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Issues in Partner Migration and Law Firm Dissolution[1]

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The practice of law is a mobile profession: "have computer will travel." Notwithstanding mobility, many lawyers prefer to practice in a law-firm setting with other lawyers for a number of reasons, from personal (we like each other) to economic (sharing overhead) to professional (support and assistance). Spectacular things can however happen when these firms dissolve and the firm's former partners, creditors, and even retirees fight over the assets – even defining the assets of the law firm can be challenging and can implicate the attorney-client relationship.

Law Firm Dissolutions

The 2000's have not been nice to law firms, including some old, venerable, firms and a local firm in one case addressed by the Colorado Court of Appeals.[2] When senior lawyers pick up their computers and leave a law firm, sometimes leaving it *in extremis*, there are a number of issues that may arise. Some of the more recent national examples are:

- In 1998, the partners of the California litigation boutique Dickson, Carlson & Campillo voted to dissolve the firm after a major rainmaker, Debra Pole, and her right-hand man arranged to join Brobeck, Phleger & Harrison LLP, taking one of the Dickson firm's largest clients with them. Litigation between the firms and the individual partners followed.[3]

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[1] Lidstone, Herrick K, Jr. Available at SSRN: http://ssrn.com/abstract=2207527

[2] *LaFond v. Sweeney*, ___ P.3d ___, 2012 WL 503655 (Colo. App. 2/16/2012), *cert. pending*, cited with approval in *Development Specialists v. Akin Gump Strauss Hauer & Feld, LLP* 2012 WL 1918705 at *14 (S.D.N.Y. 2012).

[3] http://law.justia.com/cases/california/caapp4th/83/436.html. *Dickson, Carlson & Campillo v. Pole*, 99 Cal. Rptr. 2d 678, 682 (Cal. Ct. App. 2000). The Dickson firm filed two lawsuits against Pole, the other former partner, William Fitzgerald and the Brobeck firm, and Pole and Fitzgerald filed cross-complaints against their former law firm and partners in the second action. Both sides alleged a variety of equitable, contract, and tort claims. *Id.* at 682-83.

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- Brobeck, Phleger & Harrison LLP, founded in 1926 and which at one time had over 900 lawyers, dissolved in February 2003.[4]

- One of Chicago's largest law firms with 300 attorneys, Altheimer & Gray founded in 1914, dissolved suddenly in the summer of 2003.[5]

- The international law firm, Coudert Brothers LLP (founded in New York in 1853), dissolved in August 2005.[6]

- In December 2008, Heller Ehrmann LLP, which once counted more than 730 lawyers and traced its roots back to 1890, filed its bankruptcy petition after dissolution.[7]

- Thelen LLP, another large law firm with roots back to 1924 and offices on both coasts which had peaked at 600 attorneys, closed its doors in December 2008.[8]

- Thacher Proffitt & Wood LLP (founded in 1848), a 365 lawyer firm which survived the destruction of its New York offices on September 11, 2001, dissolved in December 2008.[9]

- In March 2009, the partners of Philadelphia's 287-lawyer Wolf Block Schorr and Solis-Cohen LLP, once one of the city's elite firms, voted to dissolve.[10]

- In March 2011, Howrey LLP, with more than 500 shareholders at its peak dissolved in March 2011,[11] as did Miami-based Adorno & Yoss LLP, which billed itself as the nation's largest minority-owned law firm.[12]

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4 http://en.wikipedia.org/wiki/Brobeck,_Phleger_%26_Harrison.

5 http://en.wikipedia.org/wiki/Altheimer_%26_Gray.

6 http://en.wikipedia.org/wiki/Coudert_Brothers.

7 http://en.wikipedia.org/wiki/Heller_Ehrman.

8 http://en.wikipedia.org/wiki/Thelen_LLP.

9 http://en.wikipedia.org/wiki/Thacher_Proffitt_%26_Wood.

10 http://en.wikipedia.org/wiki/WolfBlock.

11 http://en.wikipedia.org/wiki/Howrey.

