Lawyers in Transition: Ghosts from the Old Firm Haunting the New Firm

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MR. BERNSTEIN: Well, good afternoon. Hopefully we can say something that will help keep you awake after lunch. This is always the great slot for any speaker, right after lunch, so we’ll do our best.

I think that this morning’s session was excellent, and it shows a lot about how the practice of law is a business and how business issues impact how we charge clients and how we deal with clients. I heard mentioned—I think Chip started and ended the session with the phrase that involved getting paid. And that reminded me—and this is blatant commercialism—I just published a book called Get P.A.I.D.\(^1\) It’s about business strategy for your clients and also for your businesses, about setting up your business to get paid by your customers.

And the reason that’s appropriate, aside from the commercial, is that it involves a lot of preparation, how you charge, what you charge, how you tell your clients what you charge, a lot of the things that they were talking about this morning. It’s www.getpaidsystem.com\(^2\) or on my firm’s website\(^3\) and it’s cheap, so you know, there is a lot of value in there.

So really what I want to start out with is on the subject of pricing and how you charge, just to lighten things up a little bit, a story about—I can’t really tell it well for lawyers—so I’m going to use optometrists. This optometrist has his daughter in the business and he says now I taught you everything about the business, everything about fitting frames and lenses and grinding them and all of that stuff. Now I have to teach you everything about the business, everything about fitting frames and lenses and grinding them and all of that stuff. Now I have to teach you about pricing. When you give somebody a new pair of glasses and they ask how much, you say that will be a hundred dollars. And if they don’t flinch, you say, for the frames. The lenses

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\(^{*}\) This is an edited version of the transcript from the second panel at the DePaul Business and Commercial Law Journal Symposium, Lawyers, Law Firms & the Legal Profession: An Ethical View of the Business of Law, held on May 1, 2008.

2. www.getpaidsystem.com
3. www.bersteinlaw.com
are a hundred dollars. And if they don’t flinch, you say each. It has something to do with unbundling, so now down to the serious stuff.

Any former Arter & Hadden partners in here?

A PARTICIPANT: I’m from Cleveland!

MR. BERNSTEIN: So you know somebody?

A PARTICIPANT: Yes.

MR. BERNSTEIN: You know lots of them. This is not meant to scare anybody—

MS. FEINSTEIN: Yes, it is.

MR. BERNSTEIN: Well, yeah, someone who’s gone through it from the other side. There are clearly lessons in here. I took a great deal of pleasure in this case for lots of business reasons; it’s a great case for a bankruptcy lawyer when you hear the details, but at the same time it was really a challenge because I had 200 lawyer defendants. And some of my best friends are lawyers, a lot of my family members, and I grew up in a small law firm, so I understand what it means when somebody’s challenging not only your good faith, but in the end, if you have to pay out money as a defendant.

Arter & Hadden was the oldest law firm in Ohio, about 150 years old, and at its height had, I believe, 450 lawyers in eleven offices around the country. They expanded pretty rapidly in the 1990s and bought a bunch of law firms. They wanted to have a national practice and “poof” they created a national practice.

In around 2000 when it was clear—at least our position is, the litigation is still pending, although we’re down to only two active defendants—when it was clear that they were under water, according to our experts they were insolvent as early as 2000, maybe as early as 1999, we believe that the people in control of the firm—and there is certainly a dispute as to who those people were—people in control of the firm decided they needed to do something. They had not been able to stem the tide of leaving partners, they were in a downward spiral, and they looked to some consultants who explained to them about what we learned they called Plan B, which was essentially since you can’t fix this, what you have to do is create a new business. And many of us have clients and been in cases where this has happened, create a new business and leave the debt with the old business.

So our view of things is that in July of 2003 (earlier in July there was a partners meeting, there was a dissolution resolution that had been prepared by outside counsel and then modified by general counsel of

the firm and the partners), it was basically announced to everybody in the firm as of July 15th we’re shutting down.

And it was, according to testimony, it was a surprise to many of the lawyers and many of the partners and a lot of people got hurt. A lot of people didn’t have a place to go when they split up. The way it split up was a large group of people formed a new firm called Tucker, Ellis & West, a large group of people formed a new firm called Bailey Cavalieri, there were groups that went to other firms, and a lot of people just scattered.

The bankruptcy happened, and their liquidation plan was to simply walk away, leave their business manager, who then became the CEO of this limited liability partnership; there are just lots of interesting issues about how you do this. You know, you have a limited liability partnership of lawyers and all the lawyers resign and leave, and leave a guy who’s not a lawyer standing in charge and he was going to liquidate everything for the benefit of the banks.

There were about thirty-five million dollars of accounts receivable, about twenty-five million dollars owed to the banks, and they had a nice plan where the banks were going to continue to fund the operation of the skeleton staff to collect the accounts receivable. Meanwhile, everybody else took the cases, took the files, took the clients, took the furniture, took the leaseholds—well, they would say they didn’t take the leaseholds—the leaseholds were surrendered and then they released them from the landlords, but they essentially reopened in the same place. So one day they turn out the lights as Arter & Hadden, the next day they turn on the lights as Tucker Ellis or Bailey Cavalieri.

