Section 3 Lawyers Departing from a Firm

3.1 Introduction

As noted above, lawyers are changing firms with increasing frequency, both leaving as well as joining ALAS firms. Although ALAS has not yet seen many claims arising from departing lawyers, we receive frequent inquiries on the subject. The most common questions concern: (1) communications with clients; (2) client files and other documents; and (3) solicitation of employees and staff of the departing lawyer's firm. A sample policy on departing lawyers, which addresses many of the issues covered here, is Attachment D and is Policy 20 in the *Prototype Lawyers' Manual*. ALAS also has prepared a Departing Lawyer Checklist, included as Attachment E.

There are other concerns when lawyers leave firms that are beyond the scope of this section. For a comprehensive treatment of many of those issues, including restrictive covenants that may limit or discourage departing lawyers from taking firm clients with them, *see* R. W. Hillman, *Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups* (2d ed. 1998, with annual supplements) (available from Aspen Publishers, Inc., (800) 638-8437; www.aspenpublishers.com); G. H. Cain, *Law Partnership Revisited* (2002) (available from the ABA, (800) 285-2221; www.ababooks.org (Product Code 5460035)). Many of these issues were addressed in a 2006 Annual General Meeting program in which Professor Hillman participated. A video recording of that program is available from the ALAS Loss Prevention Department. For a summary of the panel discussion, see "Understanding and Minimizing the Risk of Management Liability," *Journal*, Fall 2006, page 6. *See also* the MLI Guide, Sections 2.5 and 2.6.

3.2 Communications with Clients

When a lawyer decides to leave a firm, the most frequently asked questions concern how the change should be communicated to clients. On the one hand, a number of court decisions (cited in Section 3.2.4 below) remind us that the departing lawyer must be mindful of the fiduciary duties owed to the remaining partners and the obligation not to interfere with the firm's business. On the other hand, the lawyer has a duty under the rules of professional conduct to keep clients advised of any matters affecting the representation. *See generally* ABA Model Rule 1.4 and ABA Formal Opinion 99-414 (Sept. 8, 1999). *See also* the MLI Guide, Section 2.2.3. As discussed below, communications with clients about a lawyer's departure raise a variety of issues, including: (1) who should communicate the change to clients; (2) which clients should be advised of the change; (3) when should clients be advised of the change; and (4) what can or should be said to clients.

3.2.1 Notice to Clients

Whether a departing lawyer can or should communicate the impending departure to clients has been the subject of much debate. It seems reasonably clear today that in some states not only may the lawyer communicate the planned departure to clients, but the lawyer may have an ethical obligation to do so. ABA Formal Opinion 99-414 advises that a departing lawyer has a "duty" to advise clients of a change in affiliation. In Opinion 273 (Sept. 17, 1997), the District of Columbia Bar explained that the rationale for this obligation is that a change in firms is usually material to the client because it can affect billing and fees, staffing and other resources, and conflicts of interest. *Accord* Alaska Opinion 2005-2 (Sept. 8, 2005); Arizona Opinion 99-14 (Dec. 1999); Wisconsin Opinion E-97-2 (June 6, 1997); *Kentucky Bar Association v. Whitlock*, 2008 Ky. LEXIS 311, 2008 WL 5272763 (Dec. 18, 2008). *See also Annotated Model Rules of Professional Conduct*, Rule 1.4(a)(3), annot. 5 at 61 (6th ed. 2007). *But see* North Carolina Opinion RPC 200 (Jan. 13, 1995) (departing lawyer "may" contact clients for whose work the lawyer was responsible); Connecticut Informal Opinion 00-25 (Dec. 29, 2000) (same); Ohio Opinion 98-5 (Apr. 3, 1998) (same).

Although Model Rule 1.4, ABA Formal Opinion 99-414, and District of Columbia Opinion 273

do not distinguish between departing partners and departing associates, several state opinions imply that a distinction may exist. For example, Illinois Opinions 84-13 (May 21, 1985) and 86-16 (May 13, 1987) concluded that a departing associate *may* advise clients that he or she is leaving the firm, although the associate is generally not required to do so. In a similar vein, Iowa Opinion 82-23 (Dec. 6, 1982) states that it is the firm's obligation to advise clients for whom a departing associate was doing work that the associate has left the firm. According to this opinion, if the firm does not send a letter in a reasonable time, the associate may notify clients of the departure. *Cf. Fred Siegel Co., L.P.A. v. Arter & Hadden*, 707 N.E.2d 853 (Ohio 1999) (departing associate not required to notify "firm" clients of her departure even though she had established a professional relationship with them).