- In May 2012, Dewey LeBoeuf LLP, which had been formed in 2007 from the merger of Dewey Ballantine (formed in 1909) and LeBoeuf, Lamb, Greene & MacRae (formed in 1929) and employed more than 1,000 lawyers in 26 offices around the world filed for bankruptcy.[13]

When one or more rainmakers depart from a law firm, one of two things is likely to occur. The firm will struggle and survive, or the firm will struggle and not survive. Where the firm survives, the issues are generally contractual among the partners or shareholders – are there personal guarantees or other forms of personal responsibility on the part of the leaving partners to the firm and the remaining partners? These are generally contractual and set forth in firm buy-sell, stock redemption, or operating agreements. The ethical rules are clear that the restrictions on a lawyer leaving a law firm cannot be so onerous as to prevent him or her from practicing law.[14] Furthermore, it is the client's choice whether to follow an attorney to a new firm or to remain with the existing firm – it is not the attorney's choice or the law firm's choice. Where the law firm survives, it continues to be responsible for its debts and the relationships among the remaining partners and other attorneys.

Issues When Rainmakers Depart – *Jewel v. Boxer*

Problems develop when a lawyer, usually a significant rainmaker, leaves to work for another firm or himself with the expectation of taking a number of firm clients and firm work with him or her (the "book of business"). If that departure, perhaps coupled with other recent departures, is sufficient to end the law firm as in the above cases, the departing lawyers and their new firms may be accepting some liability far beyond any personal guarantees or contractual obligations. Increasingly the "unfinished business" doctrine poses a potentially painful headache for hiring firms and departing attorneys.

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[12] http://blogs.wsj.com/law/2011/03/28/a-few-words-about-the-adorno-yoss-implosion/.

[13] http://en.wikipedia.org/wiki/Dewey_%26_LeBoeuf. In October 2012, a federal judge approved an agreement by more than 400 former Dewey partners to pay the bankruptcy estate $71.5 million. With this payment (which ranged from $5,000 to $ 3.5 million per lawyer), the settling lawyers agreed not to bring any claims against the bankruptcy estate and received a release from the estate. *See* Jennifer Smith, *Dewey Defied Law of the Jungle*, Wall Street Journal (Oct. 14, 2012), http://tinyurl.com/atcshfo. On March 6, 2013, the ABA Journal reported that the law firm of Paul Hastings LLP and two former Dewey & LeBoeuf partners agreed to pay nearly $1.6 million to the Dewey bankruptcy estate to settle a claim over "unfinished business" taken by the two former partners to Paul Hastings. Two other former Dewey & LeBoeuf partners who are now Paul Hastings partners did not have to pay any amount because they had participated in the $71.5 million group settlement. *See* http://tinyurl.com/bbctlor. For an interesting article about the Dewey & LeBoeuf collapse, *see* James B. Stewart, Annals of Law, "The Collapse," *The New Yorker*, October 14, 2013, p. 80.

[14] Colo. R.P.C. Rule 5.6(a).

In a law firm, the most valuable asset walks out of the door at the end of each work day. If that asset does not walk back in the next day, serious issues can be raised. The law firm will not be able to perform client work, meet deadlines, or comply with ethical and other responsibilities, unless another lawyer associated with the firm and familiar with the matter, steps in.

In most cases, law firms that acquire experienced lawyers with a book of business have generally assumed that work performed and fees earned on matters which attorneys bring to the new firm are the rightful earnings of the hiring firm. A California case, *Jewel v. Boxer,*[15] which has been followed nationally, changes this analysis.[16]

The *Jewel* decision concerned a general partnership formed under California's version of the Uniform Partnership Act (the "UPA"). The court began its analysis by recognizing the long-standing rule in partnership law that when a partnership dissolves the former partners are responsible for winding up the business of the partnership for the benefit of that partnership. The *Jewel* court then extended the rule by holding that, following dissolution and based on the UPA, no partner of a defunct law firm is entitled to extra compensation for completing unfinished business and that "income generated through the winding up of unfinished business is allocated to the former partners according to their respective interests in the partnership."[17] The case expressly determined that this rule extends to all of the legal fees collected on matters begun at the old firm. The *Jewel* court rejected arguments made by the partners that:

- Execution of substitutions of counsel transformed the old firm's business into new firm business (the court noted that a post-dissolution execution of substitutions did not re-characterize the ownership of the assets at dissolution);

- Forcing former partners to share future profits infringed on the rights of clients to choose counsel (the court held that the client's right to choose counsel was irrelevant to the partners' obligations to each other).

The *Jewel* court did accept the principal that the partners can change this rule by their internal agreement. As discussed below, however, where the law firm partners enter into the *Jewel* waiver on the eve of dissolution or bankruptcy, it may be enforceable among

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[15] *Jewel v. Boxer,* 156 Cal.App.3d 171 (1984).

[16] *See generally,* Robert W. Hillman, "Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities," 43 Tex. Tech. L. Rev. 449 (2011).

