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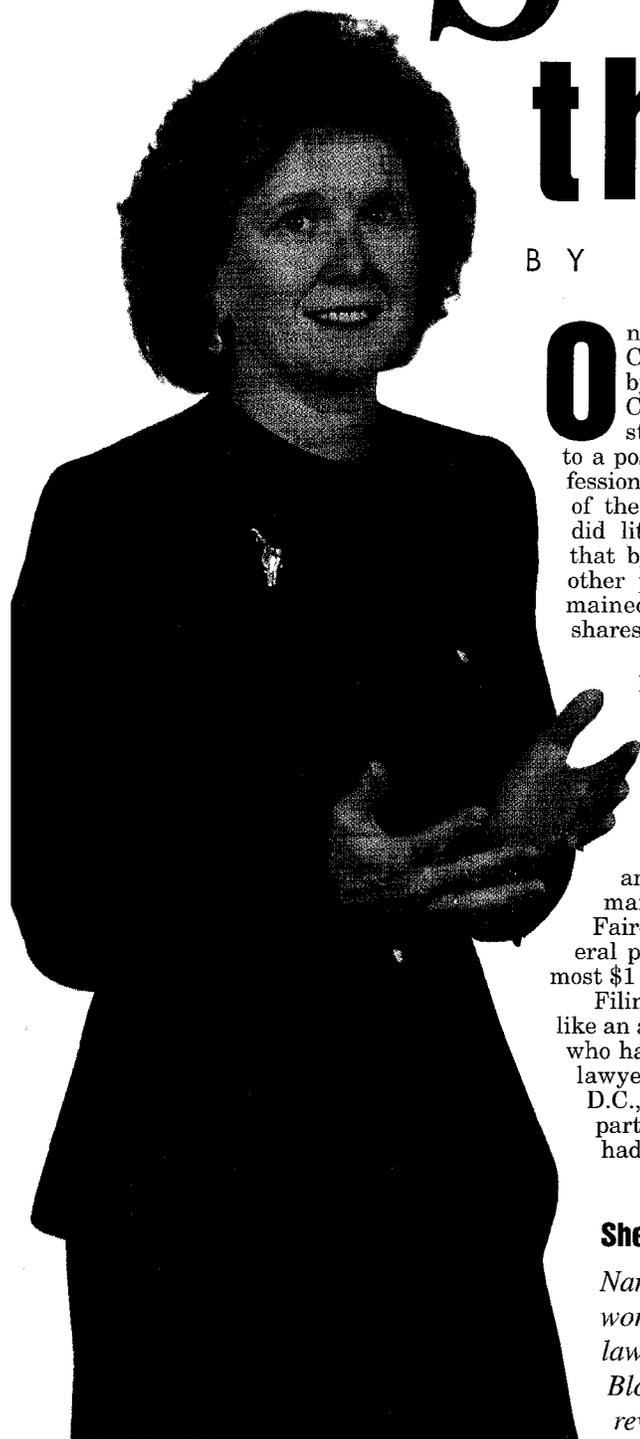
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Suing the Firm

BY RICHARD C. REUBEN



One day in May 1992, Chester Nosal was invited by his partners in the Chicago-based firm of Winston & Strawn to "relocate to a position of alternative professional responsibility outside of the firm." The euphemism did little to conceal the fact that by ousting Nosal and 19 other partners, those who remained could receive larger shares of the firm's profits.

Should the dismissed partners sue? Answering the question was agonizing for Nosal.

Prior to his dismissal, Nosal says, he had repeatedly demanded an accounting of firm distributions and expenses from then-managing partner Gary Fairchild, who is now in federal prison for embezzling almost \$1 million from the firm.

Filing the suit "was almost like an amputation," says Nosal, who had been an international lawyer in the Washington, D.C., office. "I was cutting off part of myself, something I had worked for and whose

reputation was intrinsic to my own. But it had to be done.

"I helped build that firm and its excellent reputation over a 20-year career; I was on its hiring committee back in the 1970s."

Winston & Strawn conceded nothing to Nosal's allegations of management and accounting improprieties, and successfully obtained summary judgment. Now that decision is on appeal.

If a suit like Nosal's would have been an aberration 20 years ago, the same would be true of the termination of partners and the opportunity for annual draws of \$400,000.

