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COMMENT

WHEN YOUR LAW FIRM WANTS A DIVORCE: MEDIATING THE DISSOLUTION OF LAW FIRMS¹

I. INTRODUCTION

Former Chief Justice Warren E. Burger once stated that the obligation of attorneys is "to serve as healers of human conflicts."² While few would take issue with this proposition, a substantial conceptual problem becomes apparent when the conflict arises between attorneys.³ Perhaps the best example of this problem exists in the issues surrounding the dissolution of law firms. Lawyers, who in any other context would normally endeavor to resolve a conflict between multiple parties, become the parties themselves.

In many respects a divorce and a law firm dissolution are remarkably similar.⁴ In addition to changes in the makeup of both the family and the law firm, major issues surrounding property division⁵ and custody concerns⁶ often arise. Yet, despite the parallels between these types of conflicts, the methodology

1. Although this Comment is written in terms of law firm dissolution, many of the same issues arise when only one attorney leaves the firm. Unless otherwise indicated, the reader is to assume that the analysis offered is the same for both situations.

2. The obligation of our profession is, or has long thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least expense, and with a minimum of stress on the participants. That is what justice is all about.

Chief Justice Warren Burger, Annual Report, State of the Judiciary at the meeting of the American Bar Association in Chicago (1982). Reprinted (in part) in *Gonzalez v. Superior Court, County of Los Angeles*, 140 Cal. App. 3d 146, 189 Cal. Rptr. 696 (Cal. Ct. App. 1983).

3. Kathleen Spielker, the director of the PBA Program, has stated "Our philosophy is that lawyers are in the business of lawyering and it is a handicap to their practice to be involved in disputes with each other." *Lawyer Disputes Program Generates Success, Frustration in Pennsylvania*, ALTERNATIVE DISP. RESOL. REP. (BNA), Vol. 3, 334, at 335 (September 28, 1989) [hereinafter *Lawyer Disputes*].

4. "A law partnership is like a marriage. Both are consensual relationships which continue to exist only at the partner's whims." Tolman, *Why Partnerships Fail*, LEGAL ECONOMICS, May-June 1989, at 46.

5. See *infra* notes 17-55 and accompanying text.

6. While the custody concerns in divorce normally surround the children of the parents, the custody battles in law firm dissolutions deal with the client. See *infra* notes 56-91 and accompanying text.

used to reach resolution of both situations can be markedly different. Divorce and child custody issues are no longer resolved primarily through litigation. Mediation in this context is widely encouraged, oftentimes by statute or court rule.⁷ However, despite the similarities,⁸ mediating the dissolution of law firms has rarely been encouraged, much less mandated. Law firms have generally been left to the partnership agreements to determine the rights of the parties upon dissolution. These agreements, however, no matter how detailed or comprehensive, do not always cover every area of potential dispute.⁹

In recent years, attorneys have been increasingly making lateral moves within the law firm marketplace.¹⁰ The reasons for this increased movement vary: from making more money, to a desire to have more control over one's practice, or to practice a different area of law not practiced in the current firm.¹¹ Recognizing the need for an alternative to litigation in this area, the Pennsylvania Bar Association established the Lawyer Dispute Resolution Program in 1988.¹² The purposes behind the program are two-fold: first, to give those firms that wanted a different method of resolving the issues surrounding dissolution a means to do so in an amenable fashion, and second, to expose lawyers to alternative dispute resolution.¹³ Although initial participation in this program has been minimal, the preliminary results are encouraging.¹⁴

Part II of this Comment will discuss in detail the two primary issues facing a law firm that is dealing with dissolution: property division and "custody" of the

7. See ALASKA STAT. § 25.24.060 (1989) (mediation discretionary with court); CAL. CIV. CODE § 4607 (West 1989); N.M. STAT. ANN. § 40-12-1 (1989) (child custody mediation discretionary with court); 12 OK. R. C. PRO. title 12, § 1803 (1989) (upon proper request court must order mediation); OR. REV. STAT. § 107.755 (1989) (child custody mediation mandatory upon proper cause shown); R.I. GEN. LAWS § 15-5-29 (1989) (child custody mediation discretionary with court).

8. The use of mediation in divorce "emphasizes cooperation by the couple in defining issues and common goals, and encourages them to create individual responses to their own particular needs." Fiske, *Divorce Mediation: An Attractive Alternative to Advocacy*, 20 SUFFOLK U.L. REV. 55 (1986). The same goals exist in the context of a law firm dissolution, and could be reached through the use of alternative dispute resolution.