Although it is becoming increasingly clear that departing lawyers have a duty to advise their clients that they are changing affiliations, questions also arise as to the obligations of the firm regarding client communication. In some cases, the firm has no knowledge of the extent to which clients have been notified of the lawyer's departure, either because it was sudden or because it was acrimonious. As concluded in ABA Formal Opinion 99-414, any remaining lawyer with responsibility for a client potentially affected by the change has the same duty under Model Rule 1.4 to notify the client as the departing lawyer.

The situation regarding clients for whom the lawyers remaining at the firm had no direct responsibility is less clear. There is authority that the firm has a duty to notify all affected clients of the change. *See* North Carolina Opinion RPC 200 (lawyers remaining with the firm have "an obligation to ensure that the representation of each client continues or is responsibly transferred to an outside lawyer chosen by the client"). *See also* Wisconsin Opinion E-97-2; ABA Informal Opinion 1428 (Feb. 16, 1979). Despite the paucity of guidance on the subject, the prudent course is to act consistently with these authorities and make certain that all affected clients are notified.

Because both the departing lawyer and the current firm should ensure that all affected clients are notified of the change, we recommend that the firm and the departing lawyer jointly send affected clients a letter advising of the departure. This approach was recommended in ABA Formal Opinion 99-414. Joint notification, to the extent feasible, precludes duplicative or conflicting communications to clients, as well as a charge that the letter constitutes an impermissible solicitation. In acrimonious situations, a bare-bones joint notification that satisfies the Model Rule 1.4 duties of both the departing lawyer and the firm is wise.

Florida has a specific rule on this subject. Florida Bar Rule 4-5.8 suggests sending a joint notice from the lawyer and the firm announcing the lawyer's departure. The rule prohibits the lawyer from sending a unilateral notice until the lawyer has, in good faith, attempted to negotiate a joint notice with the firm. Essentially the same rules apply when a firm is dissolving, though the rule also prescribes certain information that should be in the notice under those circumstances. The Florida rule provides that if a client fails to respond to the notice, the client is considered a client of the firm, although in a dissolution context, the client is considered to be a client of the lawyer who primarily provided the services.

3.2.2 Clients Who Should Receive Notice

Under Model Rule 1.4, any client whose representation will be materially affected should be advised of the lawyer's change in affiliation. According to ABA Formal Opinion 99-414, the clients that should be notified of a lawyer's impending departure are those for whom the departing lawyer is responsible and those with active matters in which that lawyer has played a principal role. Any client with an open matter on which the lawyer has worked should be considered a potential candidate for notification. Ongoing clients for whom the lawyer has regularly worked should also be considered, even if the lawyer is not currently working on any open matter for the client. Both the extent and the recency of the lawyer's work for the client should be evaluated to determine whether notification is required. *See* Wisconsin Opinion E-97-2.

3.2.3 Timing of Client Notice

The authorities that have considered the issue disagree on when clients should be advised a lawyer is leaving a firm. More precisely, the recurring issue is whether a departing lawyer can advise clients of a planned departure before giving notice to the firm. According to several state ethics opinions, the lawyer cannot. A joint opinion of the Pennsylvania and Philadelphia bar ethics committees states that the departing lawyer should first give notice to the firm before advising clients of plans to change firms. Pennsylvania/Philadelphia Joint Opinion 99-100 (Apr. 1999). The Ohio Supreme Court Board, in its Opinion 98-5 (Apr. 3, 1998), stated that the "firm should be made aware of the planned departure before any announcement is made to the client." ABA Formal Opinion 99-414, however, states that a lawyer can ethically advise clients of his or her impending departure before notifying the firm. District of Columbia Opinion 273 concludes there is "no ethical significance" to who is notified first. However, both opinions also state that other obligations, like a lawyer's fiduciary duties to his or her firm, may affect what the lawyer can do and say in this context.

The existing case law gives little additional guidance. The few relevant cases (*see* Section 3.2.4 below) hold that a departing lawyer cannot actively solicit clients prior to notifying the firm, but they generally do not address the issue of notification. The line between "notification" and "solicitation" can be easily blurred, however, especially when the departing lawyer communicates orally with clients.

