michigan: Ladas v. Psiharis, 241 Mich. 101, 216 N.W.2d 458 (1927).

New Jersey: Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 144 A.2d 207 (1958).

New York: Chipman v. Steinberg, 106 A.D.2d 343, 483 N.Y.S.2d 256, 257 (1984).

Oregon: Harestad v. Weitzel, 272 Ore. 199, 536 P.2d 522 (1975).

South Carolina: Halderberg v. Berry, 302 S.C. 97, 394 S.E.2d 7 (1990).

Texas: Maykus v. First City Realty & Finance Corp., 518 S.W.2d 887 (Tex. Civ. App. 1974).

Virginia: H-B Ltd. v. Wimmer, 220 Va. 176, 257 S.E.2d 770 (1979).

Both the U.P.A. § 21 and the R.U.P.A. § 404(b)(1) provide that the breaching partner holds unauthorized profits "as trustee." A constructive trust is a flexible remedy which was described in Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378 (1919).

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee."

³⁷ Sandler v. Fishman, 157 A.D.2d 708, 709-710, 549 N.Y.S.2d 808, 810 (1990) (constructive trust on a one-third interest in a non-party entity owned by defendants imposed as a remedy for defendants breach of fiduciary duty).

A claim for a constructive trust may be available when former partners leave and take cases previously litigated by the partnership prior to departure,^{37.1} since the purpose of a constructive trust is to prevent unjust enrichment.^{37.2} Constructive trusts are usually imposed when there has been self-dealing amounting to a breach of partnership fiduciary obligations.^{37.3} Some courts apply a four part test for the imposition of a constructive trust: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer of the subject res made in reliance on that promise; and (4) unjust enrichment.^{37.4} These four factors are intended to “provide important guideposts, the constructive trust doctrine is equitable in nature and should not be ‘rigidly limited.’”^{37.5}

However, even if the breach of fiduciary duty results in a loss, the breaching fiduciary may still be obligated to pay damages.³⁸ If the

^{37.1} In *Meehan v. Shaughnessy*, 404 Mass. 419, 535 N.E.2d 1255 (1989), the Supreme Judicial Court of Massachusetts held that departing partners of a law firm had breached their fiduciary duty by unfairly acquiring consent from clients to remove cases to their new firm. The court imposed a constructive trust on any profits from cases determined to have been unfairly removed and held that unless the defendant attorneys could prove that the clients would have left the firm even without the breach, the defendants are liable for all profits or fees on the client cases wrongfully removed. The court would subtract from those profits the defendants’ share of the fee that they would have received had the firm kept the cases and the reasonable overhead expenses, which would not include a fee for the attorneys’ own time. Accordingly, a claim for a constructive trust could be used to ensure that assets of a partnership, in the form of fees from cases, wrongfully taken by departing partners were held in trust for the wronged partners.

^{37.2} *Simonds v. Simonds*, 46 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189 (1978); *A.G. Homes, LLC v. Gerstain*, 52 A.D.3d 546, 860 N.Y.S.2d 582 (2008).

^{37.3} See, e.g.: *Lyall v. Grayco Builders, Inc.*, 180 A.D.2d 7, 584 N.Y.S.2d 465 (1992) (where former partner diverted federal set-asides from partnership project to another project); *Birnbaum v. Birnbaum*, 157 A.D.2d 177, 555 N.Y.S.2d 982 (1990) (imposition of constructive trust appropriate where former partner engaged in self-dealing in acquiring estate’s interest in the partnership).

^{37.4} *Second Circuit*: *United States v. Coluccio*, 51 F.3d 337, 340 (2d Cir.1995) (applying New York law); *In re Koreag, Controle et Revision, S.A.*, 961 F.2d 341, 352 (2d Cir.), cert. denied 506 U.S. 865 (1992) (applying New York law).

State Courts:

New York: *Bankers Security Life Insurance Society v. Shakerdge*, 49 N.Y.2d 939, 428 N.Y.S.2d 623, 406 N.E.2d 440, 440-441 (1980); *Simonds v. Simonds*, 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189, 193-195 (1978).

^{37.5} *In re Koreag, Controle et Revision, S.A.*, 961 F.2d 341, 352 (2d Cir.), cert. denied 506 U.S. 865 (1992) (applying New York law), citing *Simonds v. Simonds*, 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189, 194 (1978).

³⁸ *Liggett v. Lester*, 237 Ore. 52, 390 P.2d 351 (1964).

circumstances are sufficiently outrageous, the breach of fiduciary duty may also result in the imposition of punitive damages.³⁹

The fiduciary duty is actually a “default” position. Generally, common law and statutory standards concerning the partnership relationship can be overridden by agreement of the parties. The Uniform Partnership Act and the states which follow it specifically provide that the rights and duties of partners are almost always subject to any agreement they reach among themselves.⁴⁰ Nevertheless, the courts have occasionally struck down contractual modifications of the statutory “standard form” of fiduciary duty, especially when such agreements are seen as unconscionably violative of the fiduciary obligations of the parties.⁴¹

Disputes concerning a departing partner and their alleged breach of fiduciary obligations are not always limited to a dispute between former partners. A departing partner’s former firm may claim that the new firm assisted in the breach of fiduciary duty and in essence aided and abetted its breach. The tort of aiding and abetting a civil wrong is still a relatively new idea, and various courts have had differing reactions to this concept. Most jurisdictions have recognized aiding and abetting a civil wrong as a separate and distinct tort,⁴² while minority regard it as an element of the larger tort that one is aiding

³⁹ *Beasley v. Cadwalader, Wickersham & Taft*, 1996 WL 438777 (Fla. Cir., 1996). See generally, Bromberg and Ribstein, 2 *Partnership*, § 6.07(i) (1996), citing *Interstate Properties v. Pyramid Co. of Utica*, 581 F. Supp. 982, 990 (S.D.N.Y. 1984).

⁴⁰ Bromberg and Ribstein, 2 *Partnership*, § 6.01(c) (1996). See also, Section 103 of the 1994 revised Uniform Partnership Act (“Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement.”). See *Day v. Sidley & Austin*, 394 F. Supp. 986 (D.D.C. 1975), *aff’d* 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied* 431 U.S. 908 (1977).

State Courts:

Texas: *International Bankers Life Insurance Co. v. Holloway*, 6 Tex. Sup. J. 426, 368 S.W.2d 567 (Tex. 1963); *Shannon v. Monasco*, 632 S.W.2d 946 (Tex. App. 1982).

⁴¹ Bromberg and Ribstein, 2 *Partnership*, § 6.01(c) (1996) (“Nevertheless, the court might refuse to enforce even a clear provision if it would operate particularly harshly, the complaining partner lacked notice or the ability to bargain effectively, or the partners seeking to enforce the agreement breached their fiduciary duty.”).

⁴² *First Circuit*: *Invest Almaz v. Temple-Inland Forest Products Corp.*, 243 F.3d 57 (1st Cir. 2001) (applying New Hampshire law).

Second Circuit: *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843 (2d Cir. 1987) (applying New York law); *Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452, 469 (S.D.N.Y. 2001) (applying New York law); *Brice v. Security Operations Systems, Inc.*, 85 Fair Empl. Prac. Cas. (BNA) 620, 2001 WL 185136 (S.D.N.Y. Feb. 26, 2001) (aiding and abetting liability requires that the aider and abettor share the intent or purpose of the principal actor; there can be no partnership in an act where there is no community of purpose).

(Text continued on page 1-17)

Third Circuit: Destefano v. Henry Michell Co., 2000 WL 433993 (E.D. Pa. April 13, 2000) (applying Pennsylvania law) (failure to specifically allege attorney and law firm intended to aid the defendant company's discriminatory behavior, or shared some common purpose with the company to retaliate).

Sixth Circuit: Aetna Casualty and Surety Co. v. Leahey Construction Co., 219 F.3d 519 (6th Cir. 2000) (applying Ohio law) (prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity while aiding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join in the wrongful conduct; for the purpose of establishing aiding and abetting liability, the requisite intent and knowledge may be shown by circumstantial evidence).

Eleventh Circuit: Rosenbaum v. Becker & Poliakoff, P.A., 2010 WL 376309, at *3 (S.D. Fla. Jan. 26, 2010) (applying Florida law) ("A claim for aiding and abetting a breach of fiduciary duty requires: (1) a fiduciary duty on the part of the primary wrongdoer; (2) a breach of this fiduciary duty; (3) knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing").

State Courts:

Georgia: Time Warner Entertainment Co. v. Six Flags Over Georgia, L.L.C., 245 Ga. App. 334; 537 S.E.2d 397 (2000) (although a cause of action for aiding and abetting a breach of fiduciary duty was not previously explicitly recognized, it at least twice implicitly been acknowledged that such claims are viable; aiding and abetting causes of action in tort were previously explicitly recognized in cases involving violence, sale of unregistered securities, breaches of covenants with employment contracts, fraudulent conveyances and misapplication of trust funds).

New Mexico: GCM, Inc. v. Kentucky Central Life Insurance Co., 124 N.M. 186, 947 P.2d 143 (1997) (tort of aiding and abetting a fiduciary duty requires underlying breach of fiduciary duty owed to the plaintiff; scope of a partner's fiduciary duty is limited to partnership matters).

and abetting.⁴³ The minority position is that: “Law should be kept as simple as possible. One who aids and abets a fraud is guilty of the tort of fraud (sometimes called deceit); nothing is added by saying that he is guilty of the tort of aiding and abetting as well or instead.”⁴⁴

A particularly relevant aspect of declaring aiding and abetting as a separate tort is its application to breaches of a fiduciary duty. Several courts have held that to establish liability for aiding and abetting a breach of fiduciary duty the claimant must show:

- (1) a breach by a fiduciary of obligations to another;
- (2) the defendant knowingly induced or participated in the breach; and
- (3) the plaintiff suffered damages as a result of the breach.⁴⁵

⁴³ *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000) (applying Illinois law) (although there is no separate tort of aiding and abetting in Illinois, it does not mean “that one who aids and abets a tort has no liability. The distinction is between a separate tort of aiding and abetting, and aiding and abetting as a basis for imposing tort liability”); *Renovitch v. Kaufman*, 905 F.2d 1040, 1049 (7th Cir. 1990) (applying Illinois law) (Illinois law does not recognize a separate tort of aiding and abetting fraud); *Koutsoubos v. Casanave*, 816 F. Supp. 472, 475 (N.D. Ill. 1993) (applying Illinois law) (“Illinois has never recognized the tort of aiding and abetting a breach of fiduciary duty.”).

⁴⁴ *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 624 (7th Cir. 2000) (applying Illinois law).

⁴⁵ *First Circuit*: *Invest Almaz v. Temple-Inland Forest Products Corp.*, 243 F.3d 57 (1st Cir. 2001) (applying New Hampshire law).

Second Circuit: *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843 (2d Cir. 1987) (applying New York law).

State Courts:

New York: *Shearson Lehman Brothers v. Bagley*, 205 A.D.2d 467, 614 N.Y.S.2d 5 (1994).

Other formulations of the standard include:

Second Circuit: *Goldin Assocs., L.L.C. ex rel. SmarTalk Teleservices, Inc. v. Donaldson, Lufkin & Jenrette Securities Corp.*, 2003 WL 22218643 (S.D.N.Y. Sept. 25, 2003) (applying California law) (“Under California law, to be liable under an aiding and abetting theory, the third party must (i) be an active participant in the breach and (ii) participate in the breach for the purpose of advancing his or her interests or financial advantage,” quoting *Richardson v. Reliance National Indemnity Co.*, 2000 WL 284211 (N.D. Cal. March 9, 2000) (applying California law)).

Third Circuit: *Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 174 (3d Cir. 2002) (“In order to be found liable for aiding and abetting a breach of a fiduciary duty, one must demonstrate that the party knew that the other’s conduct constituted a breach of a fiduciary duty and gave substantial assistance or encouragement to the other in committing that breach.”).

State Courts:

California: *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App.4th 445, 80 Cal. Rptr.2d 329, 342 (1998).

Colorado: *Nelson v. Elway*, 971 P.2d 245, 249-250 (Col. App. 1998) (“The elements of the tort of aiding and abetting a breach of fiduciary duty include: (1) breach

The first prong is not difficult to prove because it merely requires showing that there is a fiduciary relationship between the parties that has been breached, and with respect to the third prong, the damages requirement, it is axiomatic that if no damages were suffered, none can be recovered.⁴⁶ It is the “knowledge” requirement on which the courts have focused. To satisfy the knowledge requirement, a defendant must be shown to have had actual knowledge of the underlying offense (i.e., the breach of fiduciary duty),⁴⁷ although it has also been held that the defendant’s knowledge and intent need only be “averred generally.”⁴⁸ For the purpose of establishing aiding and abetting liability, the requisite intent and knowledge may be shown by circumstantial evidence.⁴⁹ In addition, it has been held that a plaintiff satisfies the pleading requirement for scienter when he identifies circumstances that indicate conscious behavior by the defendant, or a

by a fiduciary of a duty owed to a plaintiff, (2) a defendant’s knowing participation in the breach, and (3) damages. . . . Also, *Restatement (Second) of Torts* § 876(b) (1977), upon which the tort is premised, includes as an additional element that a defendant must give substantial assistance to the other’s breach.”).

Massachusetts: *Spinner v. Nutt*, 417 Mass. 549; 631 N.E.2d 542 (1994) (“[the plaintiff must show that the defendant knew of the breach and actively participated in it such that he or she could not reasonably be held to have acted in good faith”).

New Jersey: *Judson v. Peoples Bank and Trust Co.*, 25 N.J. 17; 134 A.2d 761 (1957) (“A person is liable with another if he ‘knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.’”).

Pennsylvania: *Koken v. Steinberg*, 575 Pa. 103, 834 A.2d 1103 (2003) (“Section 876 is a viable cause of action in Pennsylvania” and requires that “a defendant must render substantial assistance to another to accomplish a tortious act.”).

See also, *Restatement (Second) of Torts* § 876(b), requiring for the tort of aiding and abetting “(1) knowledge that the primary party’s conduct is a breach of duty and (2) substantial assistance or encouragement to the primary party in carrying out the tortious act.” See *Daniel Boone Area School District v. Lehman Brothers, Inc.*, 187 F. Supp.2d 400 (W.D. Pa 2002), in which the court dismissed an aiding and abetting claim under the *Restatement (Second) Of Torts* § 876(b) because “the Pennsylvania Supreme Court has not yet adopted § 876(b) as the law of Pennsylvania . . . and the adoption of § 876(b) would represent a significant expansion of Pennsylvania tort liability.”

⁴⁶ See *Ellsworth Motor Freight Lines, Inc. v. North American Resources, Inc.*, 2000 U.S. App. LEXIS 21276 (10th Cir. 2000) (applying Oklahoma law), holding that the act of aiding and abetting a fraudulent transfer which itself caused no damages would consequently also yield no damages.

⁴⁷ See *A.N. Wight v. Bank America Corp.*, 219 F.3d 79, 91 (2d Cir. 2000).

⁴⁸ *Id.* See also, *Aetna Casualty and Surety Co. v. Leahey Construction Co.*, 219 F.3d 519 (6th Cir. 2000) (applying Ohio law) (“We see no conflict between the position that an aider and abettor must have actual knowledge of the primary party’s wrongdoing and the statement that it is enough for the aider and abettor to have a general awareness of its role in the other’s tortious conduct for liability to attach.”).

⁴⁹ See *Aetna Casualty and Surety Co. v. Leahey Construction Co.*, 219 F.3d 519 (6th Cir. 2000) (applying Ohio law).

clear opportunity and motive to aid the action.⁵⁰ Courts have noted that in such instances, ordinary economic motives are insufficient to support the actual knowledge requirement.⁵¹

In most aiding and abetting cases, a mere fact that there was a breach of a fiduciary duty to plaintiffs and having had knowledge of one's actions is insufficient if the plaintiff does not adequately allege that there was also "substantial assistance" and "participation" by the party accused of aiding and abetting the breach.⁵² This requires the plaintiff to allege that the aider and abettor proximately caused the harm on which primary liability is predicated.⁵³ Consequently, aider and abettor liability requires the harm to be a direct or reasonably foreseeable result of the conduct, which in cases of fiduciary duty can include inaction as well, but only if the defendant also owes a direct fiduciary duty to the plaintiff.⁵⁴

[2]—The Standard of Good Faith and Fair Dealing

In addition to the duty of undivided loyalty among partners, many states also recognize that implicit in all contracts is an obligation of good faith and fair dealing.⁵⁵ This obligation inheres in every contract—including partnership agreements—and requires that no party to

⁵⁰ It is important to note that this seems to be how the majority of jurisdictions hold on the issue of knowledge. See *Invest Almaz v. Temple-Inland Forest Products Corp.*, 243 F.3d 57 (1st Cir. 2001) (applying New Hampshire law) (recognizing that with respect to the "knowledge" element, in the majority of jurisdictions recognizing the tort, actual knowledge (as opposed to constructive knowledge) of the breach of fiduciary duty is required).

⁵¹ *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 127 (S.D.N.Y. 1997).

⁵² *A.I.A. Holdings, S.A. v. Lehman Brothers, Inc.*, 2002 WL 88226 at *12 (S.D.N.Y. 2002) (applying New York law).

"New York law has defined both 'substantial assistance' and 'participation' to exist where a defendant 'affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables it to proceed.' . . . Under both analyses, the inquiry here turns on whether the aid rendered by the defendants was a 'proximate cause' of plaintiff's injury. . . . In other words, 'aider and abettor liability requires the injury to be a direct or reasonably foreseeable result of the conduct.' . . . Furthermore, inaction may only satisfy this prong of the test where the defendant owes a fiduciary duty directly to the plaintiff. . . ." (Citations omitted.)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See, e.g.:

California: *Heller v. Pillsbury Madison & Sutro*, 50 Cal. App.4th 1367, 58 Cal. Rptr.2d 336 (Cal. App. 1996); *Stacy & Witbeck, Inc. v. City and County of San Francisco*, 36 Cal. App.4th 1074, 44 Cal.Rptr.2d 472 (Cal. 1995) (law implies covenant of good faith and fair dealing in every contract and breach of specific contractual provision not necessary).

a contract will do anything to destroy or injure the rights of another party under the contract. A breach arises when one party engages in conduct which deprives the other of the benefits of their agreement.⁵⁶

The RUPA codifies the obligation of good faith and fair dealing stating that a “partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement

Massachusetts: Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 649 N.E.2d 1102 (1995) (implied covenant of good faith and fair dealing between parties to a contract requires that neither party shall do anything that will have the effect of destroying or injuring the right of another party to receive the fruits of the contract).