In the modern law firm, everyone sues, says Victor Schachter, a management lawyer with San Francisco's Schachter, Kristoff, Orenstein & Berkowitz, which has represented a number of law firms in actions brought by former partners or employees. "The gild is off the lily. When you combine the inherent hostility toward lawyers with the nature of the changes in the legal industry and the fact that law firms are seen as attractive financial targets, law firms of all sizes have to be concerned."

Many believe that an increased willingness by lawyers to sue their firms is as significant an indicator of a fundamental change in the profession as the pressures of the billable hour and market-driven "beauty contests" for clients.

Among recent examples are: Philip Heller, a former partner at

She claimed bias:

Nancy O'Mara Ezold won a discrimination lawsuit against Wolf, Block, but it was reversed on appeal.

Richard C. Reuben, a lawyer, is a reporter for the ABA Journal.

Lawyers who once would rather take grievances against their firms to the grave are now taking them to court. Is it the death of professionalism or the dawning of accountability?

Pillsbury, Madison & Sutro in Los Angeles, who sued unsuccessfully for \$4 million over an allegedly unjust expulsion and later obstruction of his job search; Richard G. Cohen, a former Lord, Day & Lord tax partner in New York City, who sued unsuccessfully over enforceability of rules imposing financial disincentives on withdrawing partners; and Houston attorneys Sidney Ravkind and Zoe B. Littlepage, who settled litigation with Mandell & Wright over rights to about 250 breast implant case files, then worth nearly \$50 million in potential verdicts or settlements.

Not so long ago, a lawyer would have taken a grievance to the grave rather than sue former colleagues.

During the past 15 years, events and determined individuals drastically changed the legal landscape. Whether it has been changed for better or worse is a matter of controversy: Some claim law suits are necessary to vindicate basic rights, while others see them as eating away at the fabric of the profession. Those involved on either side of litigation, though, attest that such suits are hard-fought, and carry enormous personal and professional costs.

Senior lawyers lament the new litigiousness as an affront to professionalism. "When I was young at law, and as the years went on, I do not remember ever hearing of someone who left a firm and then sued," recalls Sol Linowitz, a retired partner at Coudert Brothers' Washington, D.C., office and author of "The Betrayed Profession." He adds: "Washing one's linens in public was not something anyone would think of doing. We worked things out."

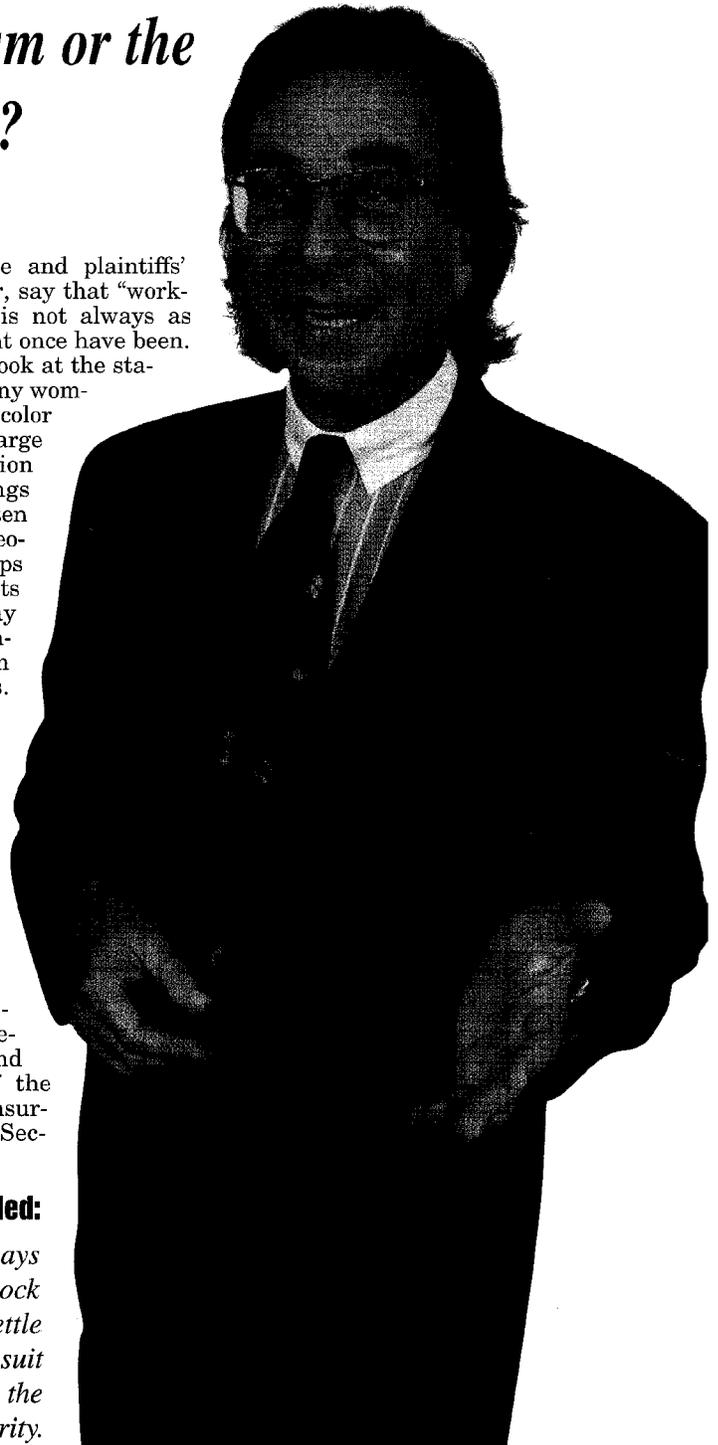
Both defense and plaintiffs' lawyers, however, say that "working things out" is not always as simple as it might once have been.