The prudent course and the weight of authority indicate that a lawyer should not tell clients about a planned departure before notifying the firm. Once the lawyer has advised the firm, he or she should notify clients as promptly as possible. District of Columbia Opinion 273 warns that the client must be notified sufficiently in advance of the lawyer's departure so that the client has an "adequate opportunity" to consider whether it wishes the departing lawyer to continue the representation or to retain other counsel. Adequate notice is also required if the departing lawyer does not plan to continue the representation. *See* ABA Model Rule 1.16(d).

3.2.4 Content of Client Notice

The content of the communication to the client depends upon when the communication is made. Basically, three time periods need to be considered: (1) the period prior to when the departing lawyer notifies the firm; (2) the period between when the lawyer notifies the firm and the actual departure; and (3) the period after the lawyer has departed from the firm.

Content Prior to Notifying Firm. As discussed above, there is a split among ethics opinions as to whether the lawyer can say anything to clients about a planned departure before notifying his or her firm. One should note, however, the apparent availability in at least some states of damages or injunctive relief for improper solicitation, and consider whether an ethics opinion in that state allowing notice to clients before notice to the firm would be a defense to a civil action. If the lawyer nevertheless decides to notify clients at this time, he or she should provide only the bare details of the new affiliation (*e.g.*, name, address, and telephone number of the new firm and the date of change) and whether the lawyer is willing to continue the representation. According to ABA Formal Opinion 99-414, the client also should be told that it has the right to choose counsel. At a later date, the lawyer needs to provide the client with more information so that it can make an informed decision regarding its representation. At this early stage, however, if there is any communication with clients, it should be as brief as possible to avoid a charge of impermissible solicitation.

Departing lawyers who actively solicit clients before notifying their firm of their intent to resign act at their peril. ("Actively solicit" in this context means trying to persuade the client to leave the lawyer's present firm and become a client of the lawyer's new firm.) The few cases and ethics opinions that have considered the issue agree that solicitation during this period is impermissible. In *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179 (N.Y. 1995), for example, the firm sued a departing partner for breach of fiduciary duty because he had solicited firm clients before resigning from the firm. The trial court largely denied the parties' cross motions for summary judgment. The New York Court of Appeals affirmed, ruling that a partner's preresignation solicitation of clients for personal gain is

actionable. *See also Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358 (Ill. 1998) (client contacts may breach fiduciary duties owed to other partners in the firm or cause other tort liability to the firm); *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004) (appeal after remand, affirming $2.6 million judgment against departed partners); *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200 (1983), *disapproved on other grounds by, Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 456-57 (Cal. 1994) (en banc).

In sum, the prudent course is for the lawyer to notify the firm of departure plans before saying anything to clients. If the lawyer does mention departure plans to clients first, he or she should give only basic details. Active solicitation of clients prior to notifying the firm is probably actionable in most states.

Content after Notice but before Departure. Most authorities agree that a lawyer may notify clients of a planned departure during the period between the time the lawyer notifies the firm and his or her actual departure from the firm. Indeed, as discussed in Section 2.1 above, both the departing lawyer and the law firm probably have an obligation to do so. The rules and ethics opinions offer some guidance as to the content of the notice. It should contain: (1) the pertinent details regarding the new firm (*e.g.*, name, address, telephone number); (2) the effective date of the lawyer's move; (3) whether the departing lawyer and/or the present firm are willing to continue to represent the client; (4) a statement that the client has the right to decide whether the departing lawyer, the current firm, or a third lawyer will represent it (*see* ABA Formal Opinion 99-414; Pennsylvania/Philadelphia Joint Opinion 99-100); (5) a description of any potential conflicts at the new firm (*see* District of Columbia Opinion 273); and (6) anything else reasonably necessary to permit the client to make an informed decision regarding the representation. *See* Model Rule 1.4. This might include information regarding fees at the new firm and staffing, both at the old firm and the new firm. *See* District of Columbia Opinion 273. The notice should ask the client to inform the departing lawyer and the firm of its decision regarding representation as soon as it reasonably can under the circumstances.

Beyond this basic information, there is disagreement about what the departing lawyer can say to clients during this period. Some case law indicates that the departing lawyer still should not actively solicit clients, particularly where unfair competition is present. In *Vowell & Meelheim, P.C. v. Beddow, Erben, & Bowen, P.A.*, 679 So. 2d 637 (Ala. 1996), the defendants had arranged meetings to solicit clients after they had notified their firm they were resigning but before their actual departure. Other lawyers in the firm were not informed of the meetings. The court held this constituted a breach of the departing lawyers' fiduciary duty to their current partners.