Montana: Weldon v. Montana Bank, 268 Mont. 88, 885 P.2d 511 (Mont. 1994) (covenant of good faith and fair dealing is implied in every contract).

Nebraska: Cimino v. Firstier Bank, N.A., 247 Neb. 797, 530 N.W.2d 606 (1995) (implied covenant of good faith and fair dealing exists in every contract).

Nevada: Pulley v. Preferred Risk Mutual Insurance Co., 111 Nev. 856, 897 P.2d 1101 (1995) (implied covenant of good faith and fair dealing exists in every contract).

New Jersey: Duall Building Restoration, Inc. v. 1143 East Jersey Ave. Associates, Inc., 279 N.J.Super. 346, 652 A.2d 1225 (1995) (implicit promise of good faith and fair dealing exists in all contracts).

Oregon: Uptown Heights Associates Limited Partnership v. Seafirst Corp., 320 Ore. 638, 891 P.2d 639 (1995) (every contract contains implied duty of good faith which is to be applied in manner that will effectuate reasonable contractual expectations of parties).

South Carolina: Shelton v. Oscar Mayer Foods Corp., 459 S.E.2d 851 (S.C. 1995) (in every contract is implied a covenant of good faith and fair dealing).

Utah: Olympus Hills Shopping Center, Ltd. v. Smith’s Food and Drug Centers, Inc., 889 P.2d 445 (Utah 1994), cert. denied 899 P.2d 1231 (Utah 1995) (every contract includes covenant of good faith and fair dealing).

Washington: Holman v. Coie, 11 Wash. App. 195, 522 P.2d 515 (1974), review denied 84 Wash.2d 1011 (1974), cert. denied 420 U.S. 984 (1974).

Cf., Weir v. Holland & Knight, LLP, 34 Misc.3d 1207A, 2011 N.Y. Misc. LEXIS 6422, at **24-**25 (N.Y. Sup. 2011).

“Plaintiff alleges that [the law firm] breached an implied contract to compensate plaintiff reasonably for the work he performed, not to demote him based on age or upon refusal to remain silent in the face of egregious financial irregularities in the firm’s accounts, and not to wrongfully expel him from the partnership without cause and without payment of reasonable compensation. . . . Plaintiff thus repeats the allegations on which his breach of contract, discrimination, and other causes of action are based.

“The implied contract claim may not be maintained, as the Partnership Agreement, an express contract, governs the relations between plaintiff and the partnership. . . . The covenant of good faith and fair dealing claim may not be maintained, as the duty of good faith and fair dealing does not create new contractual rights between the parties, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship.” (Citations and internal quotation marks omitted.)

⁵⁶ *Second Circuit:* Travellers International, A.G. v. Trans World Airlines, Inc., 41 F.3d 1570 (2d Cir. 1994); P.A. Bergner & Co. v. Martinez, 823 F. Supp. 151 (S.D.N.Y. 1993).

State Court:

New York: Wieder v. Skala, 80 N.Y.2d 628, 593 N.Y.S.2d 752, 609 N.E.2d 105 (1992).

and exercise any rights consistently with the obligation of good faith and fair dealing.”⁵⁷ This obligation “runs . . . in all matters related to the conduct and winding up of the partnership business.”⁵⁸ The requirement of good faith and fair dealing under the RUPA is not a fiduciary duty.⁵⁹ Nor is it a separate obligation, being instead part and parcel of the other duties and rights partners and partnerships have under the RUPA or the partnership agreement.⁶⁰

“Good faith” has been defined as “honesty in fact in the conduct or transaction concerned.”⁶¹ Faithfulness to an agreed common purpose and consistency with the justified expectations of the other party underscore the expectations which accompany the good faith performance of a contract. The requirement of good faith performance excludes conduct which violates community standards of decency, fairness and reasonableness.⁶²

The drafters of the RUPA rejected the Uniform Commercial Code concept of “honesty in fact in the conduct or transaction concerned,” stating it was either “too narrow or not applicable.”⁶³ As a result, in jurisdictions adopting the RUPA, the courts over time will develop the parameters of “good faith and fair dealing” on a fact-specific basis.

⁵⁷ R.U.P.A. § 404(e).

⁵⁸ Official Comment 4 to R.U.P.A. § 404(e).

⁵⁹ See R.U.P.A. § 404(a).

⁶⁰ Official Comment 4 to R.U.P.A. § 404(e).

⁶¹ Restatement (Second) Contracts, § 205, relying on U.C.C. § 1-201(10).

⁶² *Industries, Corp. v. Gibson*, 741 P.2d 1161 (Alaska 1987). See also, *Restatement (Second) Contracts*, § 205.

⁶³ Official Comment 4 to R.U.P.A. § 404(e).

“The meaning of ‘good faith’ and ‘fair dealing’ is not firmly fixed under present law. ‘Good faith’ clearly suggests a subjective element, while ‘fair dealing’ implies an objective component. It was decided to leave the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases. Some commentators, moreover, believe that good faith is more properly understood by what it excludes than by what it includes. See Robert S. Summers, ‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code,” 54 Va. L. Rev. 195, 383 (1968).

“Good faith, as judges generally use the term in matters contractual, is best understood as an ‘excluder’—a phrase with no general meaning or meanings of its own. Instead, it functions to rule out many different forms of bad faith. It is hard to get this point across to persons used to thinking that every word must have one or more general meanings of its own—must be either univocal or ambiguous.

“The UCC definition of ‘good faith’ is honesty in fact and, in the case of a merchant, the observance of reasonable commercial standards of fair dealing in the trade. See UCC secs. 1-201(19), 2-103(b). Those definitions were rejected as too narrow or not applicable.”

[3]—Good Faith and Fair Dealing in the Context of Law Firm Partnerships

If a partnership agreement fails to provide an explicit process for compensating a partner leaving the firm, the fiduciary duties which bind the parties and the covenant of good faith and fair dealing implied in the partnership agreement require that the departing partner not be deliberately under compensated. Even if a law firm partnership agreement provides the firm with discretion in setting compensation, it does not mean that the firm has a “free pass” in so doing. This is because “a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.”^{63.1} However, when it comes to a claim of unfair under compensation by a partner leaving the firm, the courts will generally side with the firm against a departing partner claiming unfair compensation.⁶⁴ The reasoning is that partners have broad authority to establish their rights and obligations by agreement, and if the firm consistently followed the procedures laid out in the partnership agreement, a partner leaving the firm is deemed to have had agreed to the compensation system provided for in the law firm’s partnership agreement.⁶⁵ Nevertheless, law firms have been held liable for breach of the implied covenant of good faith and fair dealing when they were found to have under compensated a partner.^{65.1}

^{63.1} *Foster Enterprises v. Germania Federal Savings & Loan Ass’n*, 97 Ill. App.3d 22, 52 Ill. Dec. 303, 421 N.E.2d 1375, 1381 (1981). See also, *Pierce v. MacNeal Memorial Hospital Ass’n*, 46 Ill. App.3d 42, 4 Ill. Dec. 615, 360 N.E.2d 551, 558 (1977).

⁶⁴ *Roan v. Keck, Mahin & Cate*, 1992 WL 104789 (7th Cir. May 18, 1992).

⁶⁵ *Id.* See also:

District of Columbia Circuit: *Day v. Sidley & Austin*, 394 F. Supp. 986 (D.D.C. 1975), *aff’d* 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied* 431 U.S. 908 (1977) (plaintiff’s allegations of an unwritten understanding cannot be heard to contravene the detailed provisions of the partnership agreement which embodied the complete intentions of the parties as to the manner in which the firm was to be operated).

State Courts:

New York: *Rutkowski v. Hill, Betts & Nash*, 206 A.D.2d 258, 613 N.Y.S.2d 874 (1994) (terms of partnership agreement unambiguously provides for method of compensating withdrawn partner); *Weir v. Holland & Knight, LLP*, 34 Misc.3d 1207A, 2011 N.Y. Misc. LEXIS 6422, at **31 (N.Y. Sup. 2011) (dismissing claim by law firm partner for breach of the implied covenant of good faith and fair dealing because provisions of law firm partnership agreement governed the partners’ relationship and was express contract).

^{65.1} *Rosenthal v. Sonnenschein Nath & Rosenthal, LLP*, 985 A.2d 443, 451-452 (D.C. 2009), applying Delaware law (breach of the implied covenant of good faith and fair dealing by the law firm against departing partner even though the firm doubled the partner’s compensation from the previous year; for the period in question,

In contrast, when there are no procedures for determining the compensation for a departing partner provided for in a law firm's written agreement, and the compensation process which evolves is totally subjective and not subject to any rules imposed by the partnership agreement, then the courts are more likely to find in favor of the departing partner, not only with a declaration of unfair compensation, but with respect to such matters as providing the departing partner access to complete financial information; providing participation in the compensation process for the year of withdrawal, and providing

(Text continued on page 1-23)

the jury "could fairly conclude that he had been dealt with arbitrarily for that period in relation to partners similarly situated, and thus denied 'the fruits of the bargain' struck in the partnership agreement and related compensation policies of the firm"; departing partner not required to remain with the firm in order to maintain a claim for breach of implied covenant of good faith and fair dealing; "Nothing in law or logic made the retirement a bar to the benefits of the bargain he sought to obtain by a lawsuit once [the law firm] breached the covenant of good faith and fair dealing".

credit for all clients for which he had been given fee generation credit in the past.⁶⁶

Although a partnership “can impart discretion to a management committee”⁶⁷ to fix compensation, the discretion must be exercised in light of the obligations owed among partners to deal fairly and equitably with one another. Moreover, the court may examine the self-dealing of the partners because the compensation allocated to a withdrawn partner directly impacts the remaining partners’ share of the profits.⁶⁸

A partnership agreement which leaves division of profits up to a select group of partners, such as the firm’s founding partners, but fails to prescribe the method of compensation is also subject to judicial scrutiny.⁶⁹

“The founding partners’ determination of the plaintiff’s share of the profits ‘positioned them on both sides of the transaction’ because the percentage of the profits which they had assigned to the plaintiff had a direct impact on their own share of the profits. . . . The founding partners were responsible for dividing the partnership’s profits and assigning to each partner his respective share of the profits. Thus, the founding partners had some self-interest in designating each partner’s respective share of the profits because the percentage of profits which they were assigning to the other partners had a direct effect on their own percentage of the profits.”⁷⁰

In general, in the absence of a contracted-for method of partner compensation, the courts will intervene to insure that a partnership’s compensation of a withdrawn partner comports with notions of fairness resulting from the parties fiduciary duties and the covenant of good faith and fair dealing implied in the partnership agreement.

⁶⁶ Smith v. Brown and Jones, 167 Misc.2d 12, 633 N.Y.S.2d 436 (N.Y. Sup. 1995).

⁶⁷ *Id.*

⁶⁸ *Compare*, Beasley v. Cadwalader, Wickersham & Taft, 1996 WL 438777 (Fla. Cir. 1996).

“This was not a situation where the management committee was merely fulfilling its management function. Rather, it was participating in a clandestine plan to wrongfully expel some partners for the financial gain of other partners. Such activity cannot be said to be honorable, much less to comport with the ‘punctilio of honor.’

“While life in the market place may well be made up of fear, greed and money, life in a partnership is not so composed. . . . When the partnership encounters foul weather, the partners must either all stay the course or abandon it. . . . [It is] a gross breach of fiduciary duty for some partners to throw others overboard for the expediency of increased profits. . . .”

⁶⁹ Starr v. Fordham, 420 Mass. 178, 648 N.E.2d 1261 (1995).

⁷⁰ *Id.*, 648 N.E.2d at 1266.

§ 1.04 Informing Clients of a Change in Firm

To succeed in an increasingly competitive marketplace, law partnerships have been forced to reexamine and change their relationships with their partners. The life of a law firm and law firm life for its partners is no longer static, but has become remarkably fluid and complex as lawyers and entire practice groups often change the venue in which they practice. The practice of law is indeed a mobile profession.

A volatile issue in the modern day law firm is the departure of partners and the balancing of the corollary responsibilities between a departing partner and the law firm from which the partner is leaving.

There has been a significant amount of litigation raised by partner departures. The courts have in fact recognized that “law firms are under siege.”¹ From this environment, the courts have developed broad guidelines concerning the standards and obligations in order to guide departing partners and the firms they are leaving.

A departing partner is required to act as a fiduciary with respect to his soon-to-be-former partners, and not to take unfair advantage of them.² In other words, the playing field on departure has to be level. This is particularly true concerning the manner and timing of notification of firm clients. In searching for “the standard for general guidelines as to what partners are entitled to expect from each other concerning their joint clients or the division of their practice,”³ Informal Opinion 1457 of the ABA Committee on Ethics and Professional Responsibility is an appropriate declaration of the ethical standards for attorneys announcing a change in professional association.⁴

¹ *Jacob v. Norris, McLaughlin & Marcus*, 247 N.J. Super 266, 588 A.2d 1287 (1991), *rev'd on other grounds* 128 N.J. 10, 607 A.2d 142 (1992).

² *Meehan v. Shaughnessy*, 404 Mass. 419, 535 N.E.2d 1255 (1989).

³ *Id.*, 404 Mass. at 437. See also, *Redman v. Walters*, 88 Cal. App.3d 448, 152 Cal. Rptr. 42 (1979).

⁴ ABA Committee on Ethics and Professional Responsibility Informal Opinion 1457 (April 26, 1980). These standards provide the following guidelines for notice to clients:

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

One of the issues of greatest import is whether departing partners may “solicit” clients of the firm. Again, principles governing a fiduciary relationship between the firm and the withdrawing partner are applicable.⁵ If the partner who is leaving has not yet informed the firm of his resignation, the answer is a resounding “No.”

“[A]s a matter of principle, preresignation surreptitious “solicitation” of firm clients for a partner’s personal gain . . . is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value—the loyalty owed partners (including law partners), which distinguishes partnerships (including law partnerships) from bazaars.”⁶

The issues raised in a case of a departing partner may focus on whether (1) there a breach of fiduciary duty when a withdrawing partner, prior to announcing his resignation, “solicits” firm clients; (2) a contractual requirement (among partners) that an attorney try to “integrate” or “institutionalize” clients into the firm is legally enforceable; and (3) a cause of action for fraud is stated by alleging that a promisor, at the time of making certain representations, lacked any intention to perform.

Although all these issues have yet to be addressed by the judiciary, the courts have offered some guidance when it comes to the question of informing the client about the departure so that client can make an informed choice of whether to stay with the firm or move on with the partner who is leaving.

“At one end of the spectrum, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice. Ideally, such approaches would take place only after notice to the firm of the partner’s plans to leave.

See also, ABA Committee on Ethics and Professional Responsibility Informal Opinion 1466 (Feb. 12, 1981) (extending Informal Opinion 1457 to departing associates as well as partners).

⁵ Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179 (1995); Denberg v. Parker Chapin Flattau & Klimpl, 82 N.Y.2d 375, 604 N.Y.S.2d 900, 624 N.E.2d 995 (1993); Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 551 N.Y.S.2d 157, 550 N.E.2d 410 (1989).

⁶ Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179, 1183 (1995).

“At the other end of the spectrum, [the partner’s fiduciary duties would clearly be violated by such conduct as] secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice. . . .”⁷

The fiduciary obligations owing between partners and their firms clearly exist even as the parties’ relationship is coming to an end and in some instances, even afterwards. With this in mind, both departing partners and the departed law firm must avoid acting out of pure self interest and remember that as partners, even to the sometimes bitter end, we are guided by this “punctilio of an honor the most sensitive”⁸ known as fiduciary duty.

As indicated, a partner planning to withdraw from a firm should not solicit the firm’s clients before informing the firm of the intent to withdraw.⁹ The solicitation of firm clients prior to an announcement of departure is a breach of the departing partner’s loyalty obligations.¹⁰ A lawyer planning on leaving a firm may, however, take certain logistical steps towards that end such as locating alternative offices and affiliations that are consistent with his fiduciary duties.¹¹

⁷ *Id.*, 653 N.E.2d at 1177.

⁸ *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928). An interesting issue not addressed by the courts is what effect, if any, the existence of a notice provision has on a departing partner’s fiduciary duty to his partners. Courts have not addressed the obligations of a former partner to his firm during the period in which the soon-to-be former partner is complying with the firm’s departure notice period.

⁹ *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179 (1995).

¹⁰ *Id.* See also:

Illinois: Chicago Bar Association Feature: Primer on Acting Rationally When Lawyers Relocate, 14 C.B.A. Record 24 (2000).

Ohio: Ohio Formal and Informal Opinions, Op. 98-5 (1998).

Pennsylvania: Pennsylvania Bar Association, Formal Opinion 99-100 (1999).

¹¹ *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 1013, 653 N.E.2d 1179 (1995). See also, *Meehan v. Shaughnessy*, 404 Mass. 419, 535 N.E.2d 1255 (1989), in which the court found that certain logistical arrangements made by departing partners were permissible “especially in light of the attorney’s obligation to represent adequately any clients who might continue to retain them on their departure from [the firm].” 535 N.E.2d at 1264. Thus, certain pre-departure arrangements may be required under a lawyer’s fiduciary obligations. The arrangements in *Meehan* included executing a lease for the departing attorneys’ new office, preparing lists of clients expected to leave the old firm, and obtaining financing on the basis of these lists. In short, planning for competition with one’s law firm may not be a breach of a lawyer’s fiduciary obligation. However, actual competition

The concern is not so much with the competition that may result between the departing lawyer and law firm, but rather, the fairness of the competition.¹² Once a lawyer announces plans to leave, the firm is on notice that its relationship with certain clients may be at risk. As a result, the firm is entitled to an equal opportunity to compete with the departing lawyer for the clients' business.¹³

Merely informing a client of the potential of withdrawal and new practice is not prohibited.¹⁴ Nevertheless, communication with the firm's clients about the lawyer's impending departure before the firm is aware of the departure may be construed as an attempt to lure clients away in violation of the lawyer's fiduciary duties.¹⁵ Disclosure to clients should only occur after notice to the firm of the lawyer's plan to leave is given.¹⁶

Following a lawyer's announcement of plans to withdraw from a firm, the departing partner may inform firm clients with whom he has had a prior professional relationship about his impending withdrawal and new practice, and remind the client of its choice of its freedom to retain counsel.¹⁷ An attorney is not barred from communicating by telephone or in person with clients with whom he personally has had a professional relationship, to inform them that he is establishing a new practice.¹⁸ In addition, an attorney is not prohibited from advising those persons whom he reasonably believes to be his clients that they have a right to select between the partnership and the attorney's

is a breach. The New York Court of Appeals made this point, saying "as a matter of principle, preresignation surreptitious solicitation of firm clients for a partner's personal gain . . . is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value—the loyalty owed partners (including law partners), which distinguishes partnerships (including law partnerships from bazaars)." *Graubard, supra*, 629 N.Y.S.2d at 1013.