"When you look at the statistics of how many women or people of color are partners in large firms, the notion of having things 'worked out' often translates into people in these groups folding their tents and going away without a meaningful vindication of their rights. That's not 'working things out,'" says Deborah Raskin, a partner at Vladdack, Waldman, Elias & Engelhard in New York City who represents lawyers suing their firms.

Peter Bennett, a Maine defense lawyer and former chair of the ABA Torts and Insurance Practice Sec-

His firm defended:

*Ian Strogatz says
Wolf, Block
refused to settle
because the suit
challenged the
firm's integrity.*



tion's employer-employee relations committee, however, insists many plaintiffs and their lawyers have dollar signs in their eyes.

"A lot of employment cases result in large verdicts, and lawyers who lose their jobs may be thinking, 'Why not try, just for the hell of it?'" he says. "In the plaintiffs' bar, who is [a better target] to sue than a bunch of rich lawyers?"

Just a few decades ago, there was little reason to sue because members of firms watched out for each other like family, sharing profits as well as losses. Joining a firm was a lifetime commitment, and partners rarely forged out on their own. Moreover, the broader legal community was tightly knit, and a lawsuit against a firm was tantamount to career suicide.

"The way you handled yourself in general made clear that this was a distinguished profession, rather than the usual business," Linowitz says. "As a member of a learned profession, members of the bar adhered to certain standards of civility and decorous conduct. Suing one's firm just wasn't done."

Elizabeth Hishon was keenly aware of those considerations in 1978 when, as a sixth-year associate at King & Spalding in Atlanta, she decided to sue her firm for allegedly violating Title VII of the Civil Rights Act of 1964. The firm had refused to admit her to partnership, she argued, because she is a woman.

"I had great respect for the firm and the lawyers there," says Hishon. "I believed that the firm's decision was the result of the same kind of discrimination that professional women in a number of other areas were experiencing. I felt that I was in a strong position to make a statement, and that I would regret not doing so."

While it was a tough decision, Hishon says she was buoyed by her commitment to her position, as well as the support of other members of the bar—including men.