Likewise, in *Meehan v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1989), the court found that solicitation of clients by departing lawyers, after giving notice but prior to departure, constituted a breach of fiduciary duty: "By sending a one-side announcement, … so soon after notice of their departure, [the departing lawyers] excluded their partners from effectively presenting their services as an alternative to those of [the departing lawyers]." 535 N.E.2d at 1265. *See also Wenzel v. Hopper & Galliher P.C.*, 779 N.E.2d 30 (Ind. Ct. App. 2002) (departing lawyer sent fax to major firm client); *Dowd & Dowd, Ltd.*, 693 N.E.2d 358, discussed above (departing lawyers met with the firm's largest client on the same day that they resigned). Although not deciding the issue, District of Columbia Opinion 273 warns that active solicitation during this period could violate the lawyer's obligations under partnership law, corporate law, and common law. *Accord* Pennsylvania/Philadelphia Joint Opinion 99-100 (clients should not be urged either to remain with the firm or to go with the departing lawyer).

In contrast to these cases, *Restatement* § 9(3) approves departing lawyer solicitation of clients during this period. The *Restatement* requires, as a condition to such solicitation, that the lawyer first inform the firm that he or she intends to contact clients. Professor Hillman agrees that the departing lawyer may solicit clients after notifying the firm and before the departure date as long as the solicitation occurs long enough after the announcement to allow the firm to compete, the solicitation is not done in secret, and the client is advised that it is free to choose counsel. *See* Hillman, *Lawyer Mobility* at

§ 4.8.3.2.

Even under the *Restatement* approach, there are still limitations on what a departing lawyer may say. Model Rule 7.1 prohibits a lawyer from comparing his or her services with those of another lawyer. Accordingly, a departing lawyer should make no disparaging remarks about the lawyer's current firm or make any comparison between the new firm and the current firm. *See* Pennsylvania/Philadelphia Joint Opinion 99-100; Wisconsin Opinion E-97-2. Likewise, the firm should not disparage the departing lawyer. *See, e.g.,* Pennsylvania Opinion 98-124 (Dec. 7, 1998).

Content after Lawyer Has Left Firm. Many state professional conduct rules prohibit a lawyer from soliciting in person, by telephone, or by "real-time electronic contact" a prospective client with whom the lawyer has no "family, close personal, or prior professional relationship." *See* Model Rule 7.3(a). The attorney-client relationship that a departing lawyer had with the lawyer's own clients is obviously a "prior professional relationship" that satisfies this rule. Thus, absent an agreement to the contrary, the departing lawyer usually can solicit his or her own former clients after leaving a firm. *See* ABA Informal Opinion 1457 (Apr. 29, 1980); *Restatement* § 9, Comment *i*. *Cf. Jenkins v. Smith*, 535 S.E.2d 521 (Ga. Ct. App. 2000) (lawyer not liable for appropriating a business opportunity at his prior firm). *But see Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978), where the court reinstated an injunction prohibiting departing lawyers who had left the firm from interfering with the firm's existing contractual relationships with clients. A distinguishing fact in *Adler* was that one of the departed lawyers used firm resources to solicit former clients. *See also* Texas Opinion 563 (Oct. 2005), which concluded that a lawyer who left a law firm after having worked on an hourly-billed matter for a client did not violate the Texas rules of professional conduct by soliciting that client with an offer to continue the representation under a contingent fee (assuming full disclosure as to the benefits and possible detriment of that arrangement). The opinion noted, however, that it was not considering the issue of potential liability for such conduct under common law.

A lawyer does not have a "prior professional relationship" with clients of the former firm for whom the lawyer did no work. Thus, the lawyer can solicit those clients only to the extent state rules of professional conduct allow the lawyer to solicit any other prospective client with whom the lawyer has no prior relationship. The Model Rules provide that such persons (who are not lawyers) can be solicited only by written, recorded, or electronic communication. *See* Model Rule 7.3(a). Indeed, it is common practice for lawyers who have changed firms to send announcements of their new affiliation. The Model Rules appear to authorize this practice. *See* Model Rule 7.3, Comment [7]. *See also* ABA Formal Opinion 99-414; *Hilb, Rogal & Hamilton Insurance Services of Orange County, Inc. v. Robb*, 33 Cal. App. 4th 1812 (1995).