¹² "Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms," 55 Wash & Lee L. Rev. 997, 1012 (1998).

¹³ *Meehan v. Shaughnessy*, 404 Mass. 419, 535 N.E.2d 1255, 1267 (1989), ("This disclosure will allow the partnership and the departing partner an equal opportunity to present to clients the option of continuing with the partnership or retaining the departing partner individually.").

¹⁴ New York County Lawyers Association, Ethics Op. 679 (1990).

¹⁵ Pennsylvania Bar Association, Formal Op. 99-100 (1999).

¹⁶ *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 1013, 653 N.E.2d 1179 (1995). See also, "Musical Chairs: When a Lawyer Makes a Lateral Employment Move," N.Y.L.J. (Nov. 26, 1990).

¹⁷ *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 1013, 653 N.E.2d 1179 (1995).

¹⁸ Association of the Bar of the City of New York, Op. No. 80-65. The contacting of clients by non-lawyers employed or otherwise engaged by the lawyer is not permitted and may be a violation of law.

new firm with respect to legal representation.¹⁹ Although these communications are not necessarily unethical, they may constitute tortious conduct under common law.²⁰

After a lawyer announces plans to leave a firm, both the firm and the departing attorney have an obligation to assist the client in making an informed decision.²¹ Ideally, a law firm and withdrawing partner will cooperate and provide joint notice of the partner's withdrawal to the clients.²² However, it is usually the departing attorney who sends an announcement to the client.²³ The issue is what type of written communication may be sent to pre-existing clients. Factors considered important include the form and content of the communication, the timing of the mailing and the proposed recipient of the mailing.²⁴ A letter sent by a partner that complies with ethical standards²⁵ might include the following language:

Dear [Client]:

Effective _____, __ 20__, I will become the resident partner of the XYZ law firm, and will no longer be a partner of the ABC law firm.

I want to be sure that there is no disadvantage to you, as the client, resulting from my move. While I would, of course, appreciate the opportunity to continue to represent you in the future, the choice of counsel is entirely yours and will be determinative. You may elect to have the ABC firm represent you, you may elect to have my new firm, the XYZ firm, represent you, or you may elect to have another firm represent you.

One bar association concluded that ethically, a "lawyer formerly associated with a Firm A who leaves the firm to establish a separate

¹⁹ *Id.*

²⁰ *Illinois*: Pratt v. Blunt, 140 Ill. App.3d 512, 488 N.E.2d 1062 (1986).

Pennsylvania: Adler, Bearish, Daniels, Levin and Cresco v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978).

²¹ Clients have complete freedom to choose who will provide their legal representation. See:

Illinois: 14 Chicago Bar Association 24 (2000).

Pennsylvania: Pennsylvania Bar Association, Formal Op. 99-100 (1999).

²² 14 Chicago Bar Association 24 (2000). See § 6.03[3] *infra* for a sample joint notice written by the firm and the departing partner.

²³ Ohio Formal and Informal Opinions, Op. 98-5 (1998).

²⁴ See N. 4 *supra*.

²⁵ See ABA Committee on Ethics and Professional Responsibility, Informal Opinion 1457 (April 26, 1980).

law practice may solicit business as follows: (1) the lawyer may send announcements of the opening of an office to any person, including clients of Firm A; (2) the lawyer may send letters more fully describing the new law practice to any person, including clients of Firm A.”²⁶ The bar association declined to consider whether statements made in letters to clients which pass ethical muster constitute tortious interference with the contractual rights of Firm A.²⁷

In order for the letter to clients to be considered within ethical guidelines, it should clearly present to the clients the choice they have between remaining at the firm they were originally with or moving to the new firm.²⁸ In a case in which the letter to clients was deemed unethical, the court noted that the letter was a one-sided announcement written on the old firm’s letterhead, it was sent shortly after notice of the lawyers’ departure, and as a result, the departing lawyers excluded the partners remaining with the firm from effectively presenting their services as an alternative.²⁹

²⁶ New York County Lawyers Association, Ethics Op. 679 (1990).

²⁷ *Id.*

²⁸ *Meehan v. Shaughnessy*, 404 Mass. 419, 535 N.E.2d 1255 (1989).

²⁹ *Id.*

§ 1.05 Written Law Firm Partnership Agreements

The relationship among partners and their firms is governed primarily by the partnership agreement,¹ whether written or oral.² In two situations, however, the partnership agreement does not govern. First, to the extent that the partnership agreement does not address a particular issue, the statutory code adopted in the jurisdiction governs.³ Second, in an attempt to clarify ambiguity in the UPA about rights and duties the partnership cannot waive,⁴ the RUPA attempts to state with particularity the rights and duties (such as access to books and records and fiduciary duty) that cannot be waived in the partnership agreement.⁵

¹ See R.U.P.A. § 101(7), defining “partnership agreement” as “the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement.” See also, *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 837 N.Y.S.2d 600, 603, 868 N.E.2d 956 (2007) (“It is well settled that partners may fix their partnership rights and duties by agreement”).

² *Id.* See also, R.U.P.A. § 103(a). See:

Louisiana: *Gutierrez v. Baldrige*, 65 So.3d 251 (La. App. 2011) (non-law firm claim of an oral partnership agreement; corroborating circumstances are required to demonstrate alleged oral partnership agreement; “One of the showings [a claimant] must make at trial is that circumstances corroborate his allegation that a verbal contract of partnership existed between him and [the claimed partner]”).

New York: *Finkel v. Firestone*, 102 A.D.3d 735, 958 N.Y.S.2d 435, 437 (2013) (no oral law firm partnership agreement when memo between attorneys listed fifteen “outstanding issues between the parties as to the terms of the partnership, including the amount of time the plaintiff would devote to the partnership”).

³ R.U.P.A. § 103(a).

“To the extent the partnership agreement does not otherwise provide, this Act governs relations among the partners and between the partners and the partnership.”

⁴ Hillman, Vestal, and Weidner, *The Revised Uniform Partnership Act*, p. 33 (2005).

⁵ R.U.P.A. § 103(b).

“The partnership agreement may not:

“(1) vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all of the partners;

“(2) unreasonably restrict the right of access to books and records under Section 403(b);

“(3) eliminate the duty of loyalty under Section 404(b) or 603(b)(3), but

“(i) the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or

“(ii) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

“(4) unreasonably reduce the duty of care under Section 404(c) or 603(b)(3);

“(5) eliminate the obligation of good faith and fair dealing under Section 404(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(Text continued on page 1-31)

“(6) vary the power to dissociate as a partner under Section 602(a), except to require the notice under Section 501(1) to be in writing;

“(7) vary the right of a court to expel a partner in the events specified in Section 601(5);

“(8) vary the requirement to wind up the partnership business in cases specified in Section 801(4), (5), or (6);

Despite the business acumen and entrepreneurial skills of lawyers, it is surprising how often attorneys either function with a grossly inadequate partnership agreement or entirely without a written agreement.⁶ Many disputes between law firms and their former partners develop because the partnership never took the time and effort to prepare a comprehensive written agreement establishing the rights and duties of the parties. In one instance, a nearly one hundred year-old law firm trying to expel a partner had to dissolve and reconstitute to accomplish that simple procedure because the firm's partnership agreement omitted a provision permitting the expulsion of partners.⁷ One court wryly commented about a firm operating with no agreement at all: "Like the children of the legendary shoemaker who went without shoes, this firm of numerous sophisticated and talented lawyers is, and has at all times been, without a written partnership agreement."⁸ Courts have also recognized that law firms which operate without a partnership agreement do so at their peril: "When partners fail to have a partnership agreement . . . they have no cause to complain about the law supplying equitable resolution of [an] issue."⁹

"(9) vary the law applicable to a limited liability partnership under Section 106(b); or

"(10) restrict rights of third parties under this [Act]."

⁶ The courts have recognized oral partnership agreements. See, e.g., In the Matter of the Dissolution of Anderson, Zangari & Bossian, 2003 R.I. Super. LEXIS 89 (R.I. Super. June 3, 2003). See also:

California: Danko v. O'Reilly, 2012 WL 3279431 (Cal. Super. July 12, 2012) (denying summary judgment due to allegations of oral partnership agreement forming a law firm).

New York: Moses v. Savedoff, 96 A.D.3d 466, 947 N.Y.S.2d 419, 423 (2012) ("in determining whether parties forged such an oral partnership agreement, a court will consider the intent of the parties, whether the parties shared joint control in the management of the business, whether the parties shared profits and losses and the existence of capital contribution").

⁷ Dawson v. White & Case, 88 N.Y.2d 666, 649 N.Y.S.2d 364, 672 N.E.2d 589 (N.Y. 1996); Dawson v. White & Case, 212 A.D.2d 385, 622 N.Y.S.2d 269 (1995).

⁸ Baker v. Gordon Hurwitz Butowsky Baker Weitzen & Shalov, Index No. 82353/94 (N.Y. Sup. July 14, 1993). See also, Smith v. Daub, 219 Neb. 698, 385 N.W.2d 816 (1985).

⁹ Jewel v. Boxer, 156 Cal. App.3d 171, 203 Cal.Rptr.13 (1984). A North Carolina appellate court reversed a lower court's holding based on equity considerations and found that the state's limited liability company statute provided an adequate remedy at law. In Mitchell, Brewer, Richardson, Adams Burge & Boughman, PLLC v. Brewer, 705 S.E.2d 757 (N.C. 2011), the court faced the problem of a law firm PLLC without a written operating agreement, or even an oral one, and held that a member of the firm "is bound by an operating agreement only if 'the member has expressly assented' to it." Since "various documents demonstrate the parties' disagreement as to how to handle the breakup of the PLLC[,] they certainly do not demonstrate that

The careful drafting of a partnership agreement customized to a particular law firm's practice is a cornerstone in the efficient management of the firm, its culture, and its economics. These are the three components of a partnership's identity. Experience indicates that the effort required in formulating an appropriate agreement which clearly and adequately addresses these three issues will undoubtedly pay dividends in the future and assure a successful, harmonious and profitable firm. Careful draftsmanship is also necessary because the courts strictly construe law firm partnership agreements and hold attorneys and law firms to the precise provisions of the agreement.¹⁰

any plaintiff 'expressly assented' to any terms proposed by defendants." Consequently, without an operating agreement the departure of partners was not a "withdrawal" as defined by statute and the firm was forced into dissolution. According to the court, "The PLLC had no operating agreement, so plaintiffs could not have withdrawn pursuant to [the statute]."

¹⁰ Generally, courts will not disturb a partnership agreement in the absence of extenuating circumstances. See:

Second Circuit: Warner v. Monsour Winn Kurland & Warner, LLP, 2011 U.S. Dist. LEXIS 39777 (E.D.N.Y. Feb. 18, 2011) (applying New York Law), (summary judgment denied in an action among law firm partners concerning the interpretation of the law firm's partnership agreement and payments to a retired partner because of the existence of genuine issues of material fact).

State Courts:

New Jersey: Chance v. McCann, 405 N.J. Super. 547, 966 A.2d 29 (2009) (parol evidence rule bars extrinsic facts to change the payout amount specified in a law firm partnership agreement when the specified amount is unambiguously clear).

New York: Dawson v. White & Case, 88 N.Y.2d 666, 649 N.Y.S.2d 364, 672 N.E.2d 589 (1996).

Ohio: Spayd v. Turner, Granzow & Hollenkamp, 19 Ohio St.3d 55, 482 N.E.2d 1232, 1240 (1985) ("A partnership agreement will generally not be disturbed by the courts in the absence of extenuating circumstances."); Blount v. Smith, 12 Ohio St.2d 41, 231 N.E.2d 301, 305 (1967) (presumption that contract was executed without misunderstanding or imposition).

Texas: Clark v. Cotton Schmidt, LLP, 327 S.W.3d 765 (Tex. App. 2010) ("When [a contract] is not ambiguous on its face, extrinsic evidence may not be used to create an ambiguity").

But see, Kafirissen v. Kotlikoff, 2010 WL 3860113 (E.D. Pa. 2010) (applying New Jersey law) (extrinsic evidence permitted to interpret a law firm partnership agreement after the death of one of the partners; "under New Jersey law, extrinsic evidence is admissible to aid in the interpretation of a contract 'even when the contract on its face is free from ambiguity'").

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Before a court will declare a partnership agreement unenforceable on the grounds of being indefinite, the “indefiniteness must reach the point where construction becomes futile.”^{10.1} In addition, violation of a rule of professional conduct by a partner cannot serve as a basis for declaring a partnership agreement void and unenforceable,^{10.2} and the courts are extremely cautious about setting partnership agreements aside on the grounds they violate public policy.^{10.3}

A partnership agreement should, at a minimum, define and address the major “life events” of a law firm. These events include formation,¹¹ partner compensation,¹² partner departures,¹³ retirement,¹⁴ death,¹⁵ disability,¹⁶ dissolution,¹⁷ termination of the partnership,¹⁸ and general firm management and governance.¹⁹ In addition, once a written agreement is in place the partners, in order to take advantage of its protections, must abide by its provisions.^{19.1}

^{10.1} Poole v. Prince, 2010 WL 4148530 (Ala. Oct. 22, 2010) (fee sharing agreement not so indefinite as to render agreement void and unenforceable).

^{10.2} *Id.*, 2010 WL 4148530 at *21.

^{10.3} *Id.*

“The power to declare a contract void based on a violation of public policy is a very delicate and undefined power and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. . . . The courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain. . . . [T]he courts will not declare an agreement void on the ground of public policy unless it clearly appears to be in violation of the public policy of the state.” (Citations and internal quotation marks omitted.)

See also, Garfinkel v. Mager, 2010 WL 5184564 (Fla. App. Dec. 23, 2010) (agreement between law firm and managing partner which prevented former managing partner or related entities from representing or assisting any client in litigation against the law firm not violative of public policy).

¹¹ See Chapters 2 and 3 *infra*.

¹² See Chapter 5 *infra*.

¹³ See: §§ 6.03, 6.06 *infra*.

¹⁴ See § 6.04 *infra*.

¹⁵ See § 6.05 *infra*.

¹⁶ See § 6.06 *infra*.

¹⁷ See Chapter 7 *infra*.

¹⁸ See: §§ 6.01 and Chapter 7 *infra*.

¹⁹ See Chapter 4 *infra*.

^{19.1} Kuist v. Hodge, 2008 WL 510075 (Cal. App. Feb. 27, 2008) (former law firm partners in dispute over the distribution of a multi-million dollar fee received years after two plaintiffs partners left the firm; refusal to enforce written partnership agreement because there had been a novation of the agreement due to the managing partner’s repeated disregard of the agreement and his using the partnership as his “personal fiefdom without regard to the written agreement”).

[1]—Partner’s Compensation

One of the most difficult issues law partners—and therefore a partnership agreement—must address is compensation.²⁰ For all but a handful of firms, gone are the days of “lock-step” compensation when a partner’s draw was merely a function of his seniority. Merit-based compensation is currently the standard and appears to be here to stay. Some law firms establish compensation for partners prospectively, others do it retrospectively. Accordingly, partnership agreements must set forth a process under which merit can be fairly quantified and converted into compensation.

In some instances, depending on the complexity of the firm’s practice, a formula can be utilized in the agreement by which a partner’s compensation is simply expressed as a percentage of business originated by that partner as compared with the firm’s total income. If this method is used, a clear and workable definition of “origination” is essential. The agreement can further provide for modification of the derived amount, either upward or downward, depending on the partner’s billable hours, participation in firm administration, pro bono activities, client development efforts, stature in the community or whatever else the firm’s partners perceive as valuable to the firm.

Alternatively, a partner’s compensation can be expressed as a percentage of his ownership in the firm which is then applied to the firm’s profits. The percentage is often derived using the same factors as those under the described business originated formula, e.g., billable hours and participation in firm management. Depending on firm culture, other agreements may provide for more flexible means to determine compensation, such as the formation of a compensation committee which reviews partners’ submissions of various factors and determines, sometimes with a right to “appeal,” a partner’s compensation.

Whatever the agreed upon method, in this age of partner mobility, the partnership agreement should include a mechanism by which a partner’s compensation is reviewed and set on a yearly basis at minimum. The agreement should also empower some individual, committee or subcommittee, depending on the size of the firm and its general governance, to make the determination. If appropriate, the determination can be ratified by a vote of the partnership.

[2]—Allocation and Accrual of Equity

In addition to the setting of partners’ compensation, an important issue for any law firm is the allocation and accrual of equity and the

²⁰ See Chapter 5 *infra*.

methods of redeeming a partner's equity under various scenarios. Typically an agreement provides for the maintenance of a capital account in accordance with the applicable Treasury Regulations and the Internal Revenue Code. The agreement should provide for a method by which a capital account is maintained and increased and whether, to what extent, and by whom (if, for example, there are more than one class of partners) capital contributions are required and added to one's capital account. A mechanism for withdrawal of capital must also be addressed.

Given how mobile the profession has become there can be little doubt but that the departure of partners is virtually inevitable and would therefore qualify as a "life-event" in need of consideration in the firm's agreement. Depending on the firm's size, its history of borrowing, and the volatility of the local real estate market, it is advisable to consider including provisions in the agreement that in the case of a lease made disadvantageous by a shift in the real estate market or a loan to finance long-range partnership commitments, that a departing partner be subject to some form of adjustment which, in essence, makes the departing partner share these financial burdens with the remaining partners.

[3]—Continuation Provisions

Perpetuity of the partnership on the change in the relationship of its partners is a simple and yet probably the single most important issue for a law firm to address. The proper place to address this issue is in the firm's partnership agreement. A law firm must be structured to survive the withdrawal of a partner.

Although a partnership agreement may state a term of years as its life, more often than not the agreement has no stated term. According to the Uniform Partnership Act, the voluntary withdrawal of a partner or withdrawal via death, disability, retirement, or expulsion will terminate the partnership unless the firm's partnership agreement contains a clause to the contrary.²¹ Such a clause should bind the partnership to continue and allow for the remaining partners to close ranks, reform, and go forward with the reconstituted firm without the withdrawing partner. Absent such a "continuation provision," a partnership may terminate merely by a partner ceasing to carry on the business of the firm when he withdraws.²² The partnership agreement should be designed so that the partnership can survive the statutory

²¹ U.P.A. § 31.