[17] 156 Cal.App.3d at 176.

the contracting partners, but may also be a voidable preference or a fraudulent transfer from the perspective of the creditors.[18]

Courts throughout the country have applied the *Jewel* reasoning in other states and to other forms of law firm entities.[19] It is clear that the *Jewel* decision and its progeny place the interest of a law firm's creditors ahead of the interests of the law firm's clients, and this is questionable public policy.

Coudert Brothers

The *Jewel* doctrine was recently interpreted and applied expansively in *Development Specialists v. Akin Gump*[20] in connection with the bankruptcy of the Coudert Brothers firm. The case has the potential to profoundly change the economics of lateral movement and in some situations even to inhibit, if not undermine, the ability of lawyers to make lateral moves. Judge McMahon ruled that ten different law firms[21] must account for profits they made from the former Coudert Brothers partners who brought work that began at Coudert with them to their new firms.[22] This included not only contingency fee cases but also cases that were being billed by the hour, ruling that "all client matters pending on the date of dissolution are assets of the firm – regardless of how the firm was to be compensated for the work." The court also concluded that departing lawyers continuing to work on a matter are not entitled "to deduct reasonable compensation" for his or her post-dissolution work before remitting the balance to Coudert.[23]

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[18] A *Jewel* waiver is a waiver by the law firm owners of the law firm's right to unfinished business at dissolution. It usually appears in a partnership agreement, operating agreement, or buy-sell agreement. In *Brobeck, Phleger & Harrison LLP*, 408 B.R. 318 (N.D. Cal. 2009), the bankruptcy court held that, while a *Jewel* waiver may be enforceable as a matter of partnership law, it would not abrogate the rights of a creditor.

[19] See e.g., *In re Labrum & Doak*, 227 B.R. 391 (Bankr. E.D.Pa. 1998); *Robinson v. Nussbaum*, 11 F.Supp.2d 1, 3, 7 (D.D.C. 1997); *Sufrin v. Hosier*, 896 F.Supp. 766 (N.D.Ill. 1995). The rule has generally been applied regardless of how the firm is structured. *See Fox v. Abrams*, 163 Cal.App.3d 610 (1985) (holding that *Jewel* applies to professional corporations); *Heller v. Arnold*, 2011 WL 4542512 (Bankr. N.D.Cal. 2011) (holding that *Jewel* applies to an LLP that is comprised of PC partners).

[20] *Development Specialists v. Akin Gump,* 462 B.R. 457 (SDNY 2012).

[21] The ten law firms were Akin Gump Strauss Hauer & Feld LLP, Arent Fox LLP, Dorsey & Whitney LLP, Duane Morris LLP, Jones Day, K & L Gates LLP, Morrison & Foerster LLP, Sheppard Mullin Richter & Hampton LLP, DLA Piper (US) LLP, and Dechert LLP.

[22] Judge McMahon also raised, but left open for future resolution, several critical questions and held that the actual value of unfinished business can only be determined in an accounting, and whether departing partners are "entitled to deduct from the net profits 'reasonable compensation' for [their] post-dissolution efforts before remitting the balance to [their] former partners for division."

[23] The *Coudert* case was decided under New York law, the governing law for the Coudert partnership agreement. New York partnership law is based on the Uniform Partnership Act (the "UPA") which does not have a provision to pay partners working for the partnership in winding up its affairs any compensation. The

As a result of the law firm bankruptcies and the application of *Jewel,* Morgan Lewis & Bockius LLP agreed to pay $10.2 million to the Brobeck bankruptcy estate.[24] In 2011, Covington & Burling agreed to pay nearly $9 million to settle an adversary proceeding in the Heller Ehrman LLP bankruptcy proceeding for legal fees Covington collected from former Heller clients who moved with the so-called "mass exodus" of IP lawyers shortly before Heller shuttered.[25] In a different case, Baker & McKenzie agreed to pay $6.65 million to compensate Coudert Brothers' bankruptcy estate for profits Baker earned from unfinished business that partners took with them when they left the defunct firm, and agreed to forfeit most of its interest in an estimated $17 million in contingency fees.[26]

Colorado Law – LaFond v. Sweeney

Colorado courts have also addressed some of these issues. A 2012 Colorado case involved the dissolution of a law firm organized as an LLC with no written agreement regarding the treatment of assets and liabilities on dissolution.[27] Richard LaFond brought a

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Revised Uniform Partnership Act ("RULPA"), such as adopted in Colorado, allows partners to deduct reasonable compensation. Some Colorado firms organized as a general partnership may be operating under the Colorado Uniform Partnership Law, which is similar to the UPA. *Compare* C.R.S. § 7-60-121(1) ["Every partner shall account to the partnership for any benefit and hold as trustee for it any profits derived by such partner 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 such partner of its property"] and § 7-60-137 ["Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; except that any partner or any partner's legal representative or assignee, upon cause shown, may obtain winding up by the court"] with § 7-64-401(8) ["A partner is not entitled to remuneration for services performed for the partnership except for reasonable compensation for services rendered in winding up the business of the partnership."].