There are also limitations on the old firm's communications with clients for whom the departed lawyer worked. The Philadelphia Bar Association addressed the subject of telephone inquiries from such clients and concluded that the firm must provide sufficient information about the departing lawyer's whereabouts so that clients can contact the lawyer. After it provides that information, the firm can ask inquiring clients whether a lawyer at the firm can be of assistance. *See* Philadelphia Opinion 94-30 (Dec. 1994). As noted above, under Model Rule 7.1, which has been adopted in most states, any letter that the firm sends to clients about the departing lawyer must be neutral.

3.3 Client Files and Other Documents

When a lawyer changes firms, issues invariably arise regarding client files and other documents. The primary concern is usually what client files and other documents the lawyer may take to the new firm. Other issues that arise are whether the firm may hold files until all fees and costs have been paid and what procedures the firm should follow when transferring files. This section briefly reviews these issues. For a complete discussion of transferring law firm files, see the Records Guide, Section V. *See also* Tab III.L, Section 2.3.

3.3.1 Documents Departing Lawyers May Take

What documents a departing lawyer may take to a new firm is an important question. Some documents clearly belong to the former firm, and the lawyer should not be allowed access to them. If the lawyer takes or copies files that do not belong to the lawyer, that conduct could constitute dishonesty or professional misconduct in violation of Model Rule 8.4. *See In re Cupples*, 952 S.W.2d 226 (Mo. 1997) (en banc). *See also* District of Columbia Opinion 273. In *Attorney Grievance Commission of Maryland v. Potter*, 844 A.2d 367 (Md. 2004), the Court of Appeals suspended for 90 days an associate who unilaterally removed the paper files and deleted the electronic files of two clients he took to the new firm. The hearing officer had found that the associate was acting to protect the clients' interests and had not committed a violation. The Court of Appeals rejected that reasoning, even finding that the conduct was criminal.

Questions also arise regarding both the rights of the departing lawyer and the firm to the following types of documents: (1) client files; (2) pleadings, memoranda, and forms prepared by other lawyers; and (3) client lists, fee information, and other business-type information.

Client Files. In general, both paper and electronic client files follow the client. That is, if the client leaves with the departing lawyer, the client files should go with the lawyer. *See* Model Rule 1.16(d); District of Columbia Opinion 273; Utah Opinion 132 (Aug. 26, 1993). *See also* New Hampshire Opinion 2005-06/3 (Jan. 2006); Illinois Opinion 01-01 (July 2001) (firm must turn over former client's computer files). Conversely, if the client stays with the firm, the client files also stay with the firm. A lawyer who leaves should also be allowed access to closed files of firm clients for whom the departed lawyer had provided services while employed at the firm. Illinois Opinion 95-2 (July 14, 1995). There are, however, exceptions to the general rule.

The first possible exception involves other lawyers' work product. Lawyers remaining at the firm may have done substantial work for the departing clients. Their notes, research memoranda, and other work product may be contained in the client files. Can the firm cull these documents from the files before it turns them over to the departing lawyer?

Whether the firm can remove remaining lawyers' work product depends upon who "owns" it. The resolution of this issue is a matter of state law. In the majority of states, the rule is that with limited exceptions, the files in a matter, including lawyer work product, belong to the client. *See, e.g., Iowa Supreme Court Attorney Disciplinary Board v. Gottschalk*, 729 N.W.2d 812 (Iowa 2007); *Swift, Currie, McGhee & Hiers v. Henry*, 581 S.E.2d 37 (Ga. 2003); *In re Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 689 N.E.2d 879 (N.Y. 1997); Alaska Opinion 2003-3 (May 6, 2003); Colorado Opinion 104 (Apr. 17, 1999). *See also* Arizona Opinion 98-07 (June 1998) (declines to decide ownership, but holds lawyer has ethical duty to allow client access to files). *Restatement* § 46 takes an approach that has the same result as the majority of cases. It provides that the lawyer is obligated to deliver to the client documents that the client reasonably needs, and that the client has the right to inspect and copy any documents relating to the representation.

Even the majority rule states usually recognize limited exceptions to the principle that lawyer work product belongs to the client. Generally, a firm need not turn over to the client documents that would violate a duty owed to a third party not to disclose confidential information. *See In re Sage Realty Corp.*, 689 N.E.2d at 883; *Restatement* § 46, Comment *c*. Nor need a firm turn over documents that are intended for internal office use, such as client assessments. *Lippe v. Bairnco Corp.*, 1998 U.S. Dist. LEXIS 20589, 1998 WL 901741 (S.D.N.Y. Dec. 28, 1998). In *Lippe*, the court construed the internal office use exception broadly, finding that lawyer notes, research memoranda, and a research outline need not be given to the client because they were internal documents prepared to assist lawyers in giving advice to clients.