²² U.P.A. § 29, stating that dissolution occurs whenever partner leaves the firm.

mandates of dissolution on withdrawal, death, and disability of any partner. To accomplish this, the partnership agreement should set forth an undertaking by the remaining partners that the partnership entity shall continue notwithstanding the exiting of a certain partner or partners.

Accordingly, it is absolutely essential that the partnership agreement contain a “continuation provision” by which it is agreed that a partner’s departure, for any reason, including death, disability, expulsion or retirement, does not cause a dissolution of the firm and does not entitle the departing partner or the estate of a deceased partner to an accounting. Without this type of provision, the departing partner may be entitled to an accounting in which all the firm’s “hard and soft” assets (including real estate, leases, furniture, office equipment, libraries, retirement plans, accounts receivable, work in process, and good will) are subject to valuation. An accounting process is never pleasant, always takes longer than anticipated, and can be disruptive and costly to a law firm’s practice. Accordingly, avoiding this process by including a “continuation provision” in the agreement may be reason enough to have a written partnership agreement.

[4]—Partnership Goodwill

A law firm partnership agreement should address the issue of firm goodwill.²³ Most agreements provide that there is no value for firm goodwill. The valuation and award of a percentage of a firm’s goodwill is a relatively recent occurrence in the pure law firm partnership context, although, somewhat oddly, it has existed far longer in the matrimonial context with the advent of equitable distribution in many states. Although initially controversial, the argument in favor of the valuation of good will appears to be gaining more acceptance, particularly since the ABA Code of Professional Responsibility²⁴ and some states²⁵ not only permit the sale of a law firm, but specifically allow the sale of good will. In light of this trend, the partnership agreement

²³ See Chapter 6 *infra*.

²⁴ ABA Model Code of Professional Conduct, *ABA/BNA Lawyers’ Manual on Professional Conduct*, pp. 1:101 *et seq.* (1994).

²⁵ *Arizona*: *Snow Bagor v. Young*, 24 Ariz. App. 177, 536 P.2d 1069 (1975).

California: Cal. Rls. Prof. Con. § 2-300.

Colorado: *In re Marriage of Huff*, 834 P.2d 244 (Col. 1992).

Delaware: *EEC v. EJC*, 457 A.2d 688 (Del. 1983).

New Jersey: *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983).

North Carolina: *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (N.C. 1988).

Ohio: *Spayd v. Turner, Granzow & HollenKamp*, 19 Ohio St.3d 55, 482 N.E.2d 1232 (1985).

should contain a provision in which the partners specifically agree that there is no good will in the law firm. Despite such language, however, there are several instances in which the courts have ignored such agreements and permitted good will to be valued either in the dissolution or matrimonial context, circumstances under which either the agreement may not apply or the so-called demands of equity require it.²⁶

[5]—Clients of Partners Leaving the Firm

Partnership agreements must address the ramifications of what can and cannot happen with respect to firm clients on the departure of a partner.²⁷ In most jurisdictions, agreements which have attempted to penalize withdrawing partners by requiring a forfeiture or reduction of their capital account or other penalties should they withdraw and compete with the departed firm have been invalidated because they have been found to run afoul of the ethical prohibitions against the restricting of an attorney's right to practice law.²⁸

Because clients have the right to choose and change counsel, it is improper for any lawyer to enter into an agreement that restricts any other lawyer's right to practice.²⁹ Both the Code of Professional

²⁶ Harmon v. Harmon, 173 A.D.2d 98, 578 N.Y.S.2d 897 (1992).

²⁷ See Chapter 6 *infra*. See also, § 1.04 *supra*.

²⁸ Denburg v. Parker Chapin Flattau & Klimpl, 82 N.Y.2d 375, 604 N.Y.S.2d 900, 624 N.E.2d 995 (1993); Cohen v. Lord Day & Lord, 75 N.Y.2d 95, 551 N.Y.S.2d 157, 550 N.E.2d 410, (1989). See also, Gray v. Martin, 63 Ore. App. 173, 663 P.2d 1285 (1983), in which the court found a provision restricting a partner's post-withdrawal payment if he should practice in the vicinity to be violative of DR2-108(A) of the State Codes of Professional Responsibilities as a restriction on an attorney's right to practice.

²⁹ See generally:

California: Howard v. Babcock, 18 Cal. App.4th 107, 7 Cal. Rptr.2d 687, *superse- ded in part* 832 P.2d 587 (Cal. App. 1992), *aff'd in part, rev'd in part* 6 Cal.4th 409, 25 Cal. Rptr.2d 80, 863 P.2d 150 (1993) (agreement limiting withdrawing partners' rights to practice invalid as violation of public policy).

Illinois: Stevens v. Rooks Pitts and Poust, 289 Ill. App.3d 991, 682 N.E.2d 1125, 1132 (1997).

Iowa: Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601-602 (Iowa 1990) (forfeiture for withdrawal unenforceable).

Massachusetts: Pettingell v. Morrison, Mahoney & Miller, 426 Mass. 253, 687 N.E.2d 1237, 1239-1240 (1997).

New Jersey: Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 155 (N.J. 1992) (one-year restriction on withdrawing partner's practice of law for firm client impermissible).

New York: Denburg v. Parker Chapin Flattau & Klimpl, 82 N.Y.2d 375, 604 N.Y.S.2d 900, 624 N.E.2d 995 (1993) (financial disincentives against competition in practice of law invalid because provisions restrict client's choice of counsel); Cohen

Responsibility³⁰ and the Model Rules of Professional Conduct, adopted by the American Bar Association in 1983,³¹ prohibit and declare improper partnership or employment agreements that restrict the right of a lawyer to practice law after the termination of a relationship created by the agreement. In addition, both codes provide that no such restriction may be imposed as part of a settlement of a controversy between the partnership and a departing or withdrawing partner.

In most jurisdictions, non-competition clauses affecting the right to practice law are unenforceable.³² The majority maintains that restricting the rights of attorneys to practice and to service clients constitutes a restriction on the client's right to counsel of his choice.³³ In this respect, the prohibition against restrictive covenants is unique. Doctors, accountants and investment bankers, for example, are professions that have had restrictive covenant clauses upheld by the courts.³⁴ The rule against these restrictive covenants is why it is

v. Lord, Day & Lord, 75 N.Y.2d 95, 551 N.Y.S.2d 157, 550 N.E.2d 410 (1989) (law firm's partnership agreement depriving a partner, who was moving from one firm to another, of net profits and legal fees earned prior to and subsequent to his departure is invalid).

Oregon: Gray v. Martin, 663 P.2d 1285, 1290 (Ore. App. 1983) (agreement precluding payment of withdrawing partner's interest in firm if partner resumed practice of law in violation of Model Code of Professional Responsibility DR 2-108(a)).

Pennsylvania: Capozzi v. Latsha & Capozzi, P.C., 2002 Pa. Super 102, 797 A.2d 314 (2002).

Tennessee: Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 531 (Tenn. 1991).

³⁰ Code of Professional Responsibility DR 2-108.

³¹ Model Rules of Professional Conduct, Rule 5.6.

³² See generally, Hillman, "Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms," 55 Wash. & Lee L. Rev. 997, 1014 (1998). In Cummins v. Bickel & Brewer, No. 00 C 3703, 2001 U.S. Dist. LEXIS 2206 (N.D. Ill. Feb. 28, 2001), defendants based their refusal to pay benefits to the plaintiff on his voluntary withdrawal/retirement as partner, claiming that the partnership agreement provided that an otherwise "Qualified Withdrawing Partner" forfeits all payments if he represents a "partnership client" within three years after withdrawing from the partnership. Plaintiff argued that the forfeiture clause was unenforceable as an illegitimate restriction on the right to practice law in violation of Rule 5.6 of the Model Rules of Professional Conduct." The court held that plaintiff was a "Qualified Withdrawing Partner" under the terms of the partnership agreement, and that the forfeiture provision was unenforceable under Illinois law, despite a choice of law provision choosing Texas as the controlling law, because to enforce it would violate Illinois public policy.

³³ Code of Professional Responsibility DR 2-108(a).

³⁴ See, e.g., Arthur Young & Co. v. Galasso, 538 N.Y.S.2d 424, 427-429 (N.Y. Sup. 1989), acknowledging the validity of restrictive covenant affecting an accounting firm.

easier for a partner to withdraw from a law firm than from any other professional service firm or practice.³⁵

The State Codes of Professional Responsibilities states that an attorney shall not “participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.”³⁶

At the same time, it is advisable to include a provision in the partnership agreement by which a retiring partner’s receipt of retirement benefits is conditioned on not competing with the firm. Similarly, the agreement should provide that a retiring partner use good faith efforts to assure that client matters are transferred to the firm on retirement and should provide incentives for a partner to remain with the law firm through to retirement age. Such an incentive might be a provision enhancing the capital payment a partner receives at retirement to a level far superior to that which a partner might receive if he left the firm prior to retirement to go into a competitive practice.

[6]—Firm Organization and Administration

To a large extent, the structure of a law firm’s management is determined by its size and culture.³⁷ Regardless of the structure of management, the partnership should clearly provide which individuals or committees have authority to address certain issues. The object of setting forth the decision-making structure of the firm is to anticipate issues—in advance—in order to provide for an appropriate forum for their resolution. Without an appropriate forum, an enormous amount of time will be wasted determining who has authority to address issues which may be in need of immediate attention. A typical structure usually includes an executive committee which passes on major long range issues, such as budgetary matters, amendments to the partnership agreement, pension plans, mergers, establishing branch offices, or affiliating with another law firm. A managing or administrative partner, or both, usually manages the day-to-day operations of the firm.

³⁵ See Hillman, *Hillman on Lawyer Mobility*, § 2:47 (1998), stating that, “The prohibition against anticompetition clauses sets lawyers apart from members of other professions.”

³⁶ DR 2-108 of the State Codes of Professional Responsibilities.

³⁷ Firm organization and administration is further discussed in Chapters 3 and 4 *infra*.

§ 1.06 Partnerships at Will

A partnership at will is a partnership without a fixed duration. The Revised Uniform Partnership Act defines a “partnership at will” as “a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.”¹ *Black’s Law Dictionary* defines a partnership at will as:

“one designed to continue for no fixed period of time, but only during the pleasure of the parties, and which may be dissolved by any partner without previous notice.”

Accordingly, a partnership at will can exist when the parties explicitly agree that their partnership has no fixed duration or when the partnership agreement is ambiguous on the point. The effect of finding that a law firm is operating as a partnership at will means that the partnership can be dissolved at any time.² According to the Uniform Partnership Act, “Dissolution is caused by the express will of any partner when no definite term or particular undertaking is specified.”³

Furthermore, a partnership at will is automatically dissolved upon death,⁴ withdrawal,⁵ or expulsion⁶ of any partner. When a firm’s agreement provides that the partnership is to continue indefinitely, a provision which, without more, creates a partnership “at will,” a partner has the right to dissolve the partnership, and the dissolution occurs “[w]ithout violation of the agreement between the partners.”⁷

Determining whether a written partnership agreement creates a partnership of fixed duration or a partnership at will is not always apparent and can create significant disputes. It also depends on whether a court takes a liberal or strict constructionist approach to partnership contracts.

¹ R.U.P.A. § 101(8).

² *McNichols v. Nelson Val Building Co.*, 253 P.2d 744, 116 Cal. App.2d 266 (1953) (partnership at will may be dissolved at any time).

³ U.P.A. § 31.

⁴ *McClellin v. Commissioner of Internal Revenue*, 131 F.2d 165 (1st Cir. 1942) (in absence of agreement to contrary death of a partner dissolves firm).

⁵ *Warren v. Warren*, 784 S.W.2d 247 (Mo. 1989) (withdrawal of partner affects *de facto* dissolution of partnership).

⁶ *Miernicki v. Seltzer*, 312 Pa. Super. 166, 458 A.2d 566 (1983), *aff’d* 505 Pa. 323, 479 A.2d 483 (1984) (ejection of partner from partnership causes dissolution).

⁷ *Johnson v. Kennedy*, 350 Mass. 294, 298, 214 N.E.2d 267 (1966); *Steele v. Estabrook*, 232 Mass. 432, 439 (1919).

In one instance, a partnership agreement stating that the firm would continue “from calendar year to calendar year” did not prevent the court from holding that the firm was a partnership at will which could be dissolved at any time.⁸ This decision, at the very least, is indicative of a court’s reluctance to rule in a manner which implies that partners, even by agreement, are bound to practice law together when they no longer wish to. At the same time, the decision can be criticized for its liberal interpretation of a partnership agreement when such agreements typically are strictly interpreted, for at the very least it can be argued that the provision in question meant that the partnership was established for at least one year.

In a contrasting case in which the court followed a strict construction interpretation, a partnership agreement which provided for a pay out to partners and a continuation of the firm only on the “death, withdrawal or retirement” of a partner was held not to apply when a partner was involuntarily ousted by the firm.⁹ The court relied on the plain language of the agreement which provided for a pay out to partners and the avoidance of dissolution only upon the “death, withdrawal or retirement.” Because the firm’s own agreement was silent concerning the effects of the expulsion of a partner, the court permitted the ousted partner to receive an accounting of the firm’s assets and liabilities.

These two decisions present conceptually different approaches to the interpretation of partnership agreements. In one instance, the court liberally construed the partnership agreement and found a partnership at will despite the fact that the partnership agreement provided for the firm’s existence from “calendar year to calendar year,” while in the other, the court strictly construed the partnership agreement and found that an ousted partner did not precisely fit within the agreement’s categories of “death, withdrawal or retirement,” and required the firm to account to the ousted partner for his interest in the firm.

⁸ *McQuillan v. Kenyon & Kenyon*, 220 A.D.2d 395, 631 N.Y.S.2d 884 (1995).

⁹ *Dawson v. White & Case*, 88 N.Y.2d 666, 649 N.Y.S.2d 364, 672 N.E.2d 589 (N.Y. 1996); *Dawson v. White & Case*, 212 A.D.2d 385, 622 N.Y.S.2d 269 (1995).

§ 1.07 Right to an Accounting

[1]—Basic Rights

One of a partner's most basic rights is to obtain an accounting of the partner's interest in the firm on its dissolution and winding up or on the partner's expulsion or withdrawal.¹ An accounting has been described as a statement of receipts and disbursements which shows all detailed financial transactions of business, including a listing of original contributions and current assets and liabilities of the partnership.^{1,1} Pursuant to the Uniform Partnership Act, in the case of a terminated, withdrawing or expelled partner, dissolution occurs and an accounting is permitted whenever the partnership agreement does not provide a clear and exclusive means of compensating a former partner or for a continuation of the partnership. Absent a provision to the contrary in the partnership agreement, withdrawal of a partner or admission of a new partner causes dissolution of the partnership by operation of law.²

In this regard, the Uniform Partnership Act states:

¹ *Lawrence v. Kennedy*, 95 A.D.3d 955, 944 N.Y.S.2d 577, 580 (2012) (“The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest”) (Inner quotation marks omitted). However, in *Goldman v. Rio*, 62 A.D.3d 834, 879 N.Y.S.2d 199, 200 (2009), the court held that “to the extent [a former partner in a law firm] seeks an accounting for the purpose of obtaining information about the funds of the partnership's clients, the [former partner] is not entitled to an accounting for that purpose, as the right to an accounting of partnership affairs is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.”

^{1,1} *Illinois*: *Laurence v. Flashner Medical Partnership*, 206 Ill. App.3d 777, 151 Ill. Dec. 875, 565 N.E.2d 146 (1990).

New York: *Lund v. Krass Snow & Schmutter*, 62 A.D.2d 551, 879 N.Y.S.2d 127 (2009) (law book written by a partner prior to joining the firm not an asset of the firm; value of the book not reflected in the firm's financial records, partner owned and controlled royalties paid on the book, and was individually taxed on the book's earnings).

Texas: *Mitchell Resort Enterprises, Inc. v. C&S Builders, Inc.*, 570 S.W.2d 463 (Tex. 1978).

² *Florida*: *Frates v. Nichols* 140 So.2d 321 (Fla.), cert. denied 146 So.2d 749 (Fla. 1962) (partnership agreement may provide that dissolution does not automatically occur when partner leaves firm).

New York: *Cohen v. Lord Day & Lord*, 75 N.Y.2d 95, 551 N.Y.S.2d 157, 160, 550 N.E.2d 410 (N.Y. 1989) (“When there is an agreement to avoid automatic dissolution of the firm, . . . the withdrawing partner may forego the ordinary and full accounting for the amount owed had there been a formal dissolution and liquidation.”); *Nishman v. DeMarco*, 76 A.D.2d 360, 430 N.Y.S.2d 339 (1980) (attorneys stipulation regarding payout insufficient to defeat right to an accounting).

“The right to an account of his interest shall accrue to any partner, or his legal representative, as again the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.”³

A partnership agreement can be oral as well as written.⁴ As a result, the partners may agree orally that the partnership will not terminate with the withdrawal or admission of partners.⁵ It is also well settled that provisions limiting the interest of departing partners are binding and strictly enforced as a matter of law.⁶ In fact, an agreement to liquidate a departing partner’s interest in the partnership may be written, oral or even implicit in the past practice of the parties in the partnership.⁷

More importantly, parties may limit a departing partner’s interest in the partnership to specific assets of the partnership, such as capital accounts and/or a share of net income and accounts receivable.⁸

³ U.P.A. § 43.

⁴ *Louis Dreyfus Corp. v. ACLI International, Inc.*, 52 N.Y.2d 736, 436 N.Y.S.2d 268, 417 N.E.2d 562 (1980).

⁵ *Rotenberg v. Chamberlain, D’Amanda, Oppenheimer & Greenfield*, 248 A.D.2d 1021, 1022, 670 N.Y.S.2d 643, 644 (1998); *Balagur v. Graubard, Mollen, Horowitz, Pomeranz & Shapiro*, *New York Law Journal*, Jan. 31, 2000, p. 31, col. 6 (N.Y. Sup. 2000).

⁶ *Dawson v. White & Case*, 88 N.Y.2d 666, 671, 649 N.Y.S.2d 364, 367, 672 N.E.2d 589 (1996) (“By statute, then, the partners are free to exclude particular items from the class of distributable partnership property, and such an agreement will be enforced.”); *In re Brown*, 242 N.Y. 1, 150 N.E. 581 (1926) (partners may agree that departing partners’ interest in partnership does not include share of partnership’s goodwill); *Siddall v. Keating*, 8 A.D.2d 44, 185 N.Y.S.2d 630, *aff’d* 7 N.Y.2d 846, 196 N.Y.S.2d 986, 164 N.E.2d 860 (1959). See N.Y. Prtnrshp. L. § 71 (statutory rules for distribution of partnership property to departing partner are “subject to any agreement to the contrary”).