9. Clearly, it is also unreasonable to expect pre-dissolution mediation to cover every area of potential conflict. However, it is reasonable to have the mediation cover as many issues as can be identified, many of which are not adequately dealt with in partnership agreements or articles of incorporation, such as property division or the taking of firm clients.

10. See Comment, *Lateral Moves and the Quest for Clients: Tort Liability of Departing Attorneys for Taking Firm Clients*, 75 CAL. L. REV. 1809, 1809 n.1 (1987) [hereinafter Comment, *Lateral Moves*]; Kenny-Tuttle, *Coatney Leaving Law Firm to Start Up New Practice*, SAN ANTONIO BUS. J., April 24, 1989 at 1; Gurnett, *Attorneys Leave Firm to Begin Own Defense Practice*, CAPITAL DISTRICT BUS. REV., June 12, 1989, at 3.

11. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 6 n.8 (1988). Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMPLE L. REV. 1055, 1056 n.1 (1988).

12. *Lawyer Disputes*, *supra* note 3, at 334.

13. Telephone interview with Michael Shatto, Staff Supporter of the Pennsylvania Bar Association's Lawyer Dispute Resolution Program (February 1, 1990) [hereinafter Telephone interview with Michael Shatto].

14. *Id.* See *infra* notes 116-120 and accompanying text.

firm's clients upon dissolution.¹⁵ Part III will review the Pennsylvania Bar Association Program and examine the successes enjoyed by the program. Part IV will look at the benefits of using mediation in firm dissolutions and analyze the advantages between alternative dispute resolution and litigation.

II. ISSUES FACING THE PARTIES TO A LAW FIRM DISSOLUTION

A. *Property Division*

Most partnership agreements or articles of incorporation undoubtedly provide for the distribution of assets upon dissolution. Also, there is substantial statutory guidance for distribution in those cases where the agreement or articles fail to adequately address the issue.¹⁶ Nonetheless, disputes do arise between splitting partners over two of the firm's most important assets.

1. Client Fees

Several actions have been brought by attorneys to recover client fees from former partners.¹⁷ In *Stolz v. Shulman*,¹⁸ the plaintiff contended that, after voluntarily leaving the partnership between himself and Stolz, he offered to leave the defendant all cases with the firm for twenty percent of the profits, and that the defendant agreed to this compromise.¹⁹ Stolz argued that no such agreement regarding the fees ever existed, and plaintiff filed suit.²⁰ The jury returned a verdict for the plaintiff, and defendant appealed, citing error in the failure to give requested jury instructions regarding "abandonment" of the partnership and to

15. Although many of the client custody issues are resolved using the state judicial ethics codes, this Comment will not detail the possible disciplinary actions the attorney faces for violation of these codes except where the analysis mandates discussion. The reason for this exclusion is that a violation of the judicial ethics codes is a matter involving the state bar association and the attorney in question, and is beyond the scope of the Pennsylvania Bar Association program and other similar programs as well as this Comment. For an excellent analysis of these issues, see Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 *TEMPLE L. REV.* 1055 (1988).

16. For rules governing distribution of assets upon dissolution, see generally UNIFORM PARTNERSHIP ACT § 38 (Rights of Partners to Application of Partnership Property), § 40 (Rules for Distribution); MODEL BUSINESS CORPORATION ACT § 92 (Articles of Dissolution); REVISED MODEL BUSINESS CORPORATION ACT § 14.05 (Effect of Dissolution).

17. See also *Douglas v. Thomas*, 489 So. 2d 449 (La. Ct. App. 1986); *Resnick v. Kaplan*, 49 Md. App. 499, 434 A.2d 582 (Md. Ct. Spec. App. 1981); *Smith v. Daub*, 219 Neb. 698, 365 N.W.2d 816 (Neb. 1985); *Nishman v. De Marco*, 62 N.Y.2d 926, 479 N.Y.S.2d 185, 468 N.E.2d 23 (N.Y. 1984); *Pate v. McClain*, 769 S.W.2d 356 (Tex. Ct. App. 1989); *Bailey and Williams v. Westfall*, 727 S.W.2d 86 (Tex. Ct. App. 1987); *Bader v. Cox*, 701 S.W.2d 677 (Tex. Ct. App. 1985).

18. 191 Ga. App. 864, 383 S.E.2d 559 (Ga. Ct. App. 1985).

19. *Id.* at 866, 383 S.E.2d at 561.