A minority of states follow the so-called "end product" doctrine. Under this theory, the end

product of the lawyer's work (*e.g.*, pleadings and contracts) belongs to the client, but the lawyer owns the work product containing the lawyer's mental impressions, research, and analysis. *See, e.g., Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus,* 824 S.W.2d 92 (Mo. Ct. App. 1992); Illinois Opinion 94-14 (Jan. 1995); North Carolina Opinion RPC 178 (revised) (Oct. 21, 1994); Rhode Island Opinion 92-88 (Mar. 15, 1993).

In summary, lawyers in the majority of states must turn over all client files of departing clients, subject to the narrow exceptions described above. Lawyers practicing in states that follow the end product approach probably can retain documents in client files that are work product of lawyers remaining with the firm. Lawyers in end product states should be wary, however. The *Restatement* and the more recent authorities reject the end product theory, and the trend is toward restricting the documents a firm can withhold from departing client files. *See* the Records Guide, Section V.B.2; Tab III.L, Section 2.2.

Research, Pleadings, and Forms. ABA Formal Opinion 99-414 (Sept. 8, 1999) concluded that a departing lawyer may take any research memoranda, pleadings, and forms that the lawyer drafted. If these documents were drafted by other firm lawyers for clients other than those of the departing lawyer, the lawyer probably needs permission from the firm to take them.

Troublesome issues arise regarding these types of documents. For example, it is often difficult to determine who actually drafted a pleading or form, or the document may be the product of numerous lawyers' work, some of whom are leaving the firm and some of whom are staying. Other times, a departing lawyer may request copies of pleadings the lawyer arguably has a right to take, but the firm strongly suspects the real motive is to obtain copies of the firm's forms. These difficult situations should be evaluated on a case-by-case basis in conjunction with the firm's loss prevention partner.

Business Information. The rules of professional conduct do not address the lawyer's right to client lists, fee schedules, and other business information. Rather, this subject is governed by property law, trade secret law, and other tort principles. Under these principles, this type of information probably belongs to the firm, and the departing lawyer has no right to take it. *See generally* Hillman, "The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners," 30 Fla. St. U. L. Rev. 767 (2003); Hillman, *Lawyer Mobility* at § 3.5.

Several courts have indicated that law firm client lists may constitute trade secrets that should not be taken or used by departing lawyers. The Ohio Supreme Court held that a 63-page client list taken by an associate when she left the Fred Siegel firm was a trade secret if the firm had taken reasonable steps to protect its confidentiality. *See Fred Siegel Co., L.P.A.*, 707 N.E.2d 853. The Siegel firm sued the associate and her new firm, Arter & Hadden, for tortious interference with contract and misappropriation of trade secrets after they allegedly used the client list to solicit many of the Siegel firm's clients. The Supreme Court affirmed a reversal of summary judgment for the defendant law firm and remanded for a determination, as an issue of fact, whether the Siegel firm had taken reasonable precautions to protect the secrecy of its client list. *Compare Early, Ludwick & Sweeny, LLC v. Steele*, 1998 Conn. Super. LEXIS 2256, 1998 WL 516156 (Aug. 7, 1998) (under the particular facts, client list was not firm's trade secret).

The wrongful taking of personnel information rather than client lists was the focus of a suit filed by Breed, Abbott & Morgan (Breed Abbott) against two former partners who left that firm and joined Chadbourne & Parke (Chadbourne). *Gibbs v. Breed, Abbott & Morgan,* 693 N.Y.S.2d 426 (Sup. Ct. 1999), *aff'd in part, modified in part, and rev'd in part*, 710 N.Y.S.2d 578 (N.Y. 2000). Prior to leaving, the departing partners sent Chadbourne salary and other personnel information relating to Breed Abbott lawyers and staff, which Chadbourne then used to recruit them. When they left, the partners took with them their chronological correspondence files. In September 1998, a New York trial judge ruled that the two departing partners breached their fiduciary duty to their former partners and assessed nearly $2 million in damages against them. The Court of Appeals agreed that the departing partners breached their fiduciary duty by sending confidential information about Breed Abbott employees to Chadbourne while they were still Breed Abbott partners. However, it reversed the trial court's finding regarding the partners'

taking of chronological files, finding that taking chronological files was a common practice for departing lawyers and did not constitute a breach of fiduciary duty. The Court of Appeals also vacated the damage award and remanded the case for a determination whether the partners' limited breach of fiduciary duty was a substantial cause of Breed Abbott's damages.