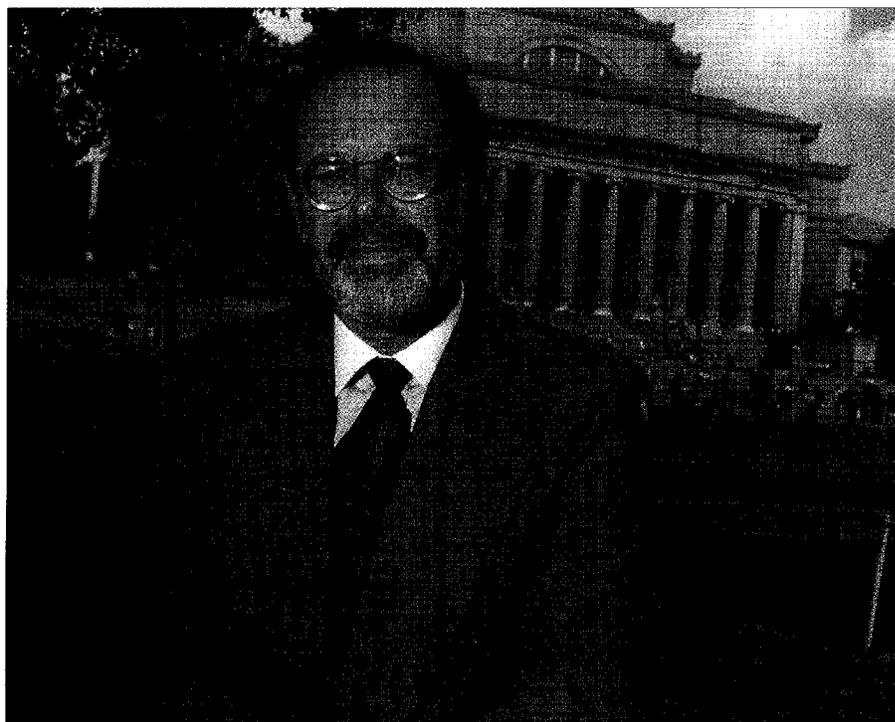
Undaunted by two lower court losses, Hishon's decision to pursue her case resulted in a landmark unanimous U.S. Supreme Court decision by Chief Justice Warren Burger to allow her claim to proceed. For the first time, the Court held that law firms could be viewed like any other employer subject to

federal discrimination laws, rather than a professional association beyond the law. The chummy, close-mouthed citadel of law firm partnership had been scaled. *Hishon v. King & Spalding*, 467 U.S. 69 (1984). (The suit was settled before going back through the lower courts; Hishon later left King & Spalding.)

Ronald Gilson, a Stanford Law

rules' that distinguished law firms from most other businesses, we shouldn't be surprised that it's treated by all as a business, and that its players respond in the same way that business people tend to respond in such situations—and that's with litigation."

The litigiousness is also a reflection of the wrenching changes



Modern law firm management breeds disputes:

Stanford's Ronald Gilson argues that lawsuits can result when firms argue over productivity formulas, which ignore human capital.

School professor who teaches courses about large law firms, says attorney lawsuits are, in some ways, inevitable in today's business climate. Where firms used to provide income insurance for partners through revenue sharing, today's view is everyone for him- or herself.

Gilson says a modern approach to firm management that emphasizes "eat what you kill" inevitably breeds disputes and litigation. "Productivity formulas are easily manipulable, and when people disagree about productivity, they're talking about taking money out of each other's pockets. These are the kinds of situations in which we see lawsuits.

"Without the internal 'sharing

firms experienced in the 1980s—booming at the start of the strength of a mergers-and-acquisitions-driven economy, but withering at the end in recession with the rest of the nation.

By 1991, firms in such metropolitan centers as Los Angeles, Chicago, Dallas and New York were downsizing by laying off associates and giving the boot to nonproductive partners. Fights over "books" of business and benefits became as commonplace as lawyer mobility itself.

At the same time, demographics of law firms were changing, as well. Baby Boom-era lawyers were challenging older partners who had more experience but who were, per-

haps, less hungry for work. Freshly minted and less expensive associates could boost profits by doing much of the work more cheaply. Women and minorities, who had been excluded from the profession until law schools began opening their doors in the 1970s, were attempting to ascend to more powerful positions, which some viewed as more threatening.

In the early 1990s, Congress also expanded rights and remedies for workers through three pieces of significant legislation: The Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993. Each provided new vehicles to challenge employment practices, including those of law firms.

Many observers point to testimony by University of Oklahoma College of Law professor Anita Hill at confirmation hearings for U.S. Supreme Court Justice Clarence Thomas as a defin-

ing moment. "Anita Hill's testimony emboldened people—of all races and genders—to come forward, and continues to do so," says Nancy Erika Smith of Smith & Mullin in West Orange, N.J., a plaintiffs' employment law firm.

Shortly after the Disabilities Act became effective, for example, several lawyers came forward to file suits against former firms claiming they had been terminated wrongfully after disclosing they were HIV-positive. While one such lawyer, Martin Caprow of San Diego, lost against Frank & Freedus, he may well have won in the court of public opinion. The litigation was the model for the popular movie "Philadelphia," for which actor Tom Hanks won an Academy Award for best actor shortly before Caprow died in 1994.