20. *Id.*

grant defendant's motion for a directed verdict and post-trial motions since any purported agreement violated the Code of Professional Responsibility.²¹

The Georgia Court of Appeals affirmed the jury verdict.²² In addressing defendant's contention that two jury instructions should have been given regarding plaintiff's alleged "abandonment" of the partnership and the client in question,²³ the court discussed the relationship between the plaintiff, the firm, and the client. The court noted that the defendant was never personally appointed as the client's agent, nor did the defendant do any work on the case.²⁴ In addition, defendant's own evidence showed that the partnership was dissolved "by agreement."²⁵ Therefore, the Court of Appeals concluded that failure to give the requested instructions was not error.

Defendant also challenged the denial of his motions for directed verdict, judgment notwithstanding the verdict, and motion for a new trial, on the grounds that any oral agreement regarding the splitting of client fees violated the Code of Professional Responsibility.²⁶ The defendant contended that such an agreement was nothing more than an agreement to breach a contract, which could not be the basis of a valid contract.²⁷ The court affirmed the denial of the motions, but on the ground that the defendant considered all cases left by the plaintiff to be assets of the firm and, thus, were properly included in the dissolution agreement.²⁸ As such, the plaintiff was entitled to twenty percent of the fees from the case in controversy.

In *Ellerby v. Spiezer*,²⁹ the plaintiff filed an action for accounting upon the dissolution of her firm to recover fees from a major case.³⁰ The trial court

21. *Id.* at 870, 383 S.E.2d at 564.

22. *Id.* at 871, 383 S.E.2d at 565.

23. The focus of this suit dealt with one case in which more than \$1.4 million had been recovered in contingent fees. *Id.* at 864, 383 S.E.2d at 560.

24. *Id.* at 869, 383 S.E.2d at 564.

25. *Id.* at 869-70, 383 S.E.2d at 564.

26. DR 2-107 (Division of Fees Among Lawyers) provides:

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1980). Defendant argued that any agreement to split fees must be written to comply with DR 2-107. *Stolz*, 191 Ga. App. at 871, 383 S.E.2d at 564.

27. *Id.* at 870, 383 S.E.2d at 565.

28. *Id.* at 870-71, 383 S.E.2d at 565.

29. 138 Ill. App. 3d 77, 485 N.E.2d 413 (1985).

30. *Id.* at 79, 485 N.E.2d at 415.

ordered the fees to be split between the partners, with a percentage of the fee being awarded as a bonus to certain partners if the fee exceeded a certain amount.³¹ Both parties appealed, citing error in the award and method of division. The Appellate Court of Illinois reversed.³² Applying the Uniform Partnership Act,³³ the court found that although the firm had dissolved, the parties were still partners until "the winding up of their partnership affairs has been completed."³⁴ As a result, all fees from any partner's case goes to the partnership, including any case in which the client has discharged the firm and retained a former partner.³⁵ In addition, the partnership agreement provided for a different method of paying out bonuses,³⁶ which was not contested on appeal.³⁷

The *Ellerby* court also dealt with the issue of individual compensation for the partner who handled the case after leaving the firm. The court notes that the Uniform Partnership Act does not permit partners to receive remuneration for participating in partnership activities.³⁸ In effect, absent a contractual provision to the contrary, a court cannot award a percentage of fees based on the work an individual partner did for a case. Instead, the court must follow the Uniform Partnership Act or partnership agreement and not consider extraneous factors in dividing the fees.³⁹

2. Partnership Interests in General

In addition to differences regarding the division of fees, there has also been litigation over the valuation of a departing partner's interest in his former firm.⁴⁰ In *Spayd v. Turner, Granzow, and Hollenkamp*,⁴¹ the plaintiff claimed he was "wrongfully expelled" from the defendant firm and requested an accounting, inventory and appraisal of all partnership assets, and judicial dissolution.⁴² The facts demonstrated that the plaintiff had intended to leave the firm nearly three

31. *Id.*

32. *Id.* at 84, 485 N.E.2d at 418.

33. See generally ILL. ANN. STAT. ch. 106 1/2, ¶ 1 et seq. (Smith-Hurd 1989).

34. *Ellerby*, 138 Ill. App. at 81, 485 N.E.2d at 416.

35. According to the court, there is no issue as to improper fee splitting in this context. *Id.*

36. The partnership agreement provided that the bonus, if any, would be divided between the partner who originated the case and the partner who handled it. *Id.* at 83-84, 485 N.E.2d at 418. The trial court modified the agreement so that a bonus was awarded to the originating partner and fifty percent of the balance of the fees went to the partner who handled the file. *Id.* at 79, 485 N.E.2d at 415.