⁷ *In re Brown*, 242 N.Y. 1, 150 N.E. 581 (1926) (“The contract may be expressly made, or it may arise by implication from other contracts and the acts and conducts of the parties.”); *Kaplan v. Joseph Schachter & Co.*, 261 A.D.2d 440, 690 N.Y.S.2d 91, 92 (1999) (implied agreement to limit departing partner’s interest in partnership).

⁸ *New York*: *Rotenberg v. Chamberlain, D’Amanda, Oppenheimer & Greenfield*, 248 A.D.2d 1021, 1022, 670 N.Y.S.2d 643, 644 (1998) (departing partner’s interest in partnership is limited by agreement to his capital contribution); *Dwyer v. Nicholson*, 193 A.D.2d 70, 602 N.Y.S.2d 144 (1993) (departing partner agreed to liquidate his interest in partnership to share of net income and accounts receivable); *Pikul v. Clough, Harbour & Associates*, 190 A.D.2d 932, 593 N.Y.S.2d 585 (1993); *Balagur v. Graubard, Mollen, Horowitz, Pomeranz & Shapiro*, *New York Law Journal*, Jan. 31, 2000, p. 31, col. 6 (N.Y. Sup. 2000).

Such agreements are not against public policy but are strictly applied, and departing partners do not have an equitable interest to an accounting of all of the partnership's assets.⁹

Accordingly, should a partnership agreement provide, for example, that a withdrawn or retired partner or a partner's estate, in the case of a deceased partner, is entitled to a payout of the partner's capital account, the partner would not be entitled to an accounting.

Furthermore, the Uniform Partnership Act¹⁰ sets forth when a partner is entitled to an accounting:

“Any partner shall have the right to a formal account as to partnership affairs:

“a. If he is wrongfully excluded from the partnership business or possession of its property by his co-partners,

“b. If the right exists under the terms of any agreement,

“c. As provided by section 21,¹¹

“d. Whenever other circumstances render it just and reasonable.”¹²

[2]—Bringing an Action for an Accounting

When a cause of action for an accounting is appropriate the adjudication of the accounting claim, which is a claim in equity, is a prerequisite to the commencement of any actions at law.¹³ This general

Texas: Clark v. Cotton Schmidt, LLP, 327 S.W.3d 765 (Tex. App. 2010) (potential ambiguity in partnership agreement over what a departing partner is entitled to from firm assets).

⁹ Rotenberg v. Chamberlain, D'Amada, Oppenheimer & Greenfield, 248 A.D.2d 1021, 1022, 670 N.Y.S.2d 643, 644 (1998).

¹⁰ U.P.A. § 22.

¹¹ Section 21(1) of the Uniform Partnership Act sets forth the fiduciary obligations of partners and states:

“Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. (2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.”

¹² U.P.A. § 22.

¹³ *Minnesota*: In re Estate of Renczykowski, 409 N.W.2d 888 (Minn. 1987).

New York: Munyan v. Curtis, Mallet-Prevost, Colt & Mosle, 472 N.Y.S.2d 321 (1984) (where partner sued at law for his capital account and firm counterclaimed for an accounting, it was “inappropriate to decide the issues between the partners piecemeal”).

South Carolina: Burch v. Ashburn, 295 S.C. 274, 368 S.E.2d 82 (1988).

rule means that in a partnership dispute, claims for relief other than for an accounting are premature until after the adjudication of the accounting claim. The rule has a sound basis in case law as well as common sense. The courts have repeatedly held that the only proper action in a dispute between partners is a claim for an accounting and that only after that claim is adjudicated are other claims permissible.¹⁴ Other claims are dismissed without prejudice, pending the adjudication of the accounting action.¹⁵ Similarly, the majority of courts have maintained that discovery in an accounting action is limited to proof of the right to an accounting and discovery concerning the partnership's financial condition must also await the adjudication of a right to an accounting.¹⁶

Although this rule has been somewhat undermined by concepts of judicial economy, the common sense support for this rule is, to a large extent, the best argument for maintaining it. The partnership relationship is most often about the value of the partnership and each partner's entitlement to share in the value. If the disgruntled partner is provided with the means to understand his share in the partnership's assets and liabilities, which would be ascertained through an accounting, other claims may, and most often do, become unnecessary. Moreover, an accounting action is relatively straightforward with limited discovery. A streamlined accounting claim which focuses on a former partner's entitlement to an accounting and then the value of one's partnership interest is relatively narrow and can proceed to adjudication with relative speed and efficiency.

To ensure the integrity of the accounting once an action has begun, the departing partner seeking the accounting may request the court in its discretion to require the firm to post a bond securing the former

Texas: Mitchell Resort Enterprises v. C&S Builders, Inc., 570 S.W.2d 463 (Tex. 1978).

See also, *Shiboleth v. Yerushalmi*, 2009 WL 792718 (S.D.N.Y. March 25, 2009) (under equitable principles, an action for an accounting based on state partnership law and not federal bankruptcy law may belong in state court even though federal bankruptcy has been filed).

But see, *Mandrell v. McBee*, 892 S.W.2d 842 (Tenn. 1994) (although accounting is a prerequisite to actions at law, that is not the case when lawsuit arises out of breach of fiduciary duty or partner's fraud).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See, e.g.: *Krauss v. Putte*, 51 A.D.2d 551, 378 N.Y.S.2d 434, 436 (1976) (until the accounting claim is adjudicated by interlocutory judgment, there can be no discovery related to other causes of action); *Wood v. Cross Properties, Inc.*, 5 A.D.2d 853, 171 N.Y.S.2d 338 (1958) (in accounting action, a deposition on other claims is not permitted until the right to the accounting has first been established by interlocutory decree).

partner’s rights.^{16.1} The posting of a bond not only secures a partner’s property rights in an accounting, but may provide a strategic advantage to the departed partner in the litigation.

[a]—The Complaint

In order to technically state a claim, in the partnership context, for an accounting, the pleading requirements are relatively simple. The complaint need only allege the existence of a partnership, an act causing dissolution, and that the partner is unaware of his share and has demanded it and been refused. The following is a simple complaint for an accounting claim when the firm’s partnership agreement does not provide for an accounting.

-----X

PARTNER
Plaintiff

- against -

LAW FIRM, LLP
Defendant

-----X

Plaintiff, Partner, by his attorneys, _____
alleges for his complaint as follows:

1. Plaintiff is an attorney duly admitted to practice law in the State of _____ and at all relevant times resided in the State of _____.

2. Law Firm, LLP, a partnership in dissolution (the Firm), the defendant in this action, is a law firm which until its dissolution operated as a _____ general partnership and at all relevant times had its principle place of business at _____.

^{16.1} See, e.g., N. Y. Ptnrshp. L. § 75.

“In an action . . . for an accounting between partners, . . . the court may, in its discretion, by order, authorize the partnership business to be continued, during the pendency of the action by one or more of the partners, upon their executing and filing with the clerk an undertaking, in such a sum and with such sureties as the order prescribes, to the effect that they will obey all orders of the court, in the action, and perform all things which the judgment therein requires them to perform.”

See also: Seiden v. Gogick, Seiden, Byrne & O’Neil, 278 A.D.2d 302, 718 N.Y.S.2d 188 (2000); Netburn v. Fishman, 81 Misc.2d 117, 364 N.Y.S.2d 727 (N.Y. Sup. 1975).

3. Partner was, at all relevant times, a general equity Partner of the Firm, owning a ____% interest.

4. On or about _____ Partner [withdrew/was expelled] as partner.

5. At the time of Partner's [expulsion/withdrawal], the Firm had no written partnership agreement.

6. Partner's [expulsion/withdrawal] from the Firm rendered the Firm a partnership in dissolution.

7. Pursuant to Section __ of the Partnership Law, on the Firm's dissolution, Partner had the right to an immediate accounting and to receive payment of his capital account and his aliquot share of the profits and assets of the Firm, including *inter alia*, his share of the Firm's goodwill and contingent fee cases.

8. Partner is ignorant of the precise amount of cash and other assets which are in the possession of the Firm.

9. Since the [withdrawal/expulsion] of Partner, the Firm, has refused to pay his capital account despite repeated demands.

10. Prior to the commencement of this action, Partner, through his attorneys, demanded of the Firm that they render an accounting of the affairs of the partnership and that he be paid his capital account, share of the net profits, monies and other assets received and to be received by the Firm to which he is entitled including, but not limited to, goodwill, contingent fees, and his interest in all other partnership property.

11. The Firm, a partnership-in-dissolution, has failed and refused to pay Partner his capital account, to render an accounting of the business and affairs of the Firm, to wind up the partnership's affairs as required by law, and the Firm has refused to pay Partner any portion of the property and assets of the partnership-in-dissolution to which Partner is lawfully entitled. The Firm's failure to do so is without justification or excuse.

12. By reason of the foregoing, Partner is entitled to a prompt accounting of his share of the partnership property of the partnership-in-dissolution including, but not limited to, its accounts receivable, work in progress and contingent fees, including immediate payment of Partner's capital account and his share of goodwill, and to monetary damages and a judgment in such amount as is shown by said account to be due and owing.

13. Plaintiff has no adequate remedy at law.

WHEREFORE, Partner demands judgment: (1) requiring the Firm to provide to plaintiff a complete and proper accounting of all monies due or to become due to the partnership-in-dissolution and other assets thereof including but not limited to Partner’s share of the accounts receivable, work in progress, goodwill and other assets as of _____, and that the defendant be compelled to pay to plaintiff his proportionate share of said assets including the capital account and good will, together with interest thereon from said date; (2) decreeing that Law Firm, LLP, the partnership-in-dissolution, is dissolved and that the firm’s property be applied to discharge liabilities and the surplus applied to pay, in cash, the net amount due and owing to Partner; (3) requiring the Firm to immediately pay to Partner his capital account, and (4) for such other and further relief as to this Court seems just, proper and equitable including the costs and disbursements of the action and reasonable attorneys’ fees.

Despite simple pleading requirements as demonstrated by the previous example, it may be tactically advantageous for a plaintiff to include in the pleading the often egregious acts that result in the partner’s claim that the partnership is dissolved. The following form of complaint includes, by way of example, some of these potential tactically relevant facts.

-----X
PARTNER
Plaintiff
- against -
LAW FIRM, LLP
Defendant
-----X

Plaintiff, _____, by his attorneys _____, as and for his Complaint, alleges as follows:

NATURE OF THE ACTION

This is an action by [*plaintiff*], an attorney, who for _____ years has been a partner in the [*predecessor*] partnership[s] of the law firm [now] named [*the newly formed partnership*]. A cause of action for an accounting is being interposed against [*the partnership in dissolution*], a law partnership in dissolution, and [*the newly formed partnership*], a new partnership, which was formed on [*date*], for the sole purpose of excluding [*plaintiff*]. This action is precipitated by the malicious activities of [*the newly formed partnership*] and [*the partnership in dissolution*], which, despite [*plaintiff's*] ___ years of service to the firm, have sought, without justification, to terminate his relationship with the law firm and to deprive him of economic benefits and clients.

(Text continued on page 1-35)

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff _____ is a resident of the County of _____ and the State of _____ and is a member of the Bar of the State of _____.

2. At all times from [date] through [date] the plaintiff was a partner in predecessor partnerships of the law firm now named [*the newly formed partnership*], a defendant in this case, which at all times relevant to this Complaint has engaged in the general practice of law and maintained its principal place of business in the City of _____ and in the County of _____.

3. [Plaintiff] was born on [date] and is married to _____. He is a graduate of _____ University and of _____ Law School. [*Insert details regarding plaintiff's professional career, his association with defendant partnership, and unfavorable acts, if any, by defendant partnership leading up to plaintiff's ouster or dismissal.*]

4. The Partnership Agreement of [*the partnership in dissolution*] which was in effect when [plaintiff] was wrongfully terminated as a partner, was executed on or about [date]. A copy of the Partnership Agreement, as amended, is annexed hereto as Exhibit ___ and made a part of this Complaint.

5. By the terms of the Partnership Agreement [plaintiff] was entitled to a _____ percentage of the partnership assets plus supplemental compensation to bring his overall cash basis compensation to \$_____ per fiscal year.

6. The Partnership Agreement also provides for a partner, with the consent of the firm, to retire with full benefits at age ___ in an amount equaling \$_____ per year, plus cost of living adjustments, for life, and a survival benefit, in case of death, to be paid to his spouse.

7. The Partnership Agreement does not contain a provision by which [defendants] may terminate a partner.

8. Nevertheless, on [date], defendant [*the partnership in dissolution*] gave notice to [plaintiff] that it had, on [date], constituted a new partnership to continue the practice of law commencing on [date], and that [plaintiff] had not been invited to become a member of the new partnership. A copy of this notice is annexed as Exhibit ___ and made a part of this Complaint.

9. Prior to the sending of the notice and for over a year, without cause or justification, defendant [*the partnership in dissolution*] attempted to coerce [plaintiff] to withdraw as a partner.

10. [Plaintiff] refused to voluntarily withdraw and, accordingly, on or about [date], in an attempt to adversely affect [plaintiff's] partnership interest, defendant [*the partnership in dissolution*] sought to amend the Partnership Agreement to, among other things,

include a provision enabling the firm to terminate a partner. A copy of the proposed amended Partnership Agreement is annexed hereto as Exhibit ___ and made a part of this Complaint.

11. [*Plaintiff*] did not ratify the amended Partnership Agreement and is not bound by its terms.

12. From on or about [*date*] through [*date*], [*plaintiff*], with the knowledge and consent of [*the partnership in dissolution*], took a scheduled vacation.

13. On or about [*date*], knowing that [*plaintiff*] would not be present, [*the partnership in dissolution*] purported to convene a meeting of the partners and agreed to dissolve.

14. Upon information and belief, at the meeting of [*date*], those partners present agreed to dissolve the partnership and to constitute a new partnership to continue their practice of law commencing on [*date*], using the name of [*the newly formed partnership*], and excluding [*plaintiff*], as more particularly set forth in the Notice as described in paragraph 8. The New Partnership is also a defendant in this case.

15. Upon information and belief, it was known to [*the partnership in dissolution*] that such dissolution only months before [*plaintiff's*] fifty-fifth birthday would deprive him and his family of the opportunity of receiving retirement and death benefits to which he might be entitled.

16. Since the dissolution of [*the partnership in dissolution*], both the partnership in dissolution and the New Partnership have acted inexcusably and unprofessionally and taken steps to reduce [*plaintiff's*] income and to harm his relations with his clients by, *inter alia*, sending misleading letters to clients of [*plaintiff*] informing them that [*plaintiff*] is no longer a partner of [*the newly formed partnership*] (a copy of a typical letter sent to [*plaintiff's*] clients is annexed as Exhibit ___ and made a part of this Complaint); seeking to disrupt the attorney-client relations which [*plaintiff*] has cultivated for ___ years; copying confidential documents belonging to clients of [*plaintiff*] without his or the clients' consent; ransacking [*plaintiff's*] office and without permission sending all of the documents in the office to his home; removing files belonging to those clients of [*plaintiff*] without [*plaintiff's*] or the clients' consent; and unrightfully denying [*plaintiff*] continuation of group term life and major medical insurance.

The Attempted Physical Expulsion

17. On [*date*], [*plaintiff*] moved this Court by Order to Show Cause for a preliminary injunction enjoining the defendants, *inter alia*, from taking any steps to evict him from the office space

which he occupied at the offices of [firm] at [address] or to interfere with his access to and use of facilities attendant to the use of that space. In that regard [plaintiff] also sought a temporary restraining order pending the hearing of the motion. Justice _____ signed the Order to Show Cause but struck out [plaintiff's] request for a temporary restraining order based upon the representation of Counsel for defendants that the status quo would be maintained until the hearing of the Motion. The Order to Show Cause as signed by Justice _____ on [date] is attached as Exhibit ___ and is incorporated herein by reference.

18. On [date], _____ and _____, both partners at [the newly formed partnership], informed [plaintiff] that he should remove all belongings and leave, and that as of [date], he would be physically restrained from entering the offices of [the newly formed partnership].

19. In response to this action, and on the same day, [plaintiff's] attorney requested that [firm] take no action until Justice _____ returned on [date]. This request was denied.

20. Rather, upon information and belief, on that day, in [plaintiff's] absence, members and/or employees of [firm] entered [plaintiff's] office without permission and ransacked it, removing its contents, including private and personal papers, and delivering them to [plaintiff's] home.

21. As a member of the partnership in dissolution, [plaintiff] was entitled to continued use of his office space at the premises of [firm] at [address] and access to and use of certain essential facilities including telephone, photocopying, fax and filing facilities attendant to occupancy of that office space. Nevertheless, without justification, [firm] took the actions set forth in paragraph 21 hereof.

22. Upon information and belief, [firm] is now possessed of assets of far greater value than that of the initial investment of the partners.

23. [Plaintiff] is ignorant of the precise amount of money and other assets which are in possession of the partnership except that, upon information and belief, [plaintiff] is entitled to a sum of money exceeding the \$_____ which is claimed by [firm] to constitute his capital account, plus retirement, continued insurance and death benefits in an amount as of yet undetermined.

24. Upon [plaintiff's] termination as of [date], he was lawfully entitled to immediate possession of his capital account, which constitutes the personal monies of [plaintiff] in the possession of the firm, as well as to certain retirement and death benefits, and continued major medical and life insurance.

25. Since [plaintiff's] termination, [firm] has refused to pay to [plaintiff] his capital account, which it admits is at least the sum of \$_____, as well as the value of his retirement and death benefits.

26. Upon [plaintiff's] termination as of [date], [the partnership in dissolution] became a partnership in dissolution and, pursuant to [relevant statutory provision], [plaintiff] was therefore entitled to an accounting of the business and assets of [the partnership in dissolution], and to payment of his share thereof.

27. Prior to the commencement of this action, [plaintiff], through his attorneys, demanded of [firm] that it account to him and that he be paid his share of the net profits, monies and other assets received by [firm] of which he is entitled.

28. [The partnership in dissolution] has failed and refused to render an accounting of the business and affairs of the firm, and the firm's affairs have not been wound up, and [firm] has refused to pay to [plaintiff] any portion of the net property and assets of the partnership in dissolution.

29. This failure is without excuse.

30. Furthermore, upon information and belief, the new partnership continues to use and has commingled with its funds and assets the funds and assets of the partnership in dissolution without the consent of [plaintiff] and without the rendering of an accounting to [plaintiff].