To the extent Colorado firms are organized as limited liability companies, the Colorado Limited Liability Company Act (§ 7-80-606(1)) excepts from the "limitations on distributions" mandate "payments to the extent that the payments do not exceed amounts equal to or constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program." There is, however, no direct authority to compensate a member for services rendered to the LLC in winding up the LLC's affairs as under RULPA. *See, also,* § 7-80-407 which provides: "A limited liability company shall reimburse a person who is or was a member or manager for payments made, and indemnify a person who is or was a member or manager for liabilities incurred by the person, in the ordinary course of the business of the limited liability company or for the preservation of its business or property, if such payments were made or liabilities incurred without violation of the person's duties to the limited liability company."

24 www.legalethicsforum.com/files/beasley-brief-26-jewel-v-boxer.pdf. *See* Debts of Defunct Law Firms Haunt Partners In Next Job, *Wall Street Journal* (Nov. 6, 2011) by Jacqueline Palank.

25 *In re Heller Ehrman*, Bankr. 2011 WL 4542512 (N.D. Cal. Sept. 28, 2011).

26 Nate Raymond, Baker & McKenzie to Pay $6 Million in Settlement over Coudert Business, N.Y.L.J. (Aug. 2, 2010) http://www.law.com/jsp/article.jsp?id=1202464119638&slreturn=20121020175302.

27 *LaFond v. Sweeney*, ___ P.3d ___, 2012 WL 503655 (Colo. App. 2/16/2012), *cert. pending*.

contingent fee case into the two-person law firm and performed a significant amount of work on that case before the firm dissolved. He continued his work on the matter after dissolution. When his former partner, Charlotte Sweeney, claimed an interest in the contingent fee, the Court of Appeals recognized that it would have to decide:

> [That since] there was no written agreement that specifically described how the contingent fee generated by the case should be distributed[,] we must look to other authority to decide the ultimate issue raised by this appeal: should the contingent fee be divided between LaFond and Sweeney, and, if so, how?

In paragraph 7 of the opinion, the Court of Appeals reached the following conclusions regarding the division of the contingent fee:

1. When the law firm in this case dissolved, the client had sole authority to determine who should represent him. Here, the client chose LaFond.

2. LaFond handled the client's case to its resolution. As a result, LaFond had rights in the contingent fee.

3. Because the contingent-fee case was brought into the law firm before the firm dissolved, the case was an asset of the law firm. Because LaFond owed fiduciary duties to the law firm and continued to handle the case until it was resolved, the contingent fee awarded as a result of the settlement of the case was the firm's asset. Therefore, his former partner Sweeney also had rights in the contingent fee.

4. LaFond owed the dissolved law firm fiduciary duties, including a duty to divide the firm's assets with Sweeney in accord with the oral (50-50) fee-sharing arrangement in place when the firm dissolved. This duty extends to the contingent fee.

5. As a result of these conclusions, the Court of Appeals reversed the trial court's judgment in favor of LaFond and remanded the matter to the trial court for further proceedings to determine the amount of the contingent fee that should be awarded to Sweeney.

The Court of Appeals also noted that this result could be changed by agreement among the partners. But where there is no agreement to the contrary, a former partner who completes a case does so on behalf of the dissolved law firm. The Court of Appeals also determined that, since the LLC Act did not have a provision permitting payment of expenses for a member winding up the LLC (unlike CUPA[28]), LaFond was not entitled to

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[28] *Compare* C.R.S. § 7-64-401(8) *with* C.R.S. §7-80-407.

compensation for the work he did finishing the law firm's case other than through his 50-50 ownership share.

Importantly, the *LaFond* case only involved the financial relationships between the law firm partners; it did not involve the rights of creditors as have so many of the other cases. Had *LaFond* involved creditors, it is likely that the result would have been the same since there was no agreement in place other than the 50-50 sharing, but the two partners would have received less.