37. *Id.* at 83, 485 N.E.2d at 418.

38. *Id.* at 82, 485 N.E.2d at 417.

39. *Id.*

40. See also *Bader*, 701 S.W.2d 677; *Jewel v. Boxer*, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984); *Reina v. Hartenstine*, 426 So. 2d 654 (La. Ct. App. 1982).

41. 19 Ohio St. 3d 55, 482 N.E.2d 1232 (Ohio 1985).

42. *Id.* at 58, 482 N.E.2d at 1235.

years before the plaintiff filed suit due to "philosophical differences" with another partner,⁴³ and did in fact leave the firm almost two years before filing suit.⁴⁴

In a bifurcated proceeding, the trial court held that the plaintiff had left the firm voluntarily and was not wrongfully expelled.⁴⁵ The trial court additionally found that the partnership agreement governed the dissolution and that payment of goodwill was "both unethical and impermissible."⁴⁶ The Ohio Court of Appeals reversed in part, holding that the partnership agreement, by itself, did not fully determine plaintiff's interest in the firm, but agreed that the payment of goodwill was improper.⁴⁷

The Supreme Court of Ohio reversed.⁴⁸ The court first addressed the issue as to the permissibility of including goodwill as an asset of a professional partnership. The court recognized the traditional rule in this area, which is to disallow goodwill in professional partnerships since the success of the partnership depends on each partner.⁴⁹ However, the court also notes that several jurisdictions were now classifying goodwill as an asset since "the reputation for skill and learning in a particular profession often creates an intangible but valuable asset by gaining the confidence of clients who will speak well of the business."⁵⁰ On that basis, the court held that including goodwill as a partnership asset is not impermissible as a matter of public policy.⁵¹ The court also found that the partners' rights in the firm must be determined from the partnership agreement since plaintiff's departure was voluntary.⁵² Since the partnership agreement made no mention of goodwill as an asset of the firm, the plaintiff was denied relief.⁵³

If the reported decisions seem inconsistent, it is because of the unique fact patterns of each case. There are, however, certain consistencies worth noting. First, partnership agreements or subsequent modifications to those agreements will be consistently upheld, unless violative of public policy. Courts oftentimes will not even look to the parties' expectations, since the parties are well aware of their legal rights and duties. Secondly, the Uniform Partnership Act is to be strictly followed, and any deviation from the statutory formula for division will be reversed.⁵⁴

These decisions are nonetheless beneficial in two respects. First, they offer consistent rulings in an area that is becoming more litigious each year. Second,

43. *Id.* at 56-57, 482 N.E.2d at 1234.

44. *Id.* at 57-58, 482 N.E.2d at 1235.

45. *Id.* at 58, 482 N.E.2d at 1235.

46. *Id.*

47. *Id.*

48. *Id.* at 64, 482 N.E.2d at 1240.

49. *Id.* at 60, 482 N.E.2d at 1237.

50. *Id.* (citing 38 AM. JUR. 2D *Good Will* § 8 (1968)).

51. *Id.* at 62, 482 N.E.2d at 1238. The court later held that including goodwill as an asset of the firm does not violate DR 2-107(B). *Id.* at 63, 482 N.E.2d at 1239.

52. *Id.* at 64, 482 N.E.2d at 1239.

53. *Id.* at 64, 482 N.E.2d at 1240.

54. 138 Ill. App. 3d at 84, 485 N.E.2d at 418.

they show that every contingency cannot be anticipated or provided for in a partnership agreement. As a result, the parties cannot always take preventative measures to keep these issues from arising, forcing them to find some means of resolving certain conflicts after the fact.

B. *Client Custody and Ethical Issues*

Perhaps the biggest issue surrounding the dissolution of a law firm concerns the status of the firm's clients. Since the client is a law firm's most valuable asset, to whom the client belongs, if anyone, is of vital importance. As the frequency of firm dissolutions and lateral moves continues to increase, the issue of liability for "grabbing and leaving"⁵⁵ becomes of great importance to all concerned. There are two ways that a departing attorney may be held liable for "grabbing and leaving:" suit on a tort theory and suit on a breach of fiduciary duty.⁵⁶ Recovery under a tort theory can be accomplished in one of two ways: suit for intentional interference with prospective economic relations and suit for intentional interference with contractual relations.⁵⁷ To be held liable under either theory, the plaintiff in these actions must show that the defendant had the intent to interfere with the relations of the plaintiff and the third party (the client), that there was actual interference, and that the interference was improper.⁵⁸ The only real distinguishing factor between the two causes of action is that intentional interference with contractual relations requires a contract to be in existence at the time of the tort.⁵⁹

55. "Grabbing and leaving" means the departing attorney takes the client with him or her upon leaving the firm. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 5 (1988).