In another HIV-related dismissal case, members of a Philadelphia jury hugged and kissed an HIV-positive lawyer known then only as "Scott Doe" upon hearing that his

former firm of Kohn, Nast & Graf had settled his wrongful dismissal claim after three weeks of trial.

Juries, in particular, have shown little tolerance for heavy-handed employment practices by law firms, a point underscored by former legal secretary Rena Weeks' \$7.2 million sexual harassment verdict in 1994 against Baker & McKenzie (later reduced to \$3.6 million).

"Juries are more skeptical of claims of ignorance of the law when they're being made by lawyers," says one of Weeks' attorneys, Philip Kay of San Francisco. "They expect that if you're a carpenter, you're going to know how to hammer a nail, and that if you're a lawyer, you're going to know the law and follow it."

But these are not merely instances of artfully aroused jury passions, as some have claimed in attempts to dismiss any significance in the Baker & McKenzie decision.

Mitigating Circumstances

While litigation against law firms may be inevitable, there are ways law firms can reduce the possibility of being next in line.

At a practical level, says Ronald Gilson, a Stanford Law School professor, firms should consider incorporating alternative dispute resolution mechanisms into partnership agreements.

"Traditional litigation is an insane way of solving disputes, and law firm disputes are no different in this regard," he says.

Some firms already are taking this step. O'Melveny & Myers, headquartered in Los Angeles, recently amended its partnership agreement to provide for ADR of disputes among partners.

"The privacy that ADR provides is particularly appealing to both sides," says partner Catherine B. Hagen, who helped draft the plan. Among the benefits of using ADR, she says, is that it allows disputes to be decided by people with expertise in law firm matters.

Victor Schachter, a management lawyer with San Francisco's Schachter, Kristoff, Orenstein & Berkowitz, says law firms also have to recognize that they need to take the same litigation-

mitigation steps as other employers.

"Education and training is a must for law firm managing partners, executives, department managers, and others in responsible positions.

"They need to know what the law is from a pro-active point of view, about how to avoid sexual harassment on the job, how to do performance evaluations properly, and handle other issues that could give rise to a liability situation."

The first mitigation step might well involve firm culture: creating an environment that does not breed the mutual contempt that can end in litigation when disputes occur.

"The key concept is making sure the relationship among professionals is a personal one that generates mutual loyalty," Schachter says. "Where people care about one another, and are not just sharing space to make money, you have a stronger likelihood of being able to resolve problems internally."

Gilson agrees. "A firm whose internal structure is more egalitarian as to decision-making and income distribution likely minimizes the possibility of hostility when problems arise," he says.

—Richard C. Reuben

Nancy O'Mara Ezold, a Philadelphia litigator, won a bench trial for gender discrimination in 1991 in a lawsuit against her former firm, Wolf, Block, Schorr and Solis-Cohen, after it denied her partnership. U.S. District Judge James McGirr Kelly rejected the firm's argument—her purported lack of legal analytical skills—as pre-textual.

The 3rd U.S. Circuit Court of Appeals at Philadelphia reversed, however, in a decision the U.S. Supreme Court ultimately refused to review. *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (1992).

While the appeals court threw out her judgment, Ezold downplays the significance of her ultimate loss.

"Losing one case is not a reason for other plaintiffs to feel they should not bring suit if the facts warrant it," she says, noting that cases like hers show "we can win at trial."

Winning at trial feels great for any lawyer. But this kind of litigation can leave even victors severely battered. Traditional notions of success often blur in the bitterness of a family feud.

As has become common in such cases, much of the argument in Ezold's case focused on

the contention by Wolf, Block that her legal analytical skills were short of the firm's standards. The result was the kind of public vetting of competence that few lawyers would want to experience but must expect when they take on the firm.

"It wasn't a pleasant experience," Ezold says, stressing the importance of personal strength and conviction. "As long as you know you're right, you can put up with the kind of testimony that Wolf, Block gave on the stand."

For the firm, it meant diverting attention from work for clients, hiring outside counsel for representation, and getting negative publicity. "We were defendants just like any other defendants," says Ian Strogatz, the Wolf, Block partner in charge of the case.

But unlike just any other matter, the Ezold case was different because the attack came from one of the firm's own, he says. "Someone who has worked with you for years is part of your family, and you like to think that the people who work with you know you well enough to know that what you're being accused of just wasn't done."