National Guidance

A recent conference in Chicago discussed many of these issues.[29] The panelists discussed the "unfinished business rule" and asked the rhetorical question, "if a dissolved firm has the responsibility to complete its unfinished business, how is it going to do that when there are no lawyers left in the firm?" The panelists noted the *Jewel* requirement that the former partners performing the unfinished business are only entitled to "reasonable overhead expenses attributable to producing" the unfinished business, but must share the net with their former firm in accordance with the partnership agreement. While "PCs and LLCs should be distinct – [and treated differently], a small but growing number of opinions say it makes no difference whether you're a PC or LLC," the *Jewel* rule applies.

The panelists also discussed why a firm should, or more properly should not, seek bankruptcy protection. "To avoid the appointment of a trustee," answered one panelist. Another noted that "an unfriendly trustee may look for even more causes of action against the firm's partners, particularly if it appears that mismanagement led to the firm's destruction." The interests of the dissolved firm may conflict with the interests of its former partners.

The panelists also discussed a question of significant interest – if a rainmaker with a large book of business becomes dissatisfied with her law firm, when can she "flee and feel safe that [she] can elude the clutches of a bankruptcy trustee" or other clawback. The answer was quite unsatisfying, and depends on the applicable statutes of limitations. Generally the answer is some time (several years) before the law firm becomes insolvent – which encourages lawyers to "get out while the getting is good rather than hanging on, because the longer they hang on the more likely they are to have to pay back [fees]." Furthermore, there was some discussion that a rainmaker who leaves a firm, thereby leading to insolvency (or at least being a contributing factor to insolvency of the firm) may be leaving herself open to claims from her former partners.[30]

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[29] *Efforts to Anticipate Income Distribution After Firm's Dissolution May Not Always Work*, 28 Lawyers' Manual on Professional Conduct (ABA/BNA) No. 19 at 575 (9/12/2012).

[30] See the discussion of the *Dickson, Carlson & Campillo* litigation in note 2, *supra.*

Formal Opinion 116

It is clear that the responsibilities of law firms and migrating laterals go beyond those set forth in Colorado Formal Opinion 116.[31] Formal Opinion 116 recognizes that both the departing lawyer and the responsible members of the firm the attorney is leaving have ethical obligations to their clients. The Formal Opinion also recognizes that these ethical obligations sometimes can be at odds with the business interests of the law firm or the departing lawyer. In such circumstances, all involved lawyers must hold the obligations to the client as paramount. The ethical considerations discussed in Formal Opinion 116 include:

- The duty to keep the client reasonably informed about the status of the legal matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, pursuant to Colo. RPC 1.4(a) and (b);

- The duty to provide competent representation to the client, pursuant to Colo. RPC 1.1;

- Avoiding neglect of client matters because of a break-up, in violation of Colo. RPC 1.3;

- Taking appropriate steps upon withdrawal from representation, in accordance with Colo. RPC 1.16(d);

- Ensuring that any funds in which a client or a third party may claim an interest are maintained separate from the lawyers' own property, in accordance with Colo. RPC 1.15(a);

- Refraining from any solicitation or efforts to retain clients that would violate the provisions of Colo. RPC 7.1 or Colo. RPC 7.3;

- Negating restrictions on a lawyer's right to practice after leaving a firm that might violate Colo. RPC 5.6(a); and

- Generally refraining from any conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Colo. RPC 8.4(c).

Formal Opinion 116 goes on to note that a "lawyer or law firm may not . . . take action that impermissibly impairs a client's right to choose counsel. For example, a dispute between attorneys in a law firm over a fee that is due or may come due should not impact

[31] CBA Ethics Comm., Formal Op. 116 (March 27, 2007).

the client's right to freely choose counsel." Thus, whether or not there may be a clawback of the fees or a division of a future contingency award, the attorney taking the case with him/her must put the client's interests first.

The Formal Opinion notes that the remaining and departing lawyers "are *required* to provide the client with at least enough information to determine the future course of the representation" and they should notify "any affected client . . . by a joint communication from the departing lawyer and the firm and that the joint notice be transmitted sufficiently in advance of the lawyer's anticipated departure to allow the client to make decisions about who will represent it and communicate that decision before the lawyer departs."[32]

General Guidance for Employees, Officers, Directors, Partners and Equity Owners

Lawyers as employees, officers, directors, partners or members of law firms have the same duties as non-lawyers employed by businesses.