56. The attorney(s) may also be held in violation of the relevant state judicial ethics codes. See CODE OF PROFESSIONAL RESPONSIBILITY 2-103; MODEL RULES OF PROFESSIONAL CONDUCT 7.3 (1970).

57. RESTATEMENT (SECOND) OF TORTS § 766 (1979) (Intentional Interference with Performance of Contract by Third Person) provides:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766B (1979) (Intentional Interference with Prospective Contractual Relation) provides:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

58. Comment, *Lateral Moves*, *supra* note 10, at 1814.

59. *Id.* at 1 n.11.

Actions for breach of fiduciary duty can be brought against both departing partners and associates.⁶⁰ Although a principal and agent can contractually limit or expand the duties owed each other,⁶¹ an associate normally owes the law firm the duties of care and skill,⁶² good conduct,⁶³ obedience,⁶⁴ disclosure,⁶⁵ and to act as authorized.⁶⁶ Since the partners are agents with one another, fiduciary duties are also owed by the partners to the firm.⁶⁷

There are cases in which an attorney was sued on a tort theory for "grabbing and leaving." In *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*,⁶⁸ the plaintiff law firm sued for an injunction to prevent departing associates from contacting clients. After leaving the firm, the defendant associates sent announcements and blank change of attorney forms to clients who were represented by the plaintiff law firm.⁶⁹ The trial court granted an injunction against the defendants on the grounds that their actions violated the Code of Professional Responsibility, causing a tortious interference with contract.⁷⁰ The Superior Court of Pennsylvania reversed, and the plaintiff appealed.⁷¹

On appeal, the Pennsylvania Supreme Court reversed and reinstated the trial court's decision.⁷² The court believed that the associates' conduct was not privileged, because it violated the Code of Professional Responsibility prohibition against self-recommendation. The court then used that violation to find that the associates' acts constituted improper influence, as the plaintiff was adversely affected by its clients' departure.⁷³

In *Rosenfeld, Meyer & Susman v. Cohen*,⁷⁴ the plaintiff law firm sued two departing partners for intentional interference with contractual relations and breach of fiduciary duty.⁷⁵ While partners with the plaintiff, the defendants had demanded a larger percentage of the profits for their work with a major client in an antitrust action.⁷⁶ When negotiations with the other partners failed to produce

60. See *Bray v. Squires*, 702 S.W.2d 266 (Tex. Ct. App. 1985); see generally REUSCHELIN & GREGORY, AGENCY AND PARTNERSHIP 121-35 (1979).

61. RESTATEMENT (SECOND) OF AGENCY § 376 (1958).

62. *Id.* § 379.

63. *Id.* § 380.

64. *Id.* § 385.

65. *Id.* § 381.

66. *Id.* See *Johnson*, *supra* note 11, at 99.

67. *Id.* at 100.

68. 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied*, 442 U.S. 907 (1979).

69. *Id.* at 421, 393 A.2d at 1178.

70. *Id.* at 423, 393 A.2d at 1178.

71. The court found that the associates' conduct was privileged by balancing the interests provided in RESTATEMENT (SECOND) OF TORTS § 767 (1979). 252 Pa. Super 553, 566-67, 382 A.2d 1226, 1229 (1977).

72. *Adler*, 482 Pa. 416, 393 A.2d 1175.

73. *Id.* at 434, 393 A.2d at 1184-85.

74. 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983).

75. *Id.* at 211-12, 194 Cal. Rptr. at 186.