31. Such use of assets and funds of the partnership in dissolution by the New Partnership is unlawful.

32. By reason of the foregoing, [plaintiff] is entitled to a prompt accounting of his share in the partnership in dissolution, including the immediate payment of his capital account, and to the value of his retirement and death benefits, and to damages in such amount as is shown by said accounting to be due and owing.

33. [Plaintiff] has no immediate remedy at law.

WHEREFORE, plaintiff _____ demands judgment: (1) requiring [the partnership in dissolution] to render to plaintiff a complete and proper accounting of his share of all monies due or to become due to the partnership in dissolution and other assets thereof as of [date], and that the defendants be compelled to pay to plaintiff his proportionate share of said assets, including his capital account and the value of his retirement and death benefits, together with interest thereon from said date; and (2) for such other and further relief as to this Court seems just, proper and equitable, including the costs and disbursements of this action and reasonable attorneys' fees.

[b]—The Answer

Among the typical defenses to a claim for an accounting is that the partnership did not dissolve or that the partner's termination was done

in accordance with the partnership agreement. In addition, since an accounting is an equitable cause of action all the equitable affirmative defenses, such as unclean hands and laches are available. The following form of answer to a complaint for an accounting tracks the previous complaint in which egregious acts were alleged.

 X

PARTNER

Plaintiff

-against-

LAW FIRM, LLP

Defendants

 X

Defendants [*new partnership*] and [*the partnership in dissolution*], a partnership in dissolution, answering the Complaint herein:

1. Denies the allegations of the paragraph headed "Nature of the Action", except admits that the law partnership of [*the partnership in dissolution*], of which plaintiff was a partner, dissolved as of [*date*], and reformed without plaintiff as a partner, and avers that the firm's action was necessitated by plaintiff's refusal over a course of years to cooperate and perform basic duties of a partner.
2. Admits the allegations of paragraphs 1 and 2.
3. Denies the allegations of paragraph 3, except admits the allegations as to plaintiff's background.
4. Denies the allegations of paragraph 4, except admits that the document attached to the Complaint as Exhibit ___ includes a copy of the Partnership Agreement of [*the partnership in dissolution*] that became effective [*date*].
5. Denies the allegations of paragraph 5.
6. Denies the allegations of paragraph 6 and refers to the effective Partnership Agreement for the terms thereof.
7. Denies the allegations of paragraph 7.
8. Denies the allegations of paragraph 8, except admits that on [*date*], [*the partnership in dissolution*] delivered the letter attached as Exhibit ___ to the Complaint and refers to said exhibit for the contents thereof.
9. Denies the allegations of paragraph 9, except admits that prior to sending the letter and for at least one year, [*the partnership in dissolution*] had endeavored to persuade [*plaintiff*] to agree to withdraw or retire as a partner of the firm.
10. Denies the allegations of paragraph 10, except admits that a draft of possible amendments to the Partnership Agreement is

attached as Exhibit ___ to the Complaint, which was discussed among some partners though never recommended for adoption by the firm.

11. Denies the allegations of paragraph 11, except admits that [plaintiff] is not bound by the draft annexed as Exhibit ___ to the Complaint.

12. Denies the allegations of paragraph 12, except admits that [plaintiff] informed [*the partnership in dissolution*] that he was taking a vacation from about [date] through [date].

13. Denies the allegations of paragraph 13, except admits that a meeting of partners of [*the partnership in dissolution*] was held on [date] pursuant to notice duly given.

14. Admits the allegations of paragraph 14.

15. Denies the allegations of paragraph 15, except admits that [*the partnership in dissolution*] was aware of plaintiff's age and of the terms of the Partnership Agreement at the time of the firm's dissolving and reforming.

16. Denies the allegations of paragraph 16, except admits that Exhibit ___ is a copy of a letter [*the partnership in dissolution*] sent to clients of the firm on whose matters [plaintiff] had worked.

17. Denies the allegations of paragraph 17, except admits that [plaintiff] served [*the partnership in dissolution*] with an Order to Show Cause on or about [date] and refers to said Order for the contents thereof; admits that this matter was assigned to Justice _____, and that Justice _____ signed the Order to Show Cause in the form attached as Exhibit ___ to the Complaint, and refers to said Order for the contents thereof.

18. Denies the allegations of paragraph 18, except admits that on or about [date], _____ and _____, both partners of [*the partnership in dissolution*] and [*new partnership*], told [plaintiff] that the firm believed he had been afforded sufficient time to relocate to a new office and, accordingly, that he would no longer be permitted to use the offices of the New Partnership.

19. Admits the allegations of paragraph 19.

20. Denies the allegations of paragraph 20, except admits that on or about [date], [*new partnership*] removed [plaintiff's] personal papers and effects and delivered them to his home.

21. Denies the allegations of paragraph 21 the Complaint.

22. Denies the allegations of paragraph 22 of the Complaint.

23. Denies the allegations of paragraph 23, except admits that under and in accordance with the terms of the Partnership Agreement, [plaintiff] was entitled to payment of his capital account in the approximate amount of \$_____.

24. Denies the allegations of paragraph 24.

25. Denies the allegations of paragraph 25.

26. Denies the allegations of paragraph 26, and further avers that this Court entered an order dated [date], directing an accounting of [plaintiff's] interest in the partnership as of [date] pursuant to Section ___ of the Partnership Law.

27. Denies the allegations of paragraph 27, except admits that prior to commencement of this action [plaintiff] made various demands on [the partnership in dissolution] for the payment of money to him.

28. Denies the allegations of paragraph 28, except admits that in addition to other payments to him, [the partnership in dissolution] made four payments each of approximately \$_____ on [plaintiff's] capital account on [four specified dates].

29. Denies the allegations of paragraph 29.

30. Denies the allegations of paragraph 30, except admits that [new partnership] succeeded to the rights and obligations of the dissolved partnership.

31. Denies the allegations of paragraph 31.

32. Denies the allegation of paragraph 32, except admits that this Court's Order dated [date] directed an accounting of [plaintiff's] interest in the partnership as of [date], pursuant to Section ___ of the Partnership Law.

33. Denies the allegations of paragraph 33.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

1. Plaintiff _____ became a member of the firm of [the partnership in dissolution] on [date], and was a member of successive partnerships practicing under the name of [the partnership in dissolution] through [date].

2. The interests of the partners in the firms of [the partnership in dissolution], including [plaintiff], have at all times been governed by written Partnership Agreements, equally binding upon all members of the firms.

3. [Plaintiff] has received the benefits and advantages of the terms of the Partnership Agreements during the period he was a partner of [the partnership in dissolution].

[Plaintiff's] interest in [the partnership in dissolution] should be determined and paid to him in accordance with the terms of the Partnership Agreement in effect as of [date].

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

1. During the period [plaintiff] was a partner of [the partnership in dissolution], the interests of all partners who have withdrawn,

retired or died have been determined in accordance with the terms of the [*the partnership in dissolution's*] Partnership Agreement.

2. [*Plaintiff's*] acquisition of an interest in [*the partnership in dissolution*] and allocations if a percentage interest in [*the partnership in dissolution*] for a period of almost twenty years have been determined by the provisions of the Partnership Agreements and prior agreements consistently applied. Such interest includes [*plaintiff's*] succession to a percentage of the interest of partners who have withdrawn, retired or died, which was acquired by him as determined by and in accordance with the terms of the Partnership Agreement.

3. [*Plaintiff*] has received the benefits of the Partnership Agreement during the entire period he remained a member of [*the partnership in dissolution*].

4. By reason thereof any accounting to [*plaintiff*] of his partnership interest should be determined in accordance with the terms of the Partnership Agreement.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

1. An accounting to [*plaintiff*] other than in accordance with the terms of the partnership could result in unjust enrichment to [*plaintiff*] at the expense of existing partners and persons who retired or withdrew as partners and the beneficiaries of the estates of deceased partners.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

1. Amounts paid by [*the partnership in dissolution*] to or on behalf of [*plaintiff*] subsequent to [*date*] must be set off against the amount determined as his interest in the partnership as of [*date*].

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

1. For some years prior to dissolution of the partnership on [*date*], [*plaintiff*] failed and refused to undertake duties expected of a partner of [*the partnership in dissolution*].

2. [*The partnership in dissolution*] sought to provide a resolution to the problems by proposals for [*plaintiff's*] retirement with compensation substantially above that provided by the Partnership Agreement, but these offers were rebuffed by [*plaintiff*].

3. By reason thereof, the partnership of [*the partnership in dissolution*] was dissolved as of [*date*].

4. Despite the fact that he was not a member of the New Partnership of _____, [*plaintiff*] willfully remained in the offices of

[*new partnership*], demanding services from the staff of the firm and causing confusion and disruption in the offices.

5. [*Plaintiff*] has further made false and derogatory statements concerning [*new partnership*] to clients and others.

6. By reason of his conduct and unclean hands, [*plaintiff*] should be denied any relief beyond payment for his capital interest in accordance with the terms of the Partnership Agreement.

WHEREFORE defendants demand judgment dismissing the complaint herein, together with the costs and disbursements of this action

[c]—Discovery

As previously discussed, discovery in an accounting action is generally limited to proof of the right to an accounting and discovery concerning the partnership's financial condition will generally not be granted until after the right to an accounting is ordered by the court. Nevertheless, the accounting process is dependent on the availability for review of documents demonstrating the partnership's assets and liabilities. It is only from a review of these documents that an expert can value the partnership and ultimately the partner's share. The following form is a sample request seeking financial documents needed for an accounting.

X

PARTNER
Plaintiff

-against-

LAW FIRM, LLP
Defendants

X

PLEASE TAKE NOTICE THAT Plaintiff Partner requests that Defendant Partnership provide documents in response to the following requests by [*date*].

INSTRUCTIONS

1. Any information withheld pursuant to a claim of privilege or pursuant to the attorney work-product doctrine must be disclosed. Plaintiff hereby requests a privilege list to be provided simultaneously with any response to this request.

2. This request shall be deemed continuing. All responses to this request must be supplemented from time to time as you become

aware of additional responsive documents, or as additional responsive documents come into your possession, custody or control.

3. Unless otherwise indicated in the request, the documents to be produced shall be those dated, created, prepared, sent, received or otherwise applicable, governing or effective from _____ through the date of this production.

DEFINITIONS

1. "Complaint" means the Complaint in this action dated _____.

2. "Answer" means Partnership Answer with affirmative defenses in this action dated _____.

3. "Partner" means the Plaintiff.

4. "Partnership" means Defendant or its affiliates, partners, owners, shareholders, officers, directors, employees, agents, attorneys, or other persons or entities acting or purporting to act on behalf of Partnership.

5. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise). Without limiting the foregoing, "communication" includes all letters, memoranda, telephone conversations (without regard to the location where the conversation originated), face-to-face conversations, meetings, visits and conferences.

6. "Document" means all written or graphic matter or any other means of preserving thought or expression of every type and description, including but not limited to originals, drafts, computer-sorted and computer-retrievable information, copies or duplicates that are marked with any notation or annotation, copies or duplicates that differ in any way from the original, correspondence, memoranda, reports, notes, minutes, contracts, agreements, books, records, vouchers, invoices, purchase orders, ledgers, diaries, logs, calendar notes, computer printouts, computer disks and programs, price quotations, sales records, card files, price lists, press clippings, sworn or unsworn statements of employees, requisitions, purchasing manuals or guidelines, lists, audit workpapers, financial analysis, tables of organizations, advertisements or other promotional material, audited and unaudited financial statements, receipts, bank statements, newspapers or newsletters, diagrams, photographs, and other writings or recordings. A draft or non-identical copy is a separate document within the meaning of this term. "Document" also includes any removable "Post-it" notes or other attachments affixed to any of the foregoing.

7. "Person" means any natural person, business, corporation, partnership, proprietorship, organization, affiliated group, association, legal or governmental entity or any other entity.

8. "Concerning" and "concern" mean relating to, referring to, pursuant to, in connection with, describing, evidencing, supporting, summarizing, memorializing or constituting.

9. "And" and "or" shall each be construed broadly and shall each mean "and" or "or" or "and" and "or" wherever such meaning broadens the meaning of any sentence or phrase.

10. "Each," "any" and "all" shall be construed broadly and each of them shall mean "each," "any" or "all" or "each," "any" and "all" wherever such meaning broadens the meaning of any sentence or phrase.

11. The singular form of any word includes the plural and vice versa.

REQUESTS

1. All documents concerning Partnership cash or cash equivalents as of *[date]*.

2. All documents concerning the accounts receivable of Partnership as of *[date]*.

3. All documents concerning the work in process of Partnership as of *[date]*.

4. All documents concerning any client funds held by or on behalf of Partnership of *[date]*.

5. All documents concerning any real property owned by Partnership as of *[date]*.

6. All documents concerning the furniture or equipment owned by Partnership as of *[date]*.

7. All documents concerning any leases entered into by Partnership as of *[date]*.

8. All documents concerning any investments of Partnership as of *[date]*.

9. All documents concerning any deferred rentals of Partnership as of *[date]*.

10. All documents concerning the value of Partnership's libraries as of *[date]*.

11. All documents concerning the goodwill of Partnership as of *[date]*.

12. All financial statements of Partnership.

13. All tax returns of Partnership.

14. All documents concerning Partner's ownership interest in Partnership.

15. To the extent not previously requested, all documents reflecting the assets whither on or off the balance sheet of Partnership as of [date].

16. All documents concerning any debts owed by Partnership as of [date], including but not limited to, lines of credit; bank loans; or promissory notes.

17. All documents concerning any accounts payable of Partnership as of [date].

18. All documents concerning any accrued expenses of Partnership as of [date].

19. All documents concerning any amounts due to clients by Partnership as of [date].

20. All documents concerning any amounts due to partners or former partners by Partnership as of [date].

21. All documents concerning any liability concerning pensions owed by Partnership as of [date].

22. To the extent not already produced, all documents setting forth all the liabilities of Partnership as of [date].

23. All documents provided to or otherwise identified to any expert retained or consulted by Partnership or its counsel in connection with this action, including but not limited to retainer letters, memoranda concerning scope of work and assumptions, and underlying client papers.

24. To the extent not already produced, documents on which Partnership intends to rely in the arbitration of this matter.

[d]—The Court Order

In the event a court orders the accounting it is important that the actual order provides sufficient detail to permit the accounting to proceed. The following form sets forth a sample order.

X

PARTNER
 Plaintiff

-against-

LAW FIRM, LLP
 Defendants

X

Plaintiff, _____, having brought this action for an accounting of his partnership interest in defendant _____, a partnership in dissolution, and for certain other relief, and having moved this Court by Order to Show Cause, dated _____, for an order:

- (1) Pursuant to [*relevant statute or rule*], restraining and enjoining, *pendente lite*, the defendants, their agents, attorneys, and anyone acting for or in their behalf, from in any way impeding the just and fair accounting of the assets and debits of [*the partnership in dissolution*]; and

Defendants by Notice of Motion dated _____, having moved this Court for an order:

- (1) Pursuant to [*relevant statute or rule*], dismissing the First Cause of Action of plaintiff's Complaint for failure to state a claim upon which relief can be granted;

Now, upon reading and filing the Notice of Motion of the defendants to Dismiss the Complaint, dated _____; the Affidavit of _____ in Support of the Motion to Dismiss, duly sworn to on [*date*], together with the exhibits annexed thereto; the Affidavit of [*plaintiff*] in Further Support of the Motion in Opposition to Defendants' Motion to Dismiss the Complaint, sworn to on [*date*], together with the exhibits annexed thereto; the Order to Show Cause, dated _____; the Reply Affidavit of _____ sworn to on [*date*] in Support of the Motion to Dismiss the Complaint; the Reply Affidavit of _____, sworn to on [*date*], in opposition to defendants' Motion to Dismiss the Complaint; the Affidavit of [*plaintiff*] sworn to on [*date*]; and the Affidavit of _____ sworn to on [*date*]; and

The Motions having been heard by this Court on [*date*], and due deliberation having been had thereon, and the Motion of plaintiff having been granted, and the Motion of defendants having been denied, and on filing the decision of the Court, dated _____; it is

ORDERED, that defendants, upon service of a copy of this order with notice of entry, shall account to the plaintiff, pursuant to Section _____ of the [*relevant partnership statute*], for plaintiff's interest in [*the partnership in dissolution*] as of [*date*], being the date of the dissolution of [*the partnership in dissolution*], and for all income received, and expenses and disbursements necessarily incurred in the operation of the partnership business, and for the management and operation of the partnership business and all of the real and personal property and any other asset belonging to the partnership, and for the profits and losses, if any, of the partnership and for all the transactions and dealings of the partnership; and it is further

ORDERED, that the matter of taking and stating the said accounts is referred to an Official Referee, to take and state all of the accounts of [*the partnership in dissolution*] and to hear and

determine the interest of plaintiff in [*the partnership in dissolution*] as of [*date*], the date of dissolution thereof. To facilitate the taking and stating of the accounts, defendants are to produce before the Official Referee, as he may direct, under oath, all books, contracts, files, reports, papers and writings under their custody or control, relating thereto, or to the dealings of the partnership, or to its assets, and they are to be examined under oath as the Official Referee may direct. The Official Referee in taking the accounts is to make all just allowances to the parties as between themselves and to determine what, on the balance of the account, shall appear to be due from the defendants to the plaintiff or from the plaintiff to the defendants; and it is further

ORDERED, that the defendants shall permit plaintiff and/or plaintiff's accountant and/or his attorney to enter upon the business premises of the defendants for the purpose of examining any books, checks, records, files, papers, reports, writings, or any other memoranda relating to the partnership business of [*the partnership in dissolution*] or under defendants' control relating thereto or to the dealings of the partnership or to any of its assets, during business hours and make a complete and independent audit of the resources and business of the partnership and make complete copies and excerpts of any books, records, reports and/or any other memoranda relating to the partnership activities; and it is further

ORDERED, that defendants shall make available to the plaintiff and/or plaintiff's attorneys and/or accountants, all business records, documents, files, writings, and papers, from [*the partnership in dissolution*] for use in the independent audit, including partnership papers, books, records, contracts, memoranda, and any other writings in the possession of the defendants, their accountants or other agents; and it is further

ORDERED, that all documents produced by defendants in the accounting proceeding shall be kept confidential among plaintiff, plaintiff's attorneys and his accountant, and shall not be disclosed to any other person or used for any purpose other than for this accounting proceeding; and it is further

ORDERED, that the Court on Motion may make such other and further protective orders as are appropriate to protect any party herein from undue burden or harassment, and to provide for the disclosure of relevant, material and non-privileged documents and evidence including but not limited to orders limiting or regulating the production of documents provided for by this Order; and it is further

ORDERED, that the defendants, their agents, attorneys and anyone acting for or in their behalf are enjoined from denying plaintiff access to the files of his/her clients to the extent that upon plaintiff's

written request defendants shall promptly make available to the plaintiff any file upon which plaintiff has worked; and it is further

ORDERED, that defendants' Motion for an order dismissing the plaintiff's First Cause of Action for failure to state a cause of action is denied.