Lawyer As Management. For example, where the departing attorney is a director, manager, general partner, or officer of the firm while he is making plans for departure, he should consider whether (in doing so) he is acting in the best interests of the law firm.[33] If not, he may be violating his fiduciary duties to the firm and its equity owners. If the departing lawyer attempts to lure other attorneys to join him in his departure before he has departed, once again questions of duty to the law firm and to the other owners arise. Is it appropriate for the departing attorney with duties to the law firm and the other attorneys in the law firm to attempt to deprive the law firm of its assets (employees and clients) while continuing to be compensated by the law firm?

Lawyer's Contractual Obligations. The departing attorney also needs to consider any and all contractual obligations that he may have to the law firm he is leaving and to its creditors. These obligations may be included in a partnership agreement, operating agreement, or buy-sell agreement, or they may be included in a bank guarantee or other document. Furthermore, most likely the departing attorney is a party to some written or oral agreement with the other attorneys in the law firm; in Colorado, all contracts include the

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[32] The Formal Opinion cites Alexander R. Rothrock, *Essays on Legal Ethics and Professional Conduct*, § A4.2.1, CLE in Colorado, Inc. (2005) and which includes a form of joint notification as Appendix B.

[33] If the firm is formed as a general partnership, consider the duties of partners in § 7-64-301 (partner as agent) and -404 (general standards of conduct, including the duty to refrain from competing with the partnership); if the firm is an LLC, consider the duties of members and managers set forth in §7-80-404; and if a professional corporation, consider the duties of directors and officers in § 7-108-401(1). In some cases, these duties can be modified or eliminated by agreement. Even then, an attorney preparing for departure in a manner inimicable to the law firm may be violating the contractual obligation of good faith and fair dealing with respect to the law firm and other owners.

implied contractual obligation of good faith and fair dealing.[34] One can wonder whether an attorney preparing to leave a law firm in a competitive manner while being compensated by that law firm is in compliance with this contractual obligation of good faith and fair dealing.

Lawyer as Employee. As an employee of a law firm, the departing lawyer, whether a shareholder, partner, or associate, owes the law firm a duty of loyalty defined by *Jet Courier Services, Inc.* v. *Mulei.*[35] In that case, the Colorado Supreme Court, citing the *Restatement of Agency* and authority from courts throughout the United States, defined the duty of loyalty and the competing public policy of encouraging competition as follows:

> Underlying the duty of loyalty arising out of the employment relationship is the policy consideration that commercial competition must be conducted through honesty and fair dealing. "Fairness dictates that an employee not be permitted to exploit the trust of his employer so as to obtain an unfair advantage in competing with the employer in a matter concerning the latter's business."[36]

The Supreme Court went on to say that, in balancing the employee's duty of loyalty with the policy to encourage competition, "'[i]t is the nature of [the employee's] preparations which is significant' in determining whether a breach has occurred."[37] This is a factual inquiry to be judged by the trial court in the context where the employer believes that anything the employee may do pre-departure is improper, while the employee likely disagrees. Given that an attorney has a higher recognition of contractual, legal, and fiduciary duties, one can believe that a court would impose a higher obligation on an attorney departing a law firm of which he was also a director, officer, manager, or partner than on an employee of any other business. The Supreme Court also said that:

> Generally, an employee breaches his duty of loyalty if prior to the termination of his own employment, he solicits his co-employees to join him in his new competing enterprise.

This would lead to a negative result to any employee of a law firm seeking to depart and, in pre-departure discussions, seeking to attract any other employee (whether partner,

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[34] This duty is a basic tenet of contract law in Colorado. *See, e.g., Cary* v. *United of Omaha Life Ins. Co., 68* P.3d 462, 466 (Colo. 2003); *Mahan* v. *Capitol Hill Internal Medicine, P.C.*, 151 P.3d 685, 690 (Colo. App. 2006).

[35] *Jet Courier Service, Inc.* v. *Mulei,* 771 P.2d 486, 492 (Colo. 1989) *(citations omitted).*

[36] *Jet Courier Service, Inc.,* 771 P.2d at 492. Defining the "duty of loyalty," the *Jet Courier* court said (citing the *Restatement (2d) Agency,* "[w]hile still employed by Jet, Mulei was subject to a duty of loyalty to act solely for the benefit of Jet in all matters connected with his employment. Jet was entitled to receive Mulei's undivided loyalty." *Id.* at 493 *(citations omitted).*

[37] *Jet Courier Service, Inc.,* 771 P.2d at 493.

associate, secretary or paralegal) to depart with him. The Supreme Court made it clear that the solicitations of co-workers do not need to be successful for the act to constitute a violation of the attorney's duty of loyalty.[38] Damages, of course, may be an issue. The Supreme Court answers that question by pointing out that:

> The general rule is that an employee is not entitled to any compensation for services performed during the period he engaged in activities constituting a breach of his duty of loyalty even though part of these services may have been properly performed.[39]

Thus all compensation payable to the departing attorney during the period of his preparation for departure may be recoupable by the law firm. On the other hand, notwithstanding the breach of "any duty of loyalty, [the departing attorney] could still recover compensation for services properly rendered during periods in which no such breach occurred and for which compensation is apportioned in his employment agreement."[40]

Lawyer as Equity Holder. Another issue that needs to be considered in connection with any departure, or any future departure even when one is not currently anticipated, is the ownership of equity in the firm by the departing lawyer. Where a law firm does not have an effective buy-sell agreement that addresses this question, there is no prohibition in the Rules of Professional Conduct or otherwise of the lawyer retaining her equity interest in the law firm. All law firms should address this in advance, or the problems of having a non-employee minority equity owner could be significant. In that case, there are two solutions:

> *Either,* negotiate a reacquisition of the shares in a settlement agreement with the departing lawyer,
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> *Or,* consider a firm dissolution and reconstitution of the remaining lawyers.

In a Washington state case,[41] a departing shareholder sought to require the firm to buy his shares despite the absence of such a requirement in the law firm's governing

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[38] *Jet Courier Service, Inc.,* 771 P .2d at 497 *(citations omitted).*

[39] *Jet Courier Service, Inc.,* 771 P.2d at 499 *(citations omitted).*

[40] *Jet Courier Service, Inc.,* 771 P.2d at 500 *(citations omitted).* The case was settled before retrial, but employee sought relief from the settlement (granted by the trial court) and affirmed in part by the Court of Appeals on procedural grounds. *Jet Courier Service, Inc.* v. *Mulei,* 860 P.2d 569 (Colo. App. 1993).

[41] *McCormick* v. *Dunn* & *Black, P.S.,* 167 P.3d 610, 619-21 (Wash. App. 2007). Interestingly, after this decision in 2008, McCormick resigned his license to practice law in Washington and again sued the former firm to force them to buy out his one-third interest at fair value. The Washington court of appeals reversed the trial court's grant of summary judgment against the law firm and remanded it for trial. *McCormick v. Dunn & Black, P.S.*, 155 Wash. App. 1019 (2010) (not reported in P.3d). Since, like Colorado Rule 265, Washington prohibits a non-lawyer from owning an interest in a law firm, McCormick will succeed this time. The question the court of appeals left for further resolution was the value of the buy-out. Nonetheless, this is a pretty drastic remedy for the departing attorney, not suitable in all circumstances.

documents or in the law governing professional corporations. The court refused to do so, stating that it would not create a stock redemption agreement for the parties when they had not done so themselves. Moreover, the fact that the plaintiff, if his stock was not redeemed, would have a continuing statutory right to inspect the law firm's confidential client information did not warrant dissolution of the professional corporation. At the end of the day, however, does a law firm want a minority interest owner who is practicing law in a competitive manner? The Washington court also held that once the plaintiff's employment was terminated and absent "oppressive conduct," the remaining shareholders did not breach their fiduciary duty to him by excluding him from managerial decisions and no longer sharing the firm's profits with him.

Even where there is an effective buy-sell agreement in place, the remaining lawyers when faced with the obligation to repurchase the equity of the departing lawyer may realize that their purchase price overstates the value of the firm and what they are willing to pay. What then, is the recourse? Dissolution would be the best recourse. Depending on the law firm entity structure (corporation, LLC, partnership), different laws will apply. Generally dissolution requires a sale (or deemed sale) of assets at fair market value and then a distribution of the proceeds (after satisfaction of all liabilities) to the equity owners. Some buy-sell agreements specifically provide for a dissolution alternative,[42] while others do not. In either case, assuming the appropriate procedures are followed, dissolution should be available as an alternative and can be used as negotiating leverage with the departing attorney demanding the high, contract-based, buy-out. That, however, brings into direct play the unfinished business doctrine and the *Jewel* analysis.

Where Other Lawyers Are Involved. If a departing lawyer informs another attorney employed by the law firm his intentions to leave, does that other attorney then owe duties to the law firm to make disclosure of the departing lawyer's intention to the other owners in order to comply with her fiduciary duties? What if the law firm is formed as a general partnership and the lawyer receiving the information is a partner? What if the lawyer receiving the information is a member of the corporate law firm's board of directors or is a manager of a law firm organized as an LLC?

Conclusion

While important, the ethical obligations are not where the issues of migratory lawyers and law firm dissolutions end.