3.3.2 Holding Client Files to Secure Fees

Another frequently asked question when lawyers leave is whether the firm can retain departing clients' files until they have paid any past due fees and disbursements. The law regarding such retaining liens varies significantly among the states. According to the *Restatement*, case law in a majority of states allows a lawyer to retain all client documents (and other property) until the fees are paid. *See Restatement* § 43, Comment *b*. *See also Pomerantz v. Schandler*, 704 F.2d 681 (2d Cir. 1983). The California courts, however, have rejected retaining liens entirely. *See, e.g., Kallen v. Delug*, 157 Cal. App. 3d 940 (1984). Other courts have limited their use. *See, e.g., Haley v. Johnson*, 2003 Conn. Super. LEXIS 420, 2003 WL 721713 (Jan. 13, 2003); *In re Palmer*, 956 P.2d 1333 (Kan. 1998); *Frenkel v. Frenkel*, 599 A.2d 595 (N.J. Super. Ct. App. Div. 1991). An Oklahoma court held that the property retained must be related to the matter for which the money is owed. *Britton and Gray, P.C. v. Shelton*, 69 P.3d 1210 (Okla. Civ. App. 2003). *But see Daniel Mones, P.A. v. Smith*, 486 So. 2d 559 (Fla. 1986).

Professional conduct rules and the authorities that interpret them have addressed the ethical implications of retaining liens. Model Rule 1.8(i)(1) permits a firm to obtain a lien to secure its fees or expenses. Model Rule 1.16(d), however, requires a law firm that is terminating a relationship to "take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled ... ." But Model Rule 1.16(d) also states that the lawyer may retain such papers to the "extent permitted by other law." States have dealt with these somewhat conflicting ethical principles in different ways.

A number of states have either adopted a limited version of Model Rule 1.8(i) or have interpreted it narrowly. District of Columbia Rule of Professional Conduct 1.8(i), for example, allows a retaining lien only to secure a departing lawyer's work product provided that the client can pay and will not suffer irreparable harm. Even that rule has been construed narrowly. *See* District of Columbia Opinion 250 (Oct. 18, 1994). Similarly, Rule 1.16(e) of the Massachusetts Rules of Professional Conduct provides for a retaining lien for work product only to the extent the client will not be unfairly prejudiced. North Dakota has gone so far as to adopt a rule that prohibits retaining liens entirely. North Dakota Rule 1.19 states: "A lawyer shall not assert a retaining lien against a client's files, papers, or property," including electronically stored items.

In addition, disciplinary boards and ethics committees in several states have either rejected or severely limited the use of retaining liens. *See, e.g.*, Hawaii Opinion 28 (revised) (June 28, 2001) (until retaining liens are explicitly recognized by law, imposition of one would be an ethics violation); Alaska Opinion 2004-1 (Jan. 15, 2004) (lawyer may not withhold expert's report if client would be prejudiced). *Restatement* § 43 permits a law firm to withhold documents prepared by the firm only if "nondelivery would not unreasonably harm the client."

As demonstrated above, whether a firm can impose a retaining lien for unpaid fees and expenses can only be determined by reference to the applicable state law. The majority of states allow some sort of retaining lien. Given the *Restatement* language and recent ethics opinions and rules, however, lawyers should be judicious in asserting lien rights.

3.3.3 File Transfer Procedures

Firms should have defined procedures for transferring files and should follow those procedures carefully. A firm should require written direction from the client to transfer files to a departing lawyer. The firm should then review the files to the extent practicable to determine whether some documents should be withheld or copied by the firm. The firm probably has the right to retain copies of documents

that it is turning over to the departing lawyer. *See, e.g., Quantitative Financial Strategies Inc. v. Morgan Lewis & Bockius LLP*, 55 Pa. D. & C. 4th 265 (Ct. C. P. 2002); Alaska Opinion 2005-2 (2005); District of Columbia Opinion 273; *Restatement* § 46. The firm should maintain a detailed index of all documents and files it turns over to departing lawyers, and should obtain and retain appropriate receipts.

Before turning files over, the firm should consider seeking a written agreement from the departing lawyer and the client that the files will be preserved for a specified period (*e.g.*, 10 years). The agreement should also provide that the departing lawyer and the client will make the files available to the firm for review and copying at the firm's request.