76. *Id.* at 209, 194 Cal. Rptr. at 185.

the desired result, the defendants left and formed their own partnership. One month later, the client left the plaintiff law firm and signed a contract with the defendants' new firm.⁷⁷

The trial court held that the plaintiff failed to state a cause of action for breach of fiduciary duty, but allowed the tort cause of action to proceed to the extent that it could prove active interference.⁷⁸ After the plaintiff's case in chief, the trial court granted the defendants' motion for nonsuit.⁷⁹ The California Court of Appeals reversed as to both the claim for breach of fiduciary duty and tort causes of action.⁸⁰

The appellate court believed that the trial court wrongfully limited plaintiff's proof of the tort claim since the pleadings were sufficient to state a cause of action for intentional interference with contractual relations. Plaintiff should have therefore had the opportunity to prove its case.⁸¹ However, the court was unable to render a final decision as to either claim due to the order of nonsuit. Thus the case was remanded for further hearing as to both causes of action.⁸²

The effects of these decisions are two-fold. First, it is clear that courts are willing to closely scrutinize the actions of departing attorneys and impose liability under either tort theory. Second, these decisions have left commentators uneasy. Both courts acknowledge the *Second Restatement's* test⁸³ for tortious interference with contract, but neither court gave any indication as to what factors lead to liability.⁸⁴ In fact, the *Adler* court may have complicated matters by analyzing the effect a violation of an ethical code has on liability.⁸⁵ Thus, while *Adler* and *Rosenfeld* stand for the proposition that grabbing and leaving could result in tort liability, their precedential value is limited due to the lack of clarity in the courts' analyses of the cases.⁸⁶

In *Adler*,⁸⁷ the Supreme Court of Pennsylvania touched on the breach of fiduciary duty issue, stating that while the departing attorney has a right to engage in business activities, that right is qualified to the extent that it violates any fiduciary duties owed the original firm.⁸⁸ Most important here, the departing attorney has the duty not to "take advantage of a still subsisting confidential relation created during the prior agency relation."⁸⁹

77. *Id.* at 210-11, 194 Cal. Rptr. at 185-86.

78. *Id.* at 213, 194 Cal. Rptr. at 187.

79. *Id.* at 212, 194 Cal. Rptr. at 187.

80. *Id.* at 208, 194 Cal. Rptr. at 184.

81. The court stated that pleading ultimate facts is sufficient to state a cause of action under California law. *Id.* at 223, 194 Cal. Rptr. at 194.

82. *Id.* at 235, 194 Cal. Rptr. at 202.

83. RESTATEMENT (SECOND) OF TORTS § 767 (1979).

84. See Comment, *Lateral Moves*, *supra* note 10, at 1830.

85. 482 Pa. 2d at 434, 393 A.2d at 1184.

86. See Comment, *Lateral Moves*, *supra* note 10, at 1830.

87. See *supra* note 66.

88. 482 Pa. 2d at 435, 393 A.2d at 1185.

89. *Id.*, citing RESTATEMENT (SECOND) OF AGENCY § 396(d) (1958).

III. THE PENNSYLVANIA APPROACH

The Pennsylvania Bar Association's (PBA) Lawyer Dispute Resolution Program (Program) is among the first⁹⁰ alternative dispute resolution mechanism established by a state bar association to mediate law firm dissolutions.⁹¹ For a modest fee,⁹² the parties can take advantage of a system expressly designed to quickly and inexpensively resolve the issues surrounding a firm's dissolution.

The program allows the parties to choose either mediation or mediation followed by binding arbitration.⁹³ The mediators and arbitrators are chosen from different panels and, absent stipulation, are brought in from neutral geographic regions.⁹⁴ In order to begin the mediation process, a request is filed with the program administrator who procures the written consent of all potential parties.⁹⁵ Once the parties agree to mediate, the program administrator assigns a mediator to the case.⁹⁶ The only grounds for disqualification of a mediator are conflict of interest or potential bias. The program expressly disallows preemptory strikes.⁹⁷ After a mediator is named, mediation sessions are scheduled and a location is chosen.⁹⁸ Each party may be represented by counsel.⁹⁹

The format of the mediation sessions is designed to be conducive to a quick resolution of the issues presented. All parties have the opportunity to present an opening statement to express their respective positions.¹⁰⁰ The parties may

90. New Hampshire has also established a program based on the Pennsylvania Bar Association Program. *Lawyer Disputes*, *supra* note 3, at 334. In addition, Maryland, Michigan, Ohio, and Rhode Island have displayed an interest in establishing a similar program. Telephone interview with Michael Shatto, *supra* note 13.

91. The Program also explicitly covers "departures of one or more attorneys from a law firm and the allocation of fees between lawyers in different firms. . . ." Areas excluded from this program involve disputes where a non-attorney is involved or where there is "a possible violation of law." PBA Program Rule A(2).