[e]—Form of Accounting

An accounting is performed by computing the law firm's assets less its liabilities, with the balance hypothetically apportioned among the partners to fix a former partner's share of the partnership.¹⁷ The actual accounting calculation should be presented simply so that a court or other finder of fact^{17.1} can, with relative ease, determine, how the calculation was reached and what the partner's share is. The format for such an accounting under the Uniform Partnership Act¹⁸ whereby the interest of a former partner would be determined is as follows:

¹⁷ See U.P.A. § 43. See also, *Dawson v. White & Case*, 88 N.Y.2d 666, 670, 649 N.Y.S.2d 364, 672 N.E.2d 589 (1996).

^{17.1} The finder of fact may be an arbitrator. In *Maroney v. Hawkins*, 50 A.D.3d 862, 855 N.Y.S.2d 667 (2008), the partnership agreement provided for arbitration in the event of disagreement of a partner's evaluated share on leaving the firm. The agreement also provided for firm members to be bound by an appraiser's report only if the report was agreed to by all parties. The court found that one member was not bound by his own expert's report even though the other member did not dispute the valuation. Instead, the court held that to be bound, both parties were required to agree to the appraisers' report. Accordingly, the issue of value became subject to arbitration.

¹⁸ See U.P.A. § 43.

**Accounting of _____, LLP
to [Former Partner]
as of _____, 2002 [date of dissolution]**

Index of Accounting	[Former Partner] Accounting as per _____, LLP
Assets -----	
1.1 Cash & Cash Equivalents	\$
1.2 Client Account Receivables and Work in Process	\$
1.3 Other Account Receivables	\$
1.4 Prepaid Expenses	\$
1.5 Client Escrow Funds	\$
1.6 Real Property	\$
1.7 Furniture Fixtures	\$
1.8 Computer Equipment	\$
1.9 Library	\$
1.10 Investments	\$
1.11 Artwork	\$
1.12 Deferred Rentals	\$
1.13 Other Assets	\$
Goodwill	\$
TOTAL ASSETS	\$
Liabilities -----	
2.1 Loans and Notes Payable	\$
2.2 Accounts Payable & Accrued Expenses	\$
2.3 Due to Clients	\$
2.4 Due to Partners, Former Partners	\$
2.5 Long Term Debt (Current)	\$
2.6 Long Term Debt (@ NPV)	\$
TOTAL LIABILITIES	\$
NET ASSETS	\$
[FORMER PARTNER'S] SHARE (__%)	\$

(Text continued on page 1-37)

Once the accounting has been rendered by the law firm, the former partner and/or his accountant should be provided a reasonable period of time to examine any books, checks, records, files, papers, writings, or any other memoranda relating to the partnership's business, including financial statements and tax returns. This will allow the former partner to make a complete and independent audit of the accounting. Once the former partner's independent examination has been completed, he would then file any formal objections to the accounting, which would then be referred to the trial court for resolution and determination.

[f]—Statutes of Limitations

Determining when the statute of limitations begins to run on the right to an accounting is a frequently litigated issue, and the courts distinguish between a statute of limitations running in an action by a third party against the defunct partnership, which is generally the date partnership affairs are wound up,¹⁹ and an action brought by a former partner for an accounting, which is generally the date of dissolution.²⁰ The statutes of limitations vary from state to state, but the majority of courts seem to agree that the limitations period begins to run from the date of dissolution of the partnership.²¹ It is important to note that the courts have different methods of determining when the dissolution occurred. Some courts recognize the date of dissolution as being the day when the first formal action was taken to dissolve the partnership²² while

¹⁹ *Hodge v. Kennedy*, 198 Va. 416, 94 S.E.2d 274 (1956) (statute of limitations for an action against a defunct partnership begins to run from the time its affairs are wound up, not from the date it ceases to do business).

²⁰ See, e.g.:

Colorado: *Tafoya v. Perkins*, 932 P.2d 836 (Col. App. 1996) (under Colorado law, absent an agreement to the contrary, when a withdrawing partner seeks an accounting against any partners winding up or continuing the business, the cause of action accrues on the date the withdrawing partner ceases to be associated with the business; once a partner ceases to be associated with the partnership, not only does it dissolve any still-existing partnership, it also causes the statute of limitations to begin to run on his own claim for an accounting).

Idaho: *Ramseyer v. Ramseyer*, 98 Idaho 47, 558 P.2d 76 (1976) (a cause of action for a partnership accounting accrues "at the date of dissolution, in the absence of any agreement to the contrary").

New Mexico: *Durham v. Southwest Developers Joint Venture*, 128 N.M. 648, 996 P.2d 911 (1999) (filing a petition in bankruptcy effectively dissolves a partnership under New Mexico law and starts the statute of limitations running for purposes of demanding an accounting).

²¹ *Id.*

²² See, e.g.:

Tenth Circuit: *Levy v. Levitt*, 2001 WL 184230 (10th Cir. Feb. 26, 2001).

State Courts:

others deem the date of dissolution to be the date that significant assets from the partnership have been sold.²³ In a case in which the date of dissolution was unclear and the defendants did not submit the issue to the jury, at least one court ruled in favor of the plaintiffs on this issue when they were able to construe a scenario that placed the plaintiff's claim within the statute of limitations.²⁴ Thus, it may be advantageous for a defendant to submit this issue to the jury when it is in dispute rather than letting a court make that determination.

There are instances in which courts have been reluctant to start the statute of limitations running from the date of dissolution. In one case, the court recognizing that it would have been impossible for the plaintiff to get an accurate accounting as of the date of dissolution since the partnership's assets were not sold until years after the date of dissolution and the proceeds from those sales were not distributed until years after the sale, held that the action was not barred by the statute of limitations.²⁵ Cases such as this, however, are fact specific and should be considered the exceptions to the general rule that the statute of limitations begins to run from the date of dissolution.

Tennessee: Riggan v. Askew, 1997 WL 675462 (Tenn. App. Oct. 29, 1997).

Washington: Malnar v. Carlson, 128 Wash.2d 521, 910 P.2d 455 (1996).

²³ See, e.g.:

Third Circuit: Lieberman v. Ali (In re Fineberg), 202 B.R. 206 (E.D. Pa. 1996).

State Courts:

Kansas: Green v. Kensinger, 199 Kan. 220, 429 P.2d 95 (1967).

²⁴ See Cheves v. Williams, 993 P.2d 191 (Utah 1999).

²⁵ Dicarlo v. Lattuca, 1998 WL 1182104 (Mass. Super. Feb. 4, 1998).

§ 1.08 Partnership by Estoppel

A partnership can also be formed as a result of representations by individuals or the firm to third parties that a partnership exists. When such representations are made and are relied upon by a third party to its detriment, a partnership by estoppel is formed even though there is no actual partnership agreement. When this happens, the putative partner, by estoppel, can bind those with whom the partner has represented that a partnership exists and can create liability as though a partnership existed.¹

The Uniform Partnership Act states:

“(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

“(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

“(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

“(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results;

¹ See, e.g., *Community Capital Bank v. Fischer & Yanowitz*, 47 A.D.3d 667, 850 N.Y.S.2d 508, 509 (2008) (“a person is estopped from denying the existence of a partnership when he, by words spoken or written or by conduct represents himself, or consents that another represent him, as a partner in an existing partnership”; no partnership by estoppel when defendants made no representations to plaintiff that a partnership existed; no indication that the plaintiff relied on existence of a partnership when retaining one of the attorneys for legal representation).

but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representations.”^{1.1}

The Revised Uniform Partnership Act abandons the phrase “partnership by estoppel” in favor of “Liability of Purported Partner.”^{1.2} Pursuant to the Official Comment of Section 308 of the Revised Partnership Act, “Section 308 continues the basic provision of partnership by estoppel from Uniform Partnership Act section 16, now more accurately entitled “Liability of Purported Partner.”

In the case of attorneys, however, a person representing himself as a partner of a firm when he is not truly a partner may not only create a partnership by estoppel with its incumbent liabilities, as under the U.P.L., but is also violating the rules of professional conduct.² According to the ABA Model Rules of Professional Conduct:

“Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.”³

The basis for the ethical restriction is that “a client is entitled to know who or what entity is representing the client.”⁴ Accordingly, the State Codes of Professional Responsibilities strictly limit how attorneys practicing together can represent their relationship to the public in letterhead, correspondence and advertising.⁵ The State Codes of Professional Responsibilities states:

“A lawyer shall not practice under a trade name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive. . . . Such, ethical issues have arisen in situations when existing partnerships have created affiliations with other firms to supplement their own resources.”⁶

^{1.1} U.P.L. § 16.

^{1.2} R.U.P.A. § 308.

² ABA Model Rules of Professional Conduct, Rule 7.5. See also, State Codes of Professional Responsibilities, DR 2-102(C).

³ ABA Model Code of Professional Conduct, *ABA/BNA Lawyers' Manual on Professional Conduct*, Rule 7.5 (1994).

⁴ ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 88-356 (1988).

⁵ State Codes of Professional Responsibilities, DR 2-102(B).

⁶ *Id.*

A “silent partnership or affiliation” between two firms, each specializing in different areas, requires disclosure to clients.⁷ Such silent partnerships are to be discouraged and clients are required to be informed of every affiliation between attorneys practicing together.

“[L]etterheads, law lists, announcements and similar public notices by lawyers are permitted to carry certain information for the purpose of aiding members of the public, and each lawyer must scrupulously avoid misrepresenting his professional status and avoid misleading persons with whom he deals. While [it] is clear that a lawyer should not associate with another lawyer in a matter without the consent of the client and should not even seek counsel from another lawyer without the client’s consent if any confidence or secret might be revealed to such other lawyer . . . , and while [it] is clear that a lawyer ought to seek consent to consult with another lawyer whenever expert or outside consultation is needed . . . , such Code provisions are for the protection of the client and not for the benefit of the lawyer. . . . [T]he listing or identification of lawyers on firm letterheads [is permitted] only if the lawyers are partners (or retired or deceased former members) or associates or have the relationship described as ‘Of Counsel’ or equivalent.”⁸

Accordingly, representations to clients, whether in letterheads, announcements, notices or verbally, must be scrupulously guarded to ensure that neither an inadvertent partnership by estoppel is created nor an ethical violation exists.

⁷ ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 1265 (“Two Partnerships in Same City Identifying Each Other as Continuing Correspondents”) (1973).

⁸ *Id.*

§ 1.09 Partnership Tiers and Differential Liability

The general partnership is the most common form by which law firms in the United States provide legal services to their clients. Each year law school graduates joining established firms aspire to someday “make partner,” an accomplishment which has been a marker of success. Although many established law firms operate as general partnerships with each partner having an equity interest, the nature of the practice of law has caused many partnerships to research and fine-tune both their structure and the manner in which they conduct their partnership, especially when it comes to admitting new partners and sharing in partnership profits and losses. Accordingly, some firms have different classes of partners with varying degrees of liability.

[1]—Two-Tier Partnerships

Many law firms operate as “two-tier” partnerships in which one tier typically retains equity in the partnership while the other does not. Non-equity partners are often referred to as “fixed-income” partners, “contract” partners, or “guaranteed share partners.” Unlike “equity” or “capital” partners (who have made a capital investment in the partnership), non-equity partners receive a fixed compensation, do not share in partnership profits or losses, and in most instances have no interest in and are not obligated to contribute to the partnership’s capital. In some partnerships, non-equity partners are able to participate in a “bonus pool” when compensation is determined.

Non-equity status has been successfully employed by many partnerships as a means of getting to know an associate who has come up through the ranks or a lateral partner who has just joined the partnership from another firm. In a sense, this allows for a courtship period when partners can get to know each other without significant commitments on either side. For the new partner, it means not having to make a significant capital contribution, and for the partnership, it means not having to share a percentage of the profits with an additional person as well as an interest in the assets of the firm.

At some partnerships, there may be the expectation that non-equity partners will willingly be promoted to equity partner after a certain defined period of time. At other partnerships, there may be no expectation that a non-equity partner will ever become an equity partner. Many partnerships are of the opinion that having the flexibility to admit non-equity partners allows them to retain valuable well-regarded associates who do not fulfill all the partnership’s criteria for becoming equity partners or who, because of prevailing economic conditions, may not want to become an equity partner or who may not have the financial wherewithal to make a capital contribution.

(Text continued on page 1-41)

The definition of a non-equity partner can vary from partnership to partnership. As discussed, typically, there is no capital contribution expected of a non-equity partner and there is an agreed upon fixed income established, as opposed to a sharing of the profits. The title of “partner” is still conferred on the non-equity partner, and to the general public there is no distinction and no knowledge of the two tiers. A further advantage to non-equity designation is the right to attain partnership status without having to assume any of the rights or liabilities.¹

In the typical partnership agreement, non-equity partners are often given the right to attend all partnership meetings, vote on certain partnership matters, participate in management and sit on firm committees, receive the same medical, disability, and life insurance benefits as equity partners, and receive death and retirement benefits.

An equity partner is usually someone who has made a capital contribution to the partnership, is assigned a percentage equity interest, and shares in the profits and losses of the partnership. Typically, an equity partner generates business for the partnership or is responsible for significant clients and client matters. An equity partner is usually viewed as an entrepreneur who, through practice development, delegation and supervision, contributes more to the bottom line of the partnership than he takes out.

An equity partner is expected to expand the partnership’s client base and bring in new business. Equity partners also may have the sole right to vote on certain issues, such as admitting or expelling a partner, dissolution or termination of the partnership, and compensation. Finally, equity partners are usually responsible for the liabilities of the law firm, including liability to clients and liability for contracts entered into by the partnership.

A well-drafted partnership agreement must address the rights, obligations and responsibilities of both equity and non-equity partners. In so doing, a significant goal of the agreement is to eliminate any doubt as to the partner’s status and to define the corollary obligations of each tier.

[2]—Vicarious Liability

Most states dictate that each partner in a general partnership has vicarious liability for the actions of all other partners. Each partner is

¹ Some commentators believe that since non-equity partners are held out to the public simply as a “partner,” they share the same liability to clients as equity partners. For the same reason, in the case of contracts entered into the partnership with third parties, absent a specific provision in the contract limiting the liability of non-equity partners, their liability may be the same as that of an equity partner. See Borgeson and Boardt, *California Law Business* (1992).

an agent of the partnership with authority to bind the partnership,² and each partner is vicariously liable for partnership obligations and all wrongful acts committed by other partners or by associates and employees of the partnership acting in the ordinary course of business.³ The partner's liability is vicarious or imputed solely because of the partner's relationship to a wrongdoer.⁴

There are generally three types of liabilities to which a partner may be exposed.

- (1) Liability to clients in malpractice for the actions of each partner and associate in the firm;
- (2) Liability for contracts entered into by the partnership; and
- (3) Liability arising from fiduciary duties to other partners in the partnership.

Although law firms were originally organized as general partnerships (and many law firms continue to utilize the general partnership format), law firms now have a wide choice of organizational forms available to them which may limit vicarious liability in these three

² See: U.P.A. § 9 (1969); RUPA § 301 (1994). Under RUPA § 303, the partnership can partially limit the apparent authority of individual members by filing a "statement of partnership authority."

³ See, e.g.: U.P.A. § 15 (partners jointly and severally liable for breach of trust or wrongful acts or omissions by a partner acting in the course of partnership business and jointly liable for all other partnership debts and obligations); RUPA § 305 (partnership liable for injuries caused by breach of trust or wrongful acts, omissions, or other actionable conduct of a partner); RUPA § 306 (all partners jointly and severally liable for all obligations of the partnership).

Vicarious liability is imposed only when the wrongful act is in the course of business of the partnership. See:

Alabama: Carlton v. Alabama Dairy Queen, 529 So.2d 921 (Ala. 1988).

Illinois: Comfort v. Wheaton Family Practice, 229 Ill.App.3d 828, 594 N.E.2d 381 (1992).

Indiana: Husted v. Gwin, 446 N.E.2d 1361 (Ind. 1983).

Michigan: Matthews v. Wosek, 44 Mich. App. 706, 205 N.W.2d 813 (1973).

Minnesota: Shetka v. Kueppers, Kueppers, Von Feldt & Salmen, 454 N.W.2d 916 (Minn. 1990).

Nebraska: Martinez v. Koelling, 228 Neb. 1, 421 N.W.2d 1 (1988).

Washington: Nuttall v. Dowell, 31 Wash. App. 98, 639 P.2d 832, review denied 97 Wash.2d 1015 (1982).

See also, Atkinson v. Haug, 424 Pa. Super. 406, 622 A.2d 983 (1993) (no law firm liability for alleged negligent acts of associate when associate was not in an attorney-client relationship with the plaintiff).

But *cf.*, Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F. Supp. 360 (S.D.N.Y. 1992) (partnership liable when lawyer used firm facilities to perpetrate fraud on client even though activities were not the practice of law).

⁴ Hughes v. Johnson, 764 F. Supp 1412 (D. Col. 1991).

areas. Not only may law firms be organized as general partnerships, but also as professional corporations or professional associations (PCs), limited liability companies (LLCs), and limited liability partnerships (LLPs), depending upon the state or states in which the law firm conducts its business. Each of these organization forms has different organizational requirements and provides different protection against vicarious liability.⁵

Typically, such statutes provide a limit to a partner's personal liability. The liability is usually related to the amount of a partner's capital investment in the partnership. This limitation, however, is inapplicable if the partner is the actor in a claim for professional liability. That is, if the partner is the one claimed to have committed professional malpractice, most limited liability statutes do not provide the partner with the limit of liability of his capital contribution.

[3]—Joint and Several Liability

The general rule of joint and several liability is that all partners in a general partnership are jointly and severally liable for every loss or injury to a third person chargeable to a partnership because of a partner's wrongful act or omission, or because of an act done with the authority of the co-partners, or for a partner's breach of trust.⁶ All partners are also jointly liable for all other debts and obligations of the partnership.⁷

Thus, ordinarily, the partnership is liable jointly only on contract, while each partner is liable severally in the event that joint partnership

⁵ See Chapter 2 *infra*.