There may be issues regarding the costs of copying client files. The firm generally cannot charge clients for copying portions of their files for its own use. *See, e.g., Quantitative Financial Strategies Inc.*, 55 Pa. D. & C. 4th at 278-79; District of Columbia Opinion 273; Pennsylvania Opinion 96-157 (revised) (Nov. 20, 1996). But it may be able to charge the client for assembling files and transporting them to the departing lawyer. *See In re Sage Realty Corp.*, 689 N.E.2d at 883; *Restatement* § 46, Comment *e*. For more on file transfer procedures, see the Records Guide, Section V.B.1.

All these procedural issues should be addressed in a firm's policy on document management and retention. *See, e.g.*, the Records Guide, Section VI and Appendix D. If each firm lawyer is required to certify annually that he or she has read and will abide by all firm policies, any departing lawyer arguably has agreed to the firm's policy regarding document retention.

3.4 Solicitation of Other Lawyers and Staff

Rules of professional conduct and opinions typically do not address the issue of a departing lawyer's solicitation of employees and staff. Such conduct is governed by common law tort principles, but case law addressing the subject is sparse. Usually, it is permissible for fellow partners to discuss leaving a firm, to make plans to leave together, and to make logistical arrangements. *Cf. Meehan v. Shaughnessy*, 535 N.E.2d 1255. If their conduct goes beyond that, however, and involves more aggressive acts such as recruiting employees and staff, departing partners may be liable. *See* the MLI Guide, Section 2.1.2.

The situation in *Gibbs v. Breed, Abbott & Morgan*, discussed in Section 3.3.1 above, involved the solicitation of other lawyers and staff by departing partners. Before leaving Breed Abbott, the two departing partners sent Chadbourne a memo containing salary and other personnel information about associates and other employees in Breed Abbott's trust and estates department. Chadbourne used the information to recruit most of that department from Breed Abbott. The court found that the departing partners' recruitment of Breed Abbott personnel while they were still members of the firm constituted an "egregious" breach of the departing partners' fiduciary duty to the other partners.

Similarly, a few cases have held that a lawyer's solicitation of firm employees together with client solicitation prior to the lawyer's departure constitutes a breach of the lawyer's fiduciary duty to the other partners. *See, e.g., Dowd & Dowd*, discussed in Section 3.2.4 above. Professor Hillman agrees that soliciting firm employees before actual departure probably constitutes a breach of the lawyer's fiduciary duty to the remaining partners. Hillman, "Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms," Symposium Issue, 55 Wash. & Lee L. Rev. 997, 1030 (1998). He concludes that departing partners should never recruit staff prior to giving notice to the firm. During the period between notice to the firm and actual withdrawal, he also advises against such solicitation with one limited exception. Professor Hillman would allow solicitation of employees to the extent necessary to service clients and then only if the firm is notified in advance. Although this exception seems logical, it appears to be untested in the courts.

Because associates are employees who do not have the same fiduciary relationship to a firm as the firm's partners, the law applicable to departing associates may be different. In *Kopka, Landau & Pinkus v. Hansen*, 874 N.E.2d 1065 (Ind. Ct. App. 2007), the court rejected all claims asserted by a firm against its former associate who, while still at the firm, asked other associates and staff whether they were

interested in joining his new firm. The court found that this activity was "mere preparation" to compete rather than active and direct competition because the associate did not "actually" offer employment to his fellow employees until after he departed.

Once a lawyer has left a firm, he or she normally can solicit employees of the former firm. *See* Pennsylvania/Philadelphia Joint Opinion 99-100 (Apr. 1999); Hillman, 55 Wash. & Lee L. Rev. at 1032. After leaving the firm, the lawyer's fiduciary duties to former partners have ended. *See* Hillman, 55 Wash. & Lee L. Rev. at 1032. If the departed lawyer uses information or resources of the former firm to solicit employees or if the solicitation is part of a scheme to cripple or destroy the former firm, however, the firm may have a cause of action against the departing lawyer and the new firm. For example, in *Reeves v. Hanlon*, 95 P.3d 513 (Cal. 2004), the court upheld a claim for intentional interference with prospective economic advantage against two lawyers who hired employees away from their former firm. Even though the two lawyers did not begin their solicitation until after they had resigned from the firm, their "campaign against the ... firm" also included destruction of computer files, misuse of confidential information, and other allegedly unethical conduct.