92. The fees for using this Program include:

A. Administrative fee: \$50 for PBA members, \$125 if no party is a member of the PBA. *Id.* at A(5);

B. Mediator fee: \$500 per diem, fee structure set by administrator. *Id.* at A(8)(a);

C. Travel expenses for the mediator: as needed. *Id.* at A(8)(b);

D. Rent for a neutral site: as needed. *Id.* at A(8)(b).

The general procedure employed by the PBA is to escrow \$1000 from the parties, refunding any excess not needed to meet expenses. *Id.* at A(8)(d).

93. If mediation and binding arbitration are chosen, the parties must attend at least one mediation session before submitting the issues to arbitration. *Id.* at A(4).

94. *Id.* at A(6), (7).

95. This consent is needed as the Program is completely voluntary. *Id.* at B(1).

96. *Id.* at B(2).

97. *Id.* at B(3). If the mediator is disqualified then the administrator assigns another one to the case. *Id.* at B(4).

98. *Id.* at B(5), (6). Rule B(5) also indicates PBA's desire to proceed expeditiously, stating "Mediation sessions shall be scheduled at the earliest date practicable."

99. *Id.* at B(9).

100. *Id.* at B(10).

present evidence in any form, including the testimony of witnesses.¹⁰¹ In addition, the entire proceeding is confidential and no statement or evidence produced during the mediation session can be used in any subsequent judicial proceeding.¹⁰² At the close of the sessions, any agreements reached are reduced to writing, and any issues not resolved can be certified and submitted to an arbitrator.¹⁰³

The program provisions relating to arbitration are similar to the rules concerning mediation. Notice is given to all interested parties, and an answer may be filed.¹⁰⁴ Selection of an arbitrator and site for arbitration are the same as in mediation.¹⁰⁵ Any party may have counsel present at the hearing.¹⁰⁶ The arbitration sessions are also confidential "unless disclosure is otherwise mandated by law."¹⁰⁷ The Uniform Arbitration Act governs the proceedings.¹⁰⁸

There are some differences in the actual procedure used in arbitration as opposed to mediation. A formal record can be made if the arbitrator deems it necessary.¹⁰⁹ Although the rules of evidence do not apply in arbitration sessions,¹¹⁰ the arbitrator does have the duty to determine the relevance and materiality of any proffered evidence, and may exclude evidence upon proper objection.¹¹¹ Witnesses may be sworn before testifying, and the arbitrator can assign burdens of proof.¹¹² Oral hearings may be waived and the issues submitted to the arbitrator by stipulation.¹¹³

The Lawyer Dispute Resolution Program has not been as popular as originally hoped. Since July 1989 the Program has received about sixty inquiries, with only seven of those actually leading to mediation.¹¹⁴ Of those seven cases, three have been successfully resolved, one was referred to a local bar association as it involved a non-attorney, and one was discontinued by the mutual agreement

101. The Program Rules expressly provide that rules of evidence are not applicable in these proceedings. *Id.* at B(9), (11).

102. *Id.* at B(13). In addition, the mediator can not be called in to testify by any party in a later proceeding.

103. *Id.* at B(15), (16).

104. *Id.* at C(2), (3).

105. *Id.* at C(5), (6).

106. *Id.* at C(11).

107. *Id.* at C(29).

108. However, Pennsylvania common law governs as to vacating and modifying arbitration awards. *Id.* at C(28).

109. *Id.* at C(12). Apparently, the parties do not have the option of stipulating to the making of a record, as "[t]he form of any record shall be within the sole discretion of the arbitrator." *Id.* In the absence of a formal record being taken, the final opinion and award are to be considered the record.

110. *Id.* at C(20).

111. *Id.* at C(20), (21).

112. *Id.* at C(15), (18).

113. *Id.* at C(25).

114. Telephone interview with Michael Shatto, *supra* note 13.

of the parties.¹¹⁵ Some commentators suggest that the lack of support is due in large part to attorneys' natural tendency to be adversarial, rather than conciliatory.¹¹⁶ Still, the Program Director is optimistic that future use of the Program will increase as more attorneys and law firms discover its existence and become more educated in the areas of alternative dispute resolution.¹¹⁷ The fact that there have been inquiries is, in itself, encouraging. Even if those firms opted not to use the program, acknowledging the alternative of mediation and/or arbitration is a major step towards the program's success.¹¹⁸

IV. ADVANTAGES OF MEDIATION

A common reaction to cases where law firms end up in court to resolve dissolution disputes is to suggest that careful drafting of the partnership agreement can resolve these issues before they ever arise. Problems arise, however, when the parties make a subsequent agreement upon dissolution to divide the property in a fashion other than what was originally provided.¹¹⁹ Even with a written partnership agreement, every potential issue cannot be anticipated. In the end, parties have traditionally been left with two choices: settle the issue amicably, or litigate. The PBA program strikes a reasonable medium between the two extremes. It allows the parties to seek outside assistance in resolving the dispute in an atmosphere that is less hostile than a courtroom.