⁶ *Second Circuit*: Benvenuto v. Taubman, 690 F. Supp 149 (E.D.N.Y. 1988).

Tenth Circuit: Hughes v. Johnson, 764 F. Supp 1412 (D. Col. 1991).

State Courts:

Arizona: Catalina Mortgage Co., Inc. v. Monier, 166 Ariz. 71, 800 P.2d 574 (1990).

Connecticut: Castronovo v. Bloom, 1996 WL 165567 (Conn. Super. March 25, 1996).

Delaware: Mauthe TIA International Peeps v. Adult Entertainment Commission, 1993 WL 485924 (Del. Super. Oct. 8, 1993).

Georgia: Block v. Woodbury, 211 Ga. App. 184, 438 S.E.2d 413 (1993).

Illinois: Sternberg Dredging Co. v. Sternberg's Estate, 10 Ill.2d 328, 140 N.E.2d 125 (1957); *In re Brown*, 389 Ill. 516, 59 N.E.2d 855 (1945).

North Dakota: Olson v. Fraase, 421 N.W.2d 820 (N.D. 1988).

⁷ *Arizona*: Catalina Mortgage Co., Inc. v. Monier, 166 Ariz. 71, 800 P.2d 574 (1990).

California: Riddle v. Lushing, 203 Cal. App.2d 831, 21 Cal. Rptr. 902 (1962).

Connecticut: Castronovo v. Bloom, 1996, Conn. Super. Lexis 763 (1996).

Illinois: Sternberg Dredging Co. v. Sternberg's Estate, 10 Ill.2d 328, 140 N.E.2d 125 (1957); Pioneer Bank & Trust Co. v. Austin Bank of Chicago, 279 Ill. App.3d 9, 664 N.E.2d 182 (1996).

New York: N.Y. Prtnrshp. L. § 26(a)(1).

assets are insufficient to pay partnership debts.⁸ A contractual obligation of partners is joint and several but nevertheless creditors may at law satisfy an execution out of separate property of any one or more of the debtor partners.⁹ A partner's individual liability dates from the time when the obligation was incurred and arises simultaneously with any joint liability, so that in theory, with respect to the ultimate rights of the creditor, the contractual obligation of a partnership is incurred by each and all.¹⁰

A cause of action against a partnership for breach of contract does not lie against individual partners absent an allegation that the partnership is insolvent or otherwise unable to meet its obligations.¹¹ Tort liability of partners of a partnership for acts committed in the course of the partnership's business is also joint and several.¹²

⁸ *Indiana*: Thompson v. Wayne Smith Construction Co., 640 N.E.2d 408 (Ind. App. 1994).

Nebraska: Martinez v. Koelling, 228 Neb. 1, 421 N.W.2d 1 (1988).

Ohio: Wayne Smith Construction Co. v. Wolman, Duberstein & Thompson, 65 Ohio St.3d 383, 604 N.E.2d 157 (1992).

Utah: McCune & McCune v. Mountain Bell Telephone Co., 87 Utah Adv. Rep. 9, 758 P.2d 914 (1988).

But see:

Alabama: Head v. Henry Tyler Construction Corp., 539 So.2d 196 (Ala. 1988) (creditor need not first exhaust partnership dispute).

Arizona: Catalina Mortgage Co., Inc. v. Monier, 166 Ariz. 71, 800 P.2d 574 (1990) (same).

New York: Ruzicka v. Rager, 305 N.Y.191, 111 N.E.2d 878 (1953).

⁹ *Second Circuit*: Eagle Associates v. Bank of Montreal, 926 F.2d 1305 (2d Cir. 1990).

State Courts:

New York: Midwood Development Corp. v. K 12th Associates, 146 A.D.2d 754, 537 N.Y.S.2d 237 (1989).

Ohio: Alexander v. Morgan Roof & Co., 31 Ohio St. 546 (1877).

¹⁰ *Patrikes v. J.C.H. Service Station, Inc.*, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. City), *aff'd* 180 Misc. 927, 46 N.Y.S.2d 233 (N.Y. Sup.), *appeal denied* 266 A.D.2d 924, 44 N.Y.S.2d 472 (1943).

¹¹ *Seventh Circuit*: United States v. Wright, 57 F.3d 561 (7th Cir. 1995).

State Courts:

New York: Nate B. & Frances Spingold Foundation v. Wallin, Simon, Black & Co., 184 A.D.2d 464, 585 N.Y.S.2d 416 (1992).

Indiana: Thompson v. Wayne Smith Construction Co., Inc., 640 N.E.2d 408 (Ind. 1994).

Nebraska: Robertson v. Southwood, 233 Neb. 685, 447 N.W.2d 616 (1989).

¹² *Arizona*: Catalina Mortgage Co., Inc. v. Monier, 166 Ariz. 71, 800 P.2d 574 (1990).

New Jersey: Commonwealth Land Title Insurance v. Conklin Associates, 152 N.J. Super 1, 377 A.2d 740 (1977), *aff'd* 167 N.J. Super. 392, 400 A.2d 1208, *cert. denied* 405 A.2d 830 (N.J. 1979).

New York: Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935).

North Carolina: Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Generally, for a partnership obligation to arise, the partnership must have existed when the liability was incurred. A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that his liability must be satisfied only out of partnership, rather than personal, property.¹³

The issue of successor liability arose in one case in which a law firm included the sole shareholder and former associate of the predecessor firm and assumed much of the business of previous firm.¹⁴ The court drew a distinction between continuation of the “entity” and continuation of the “enterprise” and held that continuation of the enterprise was not a basis for imposing successor liability.¹⁵

¹³ U.P.A § 17. See also, *Wolcott v. Ginsberg*, 697 F. Supp. 540 (D.D.C. 1988).

¹⁴ *Eha Consulting Group, Inc. v. Hardin & Associates, P.C.*, 2010 WL 1137514, at *3 (D. Md. March 19, 2010) (applying Maryland law).

“The mere continuation or continuity of entity exception applies where there is a continuation of directors and management, shareholder interest and, in some cases, inadequate consideration. The gravamen of the traditional mere continuation exception is the continuation of the corporate entity rather than continuation of the business operation. . . . In comparison, [A] continuity of enterprise analysis seeks to establish whether there is substantial continuity of pretransaction and posttransaction business activities resulting from the use of the acquired assets.” (Internal quotation marks omitted.)

¹⁵ *Id.*

§ 1.10 Comparing the Uniform Partnership Act with the Revised Uniform Partnership Act

With some notable exceptions, most states have adopted the Revised Uniform Partnership Act (RUPA).¹ Nevertheless, a few states have decided to remain with the original Uniform Partnership Act (UPA).² The two acts have a number of very important differences which can greatly affect the rights and obligations of partners, as well as the interpretation of a firm's partnership agreement. Those rights and obligations may also be affected by states varying the language of either uniform act from the original, and this can be compounded by courts from different states interpreting the identical statutory language in different ways. By including a choice of law provision in a partnership agreement, a law firm can apply either of the two acts. Accordingly, drafters of a partnership agreement should be aware of at least the basic differences between the two acts so as not to be caught unaware and unprepared should a legal issue arise during the life of the partnership.

[1]—History of the UPA and the RUPA

In 1902, the Conference of Commissioners on Uniform State Laws considered the concept of a uniform partnership law and directed the Committee on Commercial Law to draft a uniform partnership act.³ Dean James Barr Ames of Harvard Law School began the drafting process which was completed after his death by Dean William Draper Lewis of the University of Pennsylvania School of Law.⁴ In 1914 the Commissioners recommended that the Uniform Partnership Act be adopted by the legislatures of the various states.⁵ All fifty states, except Louisiana and the District of Columbia, adopted the act.

In 1994, the National Conference of Commissioners on Uniform States Laws completed the Revised Uniform Partnership Act, which continued some policies of the UPA, but which completely rewrote it.⁶ In 1996 the RUPA was amended to include sections concerning

¹ See, e.g.:

Florida: Fla. Stat. Ann. §§ 620.81001-620.9902.

Illinois: Ill. Ann. Stat., Ch. 805, §§ 206/100-805, § 206/1290.

New Jersey: N.J. Stat. Ann. §§ 42:1A-1-42:1A-56.

² See, e.g., the New York Partnership Act, which is based on the Uniform Partnership Act.

³ Callison, *Partnership Law and Practice, General and Limited Partnerships* § 1-1.

⁴ *Id.*

⁵ *Id.*

⁶ Hilman, Vestal and Weidner, *The Revised Uniform Partnership Act*, 1-2 (2005 Edition).

limited liability partnerships and foreign limited liability partnerships.⁷ Currently, the RUPA has been adopted in thirty-three states, the District of Columbia, Puerto Rico, and the United States Virgin Islands. New York has not adopted all or any part of the RUPA.⁸

[2]—Important Differences Between the UPA and the RUPA

[a]—Nonwaivable Rules

The UPA provides that partners have the right to establish all the parameters of their relationship in their partnership agreement.⁹ Accordingly, under the Uniform Partnership Act, a law firm may contravene the UPA by a contrary provision in its partnership agreement.¹⁰ For example, some state statutes provide that a partnership dissolves upon the change of membership,¹¹ but a well-drafted law firm partnership agreement will state that the firm continues and does not dissolve upon such a change. In short, under the UPA, the right of a law firm to contravene the Act in this regard is unfettered.

The RUPA, however, does not give a partnership an unfettered right to contravene the provisions of the Act through the partnership agreement. Instead, the RUPA states that certain of its provisions are not alterable.¹² Making certain statutory provisions unalterable is intended to preserve those rights and obligations that are fundamental to the relationship between law partners and between law partners and their firms.

In particular, RUPA contains a section entitled *Effect of Partnership Agreement; Nonwaivable Provisions*, which sets forth a list of provisions of the RUPA that are not waivable in the partnership agreement. The agreement may not:

- (1) eliminate the filing of the partnership certificate with the state secretary of state;
- (2) unreasonably restrict a partner's right to access to books and records;
- (3) eliminate the duty of loyalty, although the agreement may identify certain conduct which does not violate the duty and may authorize or ratify certain conduct that would otherwise violate the duty of loyalty;

⁷ *Id.*

⁸ *Id.*

⁹ U.P.A. § 18.

¹⁰ *Id.*

¹¹ See, e.g., N.Y. Prtnrshp. L. § 62.

¹² See R.U.P.A. § 103.

- (4) reduce the duty of care;
- (5) eliminate the obligation of good faith and fair dealing, although the agreement may set forth standards by which such conduct is measured;
- (6) vary the power to dissociate as a partner, except to require a written notice;
- (7) vary the right of one partner to seek court expulsion of another partner in certain specific circumstances;
- (8) vary the required wind up of a partnership in certain cases;
- (9) vary the governing law applicable to a limited liability partnership; and
- (10) restrict rights of third parties under the RUPA.¹³

The RUPA's limitation on the partnership agreement can greatly affect the rights and obligations of partners and partnerships. For example, a law firm partnership agreement applying the UPA may dramatically limit a partner's access to books and records. Such a provision would be prohibited under the RUPA if it were deemed to "unreasonably restrict" such access.¹⁴ In addition, some law firm partnership agreements narrowly define fiduciary obligations. If such narrowing was viewed as an "elimination" of fiduciary obligations, a court applying the RUPA could find such a provision to be unenforceable.

[b]—Partnership as an "Entity"

The UPA conceptually treats a partnership as an "aggregate" of its partners.¹⁵ Accordingly, on the change of membership of the partnership, the "old" firm dissolved and the "new" firm commenced.¹⁶ The RUPA eliminates this concept in favor of an entity theory of partnership. The RUPA succinctly provides: "A partnership is an entity distinct from its partners."¹⁷ As stated in the official commentary to the Act this provision provides: "there is no 'new' partnership just because of membership changes."¹⁸

Treating a partnership as an entity as opposed to the aggregate of its partners has a profound effect on a partner's rights. For example, unless the partnership agreement provides otherwise, pursuant to the Uniform Partnership Act, a change of membership of the partnership

¹³ *Id.*

¹⁴ R.U.P.A. § 403(b).

¹⁵ See the official comment to R.U.P.A. § 201.

¹⁶ U.P.A. § 29.

¹⁷ R.U.P.A. § 201.

¹⁸ Hilman, Vestal and Weidner, *The Revised Uniform Partnership Act*, 63 (2005 Edition).

results in the dissolution of the firm.¹⁹ This dissolution gives rise to a cause of action for an accounting in which the departed partner's partnership share is valued.²⁰ Under the RUPA, this would not necessarily be the case. Instead, as set forth in the official commentary: "The basic rule is that a partnership is dissolved and its business must be wound up, only upon the occurrence of one of the events listed in Section 801."²¹ Accordingly, there is no automatic dissolution. As set forth in the official comment:

"Revised Uniform Partnership Act's move to an entity theory is driven in part by the need to prevent a technical dissolution or its consequences. Under Revised Uniform Partnership Act not every partner dissociation causes a dissolution of the partnership. Only certain departures trigger a dissolution."²²

Accordingly, it is likely that cases decided under the UPA which have held that a law firm partner termination resulted in a partnership dissolution²³ and an accounting would be decided differently under the RUPA.

Treating a partnership as an "entity" under the RUPA also has a profound effect on the property rights of partners and partnerships. Property acquired by partnership is partnership, not individual partner, property,²⁴ and property becomes partnership property when acquired in the partnership's name, or in the name of a partner holding himself out as a partner or holding out existence of the partnership.²⁵ In addition, under RUPA, a partner does not have the right to receive in-kind distributions,²⁶ and the statute has a profound effect on the relationship between partners and their relation with the partnership as well as creditors in that it dictates who may be sued and the effect of judgment on partnership property and individual partner's assets.²⁷

¹⁹ U.P.A. § 29.

²⁰ U.P.A. § 38.

²¹ Hilman, Vestal and Weidner, *The Revised Uniform Partnership Act*, 292 (2005 Edition).

²² *Id.*

²³ See, e.g.:

Florida: Cadwalder, Wickersham Taft v. Beasley, 728 So.2d 253 (Fla. App. 1997).
New York: Bittetto v. F. Chau & Associates, LLP, 10 Misc.3d 595, 807 N.Y.S.2d 260 (N.Y. Sup. 2005).

See U.P.A. § 31.

²⁴ R.U.P.A. § 203.

²⁵ R.U.P.A. § 204(a).

²⁶ R.U.P.A. § 402.

²⁷ R.U.P.A. §§ 306-307.

[c]—The RUPA’s Filing Provisions

The RUPA provides for the filing of various partnership “statements” for which there are no comparable sections in the UPA. These statements enable both the partnership and the partners to file with the secretary of state a definitive “statement” setting forth partnership and partner status and rights.

For example, the RUPA provides for the filing of a Statement of Authority which sets forth the “authority or limitations on the authority” of certain partners concerning specified partnership transactions.²⁸ Accordingly, if a law firm wants its managing partner to be the only person with authority to enter into a lease, then the statement could so provide. On the other hand, the partnership may elect to limit the authority of certain partners in order to protect itself against *ultra vires* acts. However, a limiting statement is binding on third parties only if the third party has actual knowledge of the limitation.²⁹ The UPA differs in that all partners are clothed with the ability to bind the firm to transactions.³⁰

The RUPA also provides for the filing of a statement of dissociation, which is absent under the Uniform Partnership Act. Pursuant to the Revised Uniform Partnership Act, a dissociated partner may file a statement setting forth the name of the partnership and that the partner is dissociated from the firm.³¹ After ninety days from the time the statement is filed, third parties are bound and cannot hold the dissociated partners liable for continuing partnership liability.³² The UPA has no such provision. As a result, a withdrawing partner may have to prove independently the date of departure to third parties and may incur liability for post termination debt.³³

[d]—Fiduciary Duty: Abandoning the “Punctilio of Honor”

By far the most important difference between the UPA and the RUPA is the different treatment afforded fiduciary duty. Law firm partners owe one another “the duty of finest loyalty.”³⁴ Admittedly, this standard is not precise. One commentator has concluded that

²⁸ R.U.P.A. § 303.

²⁹ *Id.*

³⁰ U.P.A. § 9.

³¹ R.U.P.A. § 704.

³² *Id.*

³³ See, e.g.: *C.E. Hooper Inc. v. Perlberg*, 72 A.D.2d 687, 421 N.Y.S.2d 353 (1979); *59th & Park Associates v. Inselbuch*, 68 A.D.2d 838, 414 N.Y.S.2d 537 (1979).

³⁴ *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928).

fiduciary duty boils down to: “loyalty, care, fairness, and honesty to the partnership and co-partners.”³⁵

As a result of this less than clear statutory standard, much of the body of fiduciary duty law is based on the case law and, not surprisingly, it is far from clear. Accordingly the drafters of the RUPA sought to add some precision to the definition of “fiduciary duty” by enacting the exclusive parameters of a partner’s fiduciary duties. The RUPA provides:

“(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).

“(b) A partner’s duty of loyalty to the partnership and the other partners is limited to the following:

“(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

“(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

“(3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

“(c) A partner’s duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”³⁶

Under this limited definition of fiduciary duty, it is unclear whether certain acts deemed to be breaches of fiduciary duty under the UPA would be considered to be breaches of that duty under the RUPA.³⁷ For example, there is nothing on its face which would prevent the partnership from removing a partner purely for the self-interested profit motive of the partnership. In fact, contrary to common law statements of law firm fiduciary duty law, the RUPA specifically

³⁵ Callison, “Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond,” 1 J. of Small & Emerging Bus. L., 109, 110 (1997).

³⁶ R.U.P.A. § 404.

³⁷ Vestal, “Assume a Rather Large Boat: The Mess We Made of Partnership Law,” 54 Wash. & Lee L. Rev. 487 (1997).

states: “A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest.”³⁸ Quite at odds with this statement is the holding that a law firm breached its fiduciary duties under New York law when it ousted one of its partners in its Florida office.³⁹ In so ruling the court stated: “While life in the market place may well be made up of fear, greed and money, life in a partnership is not so composed.”⁴⁰ Perhaps under the RUPA, “fear, greed and money,” if not quite alive and well, unfortunately, have at least a “fighting chance” inside a law firm partnership.

³⁸ R.U.P.A. § 404(e).

³⁹ *Beasley v. Cadwalader, Wickersham & Taft*, 1996 WL 438777 (Fla. Cir. July 23, 1996) (applying New York law).

⁴⁰ *Id.* See also, Vestal, “Assume a Rather Large Boat: The Mess We Made of Partnership Law,” 54 Wash. & Lee L. Rev. 487 (1997), providing a detailed and interesting comparison of how this case may have been decided differently under the RUPA.