Strogatz admits the case could have been settled, but the firm was not interested. "These suits are very personal in that they challenge your principles and integrity," he says. "We wanted to be vindicated, and we were."

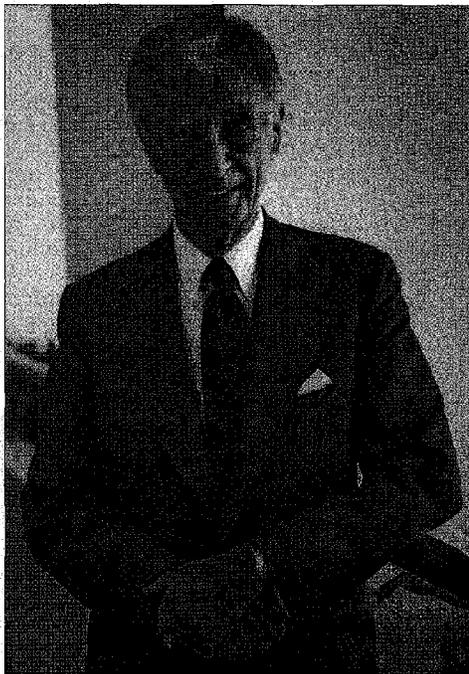
Ezold, now in a growing solo practice that includes plaintiffs' employment litigation, is able to look on the experience as beneficial. "I've had the opportunity to speak all over the country on the issue, and know that just bringing the suit has had a positive result for women and others in the law because it has led to changes in some firms."

Others are less fortunate, such as the New York associate who was fired after making a sexual harassment complaint and is now working as a paralegal because, she claims, other firms won't hire her. Like several other plaintiffs contacted for this story, she declined to discuss her litigation, or allow her name to

be used for fear of reprisal.

"There is very significant fear of being blackballed, and this is a very real fear," says plaintiffs' lawyer Smith. "I tell prospective plaintiffs [their careers will be] in much better shape if they're willing to move to another state, become a law professor, or do something else entirely."

Simply finding a lawyer will



Lawsuits affront professionalism:

Ex-Coudert partner Sol Linowitz says suing once would have been like washing one's dirty linen in public.

ing to take a case against a law firm can be difficult, as "Scott Doe," who now uses his real name of Scott Burr, discovered.

"The firms didn't want to go out on a limb, knowing they would only recover if I won, because they knew the reputation [for legal ability] of Kohn, Nast, but they didn't know me or my ability, and when the firm said it terminated me because I was incompetent, they believed the firm," says Burr, now a commercial litigator with the firm that ultimately represented him at trial, Jablon, Epstein, Wolf & Drucker of Philadelphia.

To counter such forces, Smith says she often ends up as a "ghost lawyer," working behind the scenes

to devise strategies, write letters and provide other counsel that the potential lawyer-plaintiff can use informally to avoid litigation.

If a grievance turns into a lawsuit, the litigation can be as awkward for the attorney-advocate as for the attorney-client.

"We went to law school together, sit on the same committees, and suddenly here I am calling, saying, 'We have a problem.' This can be very difficult," Smith says.

Others who represent lawyer-plaintiffs also point to possible repercussions. Loss of referrals is one possibility, greater hostility by opponents in other litigation another. Such stakes are ratcheted up a notch if the representing firm already has pending matters with the firm being sued.

"Law firms tend to put up a more vigorous fight than corporations because they have the resources to defend themselves less expensively, and have strong political incentives to defend themselves," says plaintiffs' lawyer Raskin.

Plaintiffs in such cases argue that their cases have had an important deterrent effect that ultimately cleanses conduct within firms. Defendants, for their part, often insist that litigation is necessary to preserve a firm's reputation and to safeguard its very structure against future attacks.

Stanford's Gilson, however, is not convinced by either argument, calling the whole litigation exercise a "lose-lose proposition."

"At a time when every law firm consultant seems to be saying firm relationships must be based on people getting paid what they bring in, the only possible upside [of litigation] is that people may begin to realize that this may not necessarily be the most efficient way to do business because it ignores the human capital that law firms are made of," he says.

"That would be the silver lining, but there is no reason to think that's going to happen."

In the meantime, however, disgruntled lawyers can be expected to continue resorting to litigation rather than "working things out"—because of the wall of silence so often used to bury problems within firms, and because of the all-important matter of upon whose terms things are "worked out." ■