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[42] "**Option to Liquidate the Corporation.** Notwithstanding anything herein to the contrary, in the event of a retirement or withdrawal, the remaining Shareholders may give written notice to the retiring Shareholder on or before the intended closing date of the repurchase hereunder electing to liquidate the Corporation rather than purchase the retiring Shareholder's stock as provided herein."

The conclusion from *LaFond* and the other (non-Colorado) cases is that Colorado law firms need to be careful when bringing in lateral attorneys with their book of business, and the departing attorney herself needs to be equally cautious.

- To the extent courts apply the unfinished business rule as in the *Coudert* case, the due diligence that should be performed by the law firms hiring laterals bringing a book of business will be significantly complicated.
- *Jet Courier Services* and the statutory obligations of partners, managers, officers and directors to the law firm itself indicate that any attorney seeking to depart his law firm must act cautiously and prudently and after considering his particular circumstances and role with and duties to the law firm and the other equity holders.

Bringing in Laterals. Confidentiality obligations generally prevent a potential lateral from revealing the contents of her current firm's internal partnership or other agreement, but educating a lateral on the issues that the unfinished business rule presents, both for the lawyer and the hiring firm, and seeking assurances regarding those risks (*e.g.,* that the lateral's current firm is not about to dissolve, and whether or not the current firm's partnership agreement contains an anti-*Jewel* provision) are reasonable and prudent for hiring firms. Where contingency fees are involved, the Colorado Court of Appeals' decision in *LaFond* is directly on point.

It may be better for the lawyer leaving the law firm simply to make his decision to leave at 2 am and depart by 8 am rather than taking the risk of breaching duties to the law firm and the other equity owners by preparing to leave while still drawing compensation from the law firm.[43] In many cases this may not be a realistic choice for the departing attorney who seeks to make his landing at a new law firm as soft as possible, but the more preparation for the departure the lawyer and the new law firm make, the more they are exposing themselves to potential claims by the former law firm and its equity owners.

While settlement agreements following departure are advisable, if the impact of the lawyer leaving the firm is dissolution of the firm, a settlement agreement may not be enforceable against creditors of the dissolved law firm. The preference period for insiders is one year[44]; the statute of limitations for fraudulent transfers is longer under the bankruptcy code[45] and the Colorado Uniform Fraudulent Transfers Act.[46] It may not be clear at the time

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[43] Whether an attorney considering a departure can engage in preliminary negotiations with his new law firm is a question as to the level of those negotiations. The line between preliminary negotiations and preparing to compete is very grey.

[44] 11 U.S.C. § 547.

[45] Two to 10 years under 11 U.S.C. § 548.

[46] C.R.S. § 38-8-101, *et seq.* The statute of limitations for actions under CUFTA is four years, except for actions under § 38-8-106(2) which is one year. C.R.S. § 38-8-110.

of departure that the firm will dissolve and this is a risk that follows the departure and the settlement agreement for some time.

For law firms hiring attorneys with a book of business, several due diligence procedures may be advisable to avoid future unfinished business claims. For instance, the law firm should research publicly available information about the firm that the lateral prospect wishes to leave. Even firms that resist using 'headhunters' to identify potential recruits may wish to consider engaging one or more of these professionals to act as consultants – extra eyes and ears to the marketplace – to identify firms where there are signs of incipient problems, such as a rash of resumes on the marketplace. Whenever there is the slightest perceived risk that the unfinished business rule will be applied to work being brought by the lateral to the hiring firm, the financial terms offered to migrating lawyers by the new firm are likely to be affected.

Meeting the Attorney's Obligations to Her Law Firm. The other significant point is that attorneys who are planning to depart a law firm need to navigate their ethical, statutory, contractual, and moral issues carefully. If the Colorado Supreme Court will impose a duty of loyalty on employees generally, courts are likely willing to impose greater duties of loyalty on attorneys leaving a law firm in a competitive manner. If the new law firm actively solicited the departing attorney (who was not otherwise inclined), might there be a cause of action for intentional interference with contractual relationships?

It is also important for the migratory lawyer's new firm to ensure that the attorney has met her obligations to the old firm to avoid risks of liability. Issues to which the new firm may be subject include aiding and abetting a breach of fiduciary duties or intentional interference with contractual relationships.

En Fin. Many of these conclusions and concerns will have to await further court determination. Given the historical migration of lawyers and the difficult financial status of many law firm clients and the law firms themselves as well as the big-name cases that are progressing, there may be guidance on some of these points in the future.