There are several benefits to the program that simply cannot be achieved through litigation. The most significant benefit is the monetary savings to the parties. The PBA Program is inexpensive, costing only a fraction of a full lawsuit including appeals.¹²⁰ There is also a substantial time savings. The Program is designed for expediency, with the average time needed to conduct a mediation from commencement to conclusion being six months.¹²¹ A lawsuit of this nature could take from two to six years, depending on the complexity of a firm's

115. *Id.* The reason this Program was unsuccessful in the case that was dismissed is all the parties involved refused to display the cooperation needed to resolve this conflict. Shatto now believes that litigation in this case is imminent.

116. *Lawyer Disputes*, *supra* note 3, at 335.

117. *Id.* at 334. The PBA has undertaken a substantial advertisement campaign to inform Pennsylvania attorneys about the program, including articles in state legal publications and presenting speakers at meetings of insurance carriers. Telephone Interview with Michael Shatto, *supra* note 13.

118. *Lawyer Disputes*, *supra* note 3, at 335. Interestingly, while it was anticipated that the primary use of the program would be to resolve fee disputes between attorneys, every case that has come before the program has involved a firm split. One of the objectives behind the program is to head off splits when possible. Telephone interview with Michael Shatto, *supra* note 13.

119. *See Stolz*, 191 Ga. App. 864, 383 S.E.2d 559.

120. The average cost of a mediated settlement is \$800. Telephone interview with Michael Shatto, *supra* note 13. Although the average cost of litigation in this area is nearly impossible to compute, fees running into the hundreds of thousands of dollars are not unheard of. *Terry*, *supra* note 11, n.17.

121. *Id.* Realize that this may not be accurate considering the lack of mediations from which to judge.

economic structure, the number of parties involved, and appeals, among other things.¹²² The time savings is also beneficial to the clients, since the attorneys can quickly resolve any domestic issue and return to business as usual.

There is another advantage making the PBA Program invaluable. As with most other disputes, the relationship between the attorneys has changed substantially. What was once a close and trusting business alliance is now a broken relationship of dislike and distrust. As in child custody disputes, mediating law firm splits may be imperative to heal both professional and personal wounds. By resolving these issues amicably, all parties involved will be able to enjoy positive working relationships in the future, the benefits of which inure to the client.

There are two disadvantages which may hurt the Program's success. First, a biased mediator may jeopardize the integrity of the program.¹²³ Second, there is an issue as to the validity to the Program's provisions governing binding arbitration. Although Pennsylvania common law and the Uniform Arbitration Act¹²⁴ allow only limited grounds for appeal of an arbitrator's award, the Program's staff is concerned that the Pennsylvania courts could invalidate this standard of review, thereby significantly undercutting the effectiveness of the arbitration program.¹²⁵ However, neither of these concerns have materialized into problems yet.

V. CONCLUSION

Alternative dispute resolution is being increasingly utilized in many areas of conflict.¹²⁶ Although it is not possible to mediate every split or fee dispute,¹²⁷ the PBA program and others like it offer the possibility of alternative dispute resolution to those firms that want to avoid the emotional and financial drain of time, capital, and publicity involved in resolving the dispute in court. As the Program grows in popularity, several collateral benefits could become evident, such as the extended use of alternative dispute resolution by the attorneys in other matters. As the use of ADR continues to grow clients may also benefit from the savings of time and money in resolving their disputes. Implementation of

122. For example, in *Spayd*, 19 Ohio St. 3d 55, 482 N.E.2d 1232, it took over six years from the time the parties began earnest negotiations until the final appellate opinion was handed down to resolve the controversy. Four of those years were spent in court.

123. Although this is a concern of the program staff, this has not yet been a problem. Telephone interview with Michael Shatto, *supra* note 13.

124. See generally 42 PA. CONS. STAT. ANN. § 7301 (Purdon 1989).

125. Telephone interview with Michael Shatto, *supra* note 13.

126. *But see* Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 291-92 (February-March 1986).

127. See *supra* note 118.

programs similar to Pennsylvania's will assist law firms in dissolving partnerships and in the long term advocate across the board use of ADR techniques for resolving a wide variety of disputes.

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