The trouble was that during their acquisition period they had acquired a number of firms, several in California, and those firms had retired partners who were parties to nonqualified retirement plans. So there were active partners who came with Arter, and there were retired partners who had contractual rights that were assumed by Arter.

Nonqualified plans, for those of you who are not aware, this is basically if you stay with us so many years, we’ll pay you “X” dollars a year for the rest of your life or until age sixty-five or something like that, and they’re getting these payments every month until July. And a group of those partners were not able to get any information about what was going on. There was a letter that went out that said the firm shut down, it’s being liquidated, basically have a nice day. After a few days the telephone for the chief liquidation officer went directly into voicemail, and the voicemail was full.
So now you got a bunch of people out there wondering what the heck is going on, you can't find out anything. A group of these smart retired partners from California call a Cleveland lawyer, and this actually is a lesson for you young folks about the value of networking. I met that Cleveland lawyer about twenty years ago at a national conference of bankruptcy judges meeting, and we stayed sort of friendly and he looked at this and he said, "Boy, this is going to get messy and it involves a lot of lawyers in Cleveland and I don't want to touch it, nobody in Cleveland's going to touch it, let me get somebody outside, oh, let me call Bob Bernstein."

So he sends these four or five clients to me. In about two days we realized it needed to be under the microscope somehow. The easiest way to do it was file an involuntary. We filed an involuntary on October 6th, 2003.

The timing was such, we thought, since the shutdown was July 15th, something might have happened in the few days before July 15th that might have been preferential, so we wanted to make sure that we filed the bankruptcy as early in October as we could and so we filed it October 6th. Just parenthetically, there was a grant of a four plus million dollar security interest on pre-petitioned debt on July 14th, which was preferential because of our filing and we were able to get back.

So filing involuntary, everything hits the fan, and within about three days we're in before Judge Baxter in Cleveland on a motion for relief from stay by the banks. We put together a quick deal. Everybody agrees we'll put this all on hold for about ninety days, they'll continue to liquidate, they'll give us reports on their liquidation, meanwhile the banks will advance some money to allow us on behalf of the petitioning creditors to do some investigation because this will either turn into an 11, in which case there'll be a committee and we'll want to turn that over to the committee, or it will go into a 7, there'll be a trustee, and we'll want to turn it over to a trustee.

So we're sort of in the nature of examiners and the banks agree to pay us to do that, give us a lot of information, because at this stage we're figuring if this all falls apart, there is information that we're going to need to have in order to turn over to somebody. We do that for about sixty days, and in December the chief liquidating officer decides he wants to go get a job somewhere else, he's no longer having fun, and he's leaving at the end of December.

So whoever was in charge at the time decided—and remember all the partners had resigned, so I don't know who was making these decisions—but somebody decided that the debtor would consent to an
order for relief under Chapter 7, nothing to save, and a trustee would be appointed.

The trustee was appointed on January 6th. And my first—again, this is the business lesson—my first call after that happened was to the trustee saying your firm’s about the same size as my firm, ten lawyers, you can’t handle this case alone, I know a lot about it, you need special counsel. We had a meeting and he said, you know, you’re right. So we got hired as special counsel.

We had found during this investigation period that a lot of money was taken out during the year before bankruptcy, during the two years before bankruptcy. The firm, and certainly the defendants don’t agree with this, but our view of things was that the firm was borrowing money to pay fictitious profits to the partners to keep them happy. The way fictitious profits happened, they were capitalizing certain items of expense over two or three years; that gap probably should have been expensed in one year. So therefore, they were inflating the profits of the firm so they could make distributions, and they were borrowing money to do that. That was essentially the central fraudulent transfer that we were after.

So that’s January of 2004. There were these two main firm groups of people who left and then all kinds of other people. We spent a good long time negotiating, trying to explain to these folks—the joint defense group they called themselves—the two main firms and some other people, who figured they could just, you know, two hundred lawyers, their lawyers, they could just bowl us over and they were stonewalling.

We had had our financial advisors do a report. The process—we actually tried to have a mediation process that was agreed on that involved a confidential presentation by (this is before suit) a confidential presentation by our side to whichever of the potential defendants wanted to come, followed by a confidential rebuttal by them a month or so later, and then position statements that we would exchange—we agreed to hire a mediator and go to a mediation.

An interesting twist was the bankruptcy; the U.S. Trustee opposed our hiring a mediator paid for by the estate. The U.S. Trustee said, well, you’re all smart lawyers, if the case should be settled, you can settle it. Now, as a mediator myself, I just find that absurd, you know, as a twenty-five thousand dollar fee or something like that that the U.S. Trustee didn’t want us to pay, the trustee had five million dollars in the bank. I mean it was just ridiculous.

In the end though, the defendants agreed to pay for the mediator. It cost them fifty thousand dollars for this three-day mediation. That’s
not the reason I became a mediator but—and the mediation failed. The mediation failed. Who knows why.

It is interesting that the mediator told us what he thought the case should settle for, and we all told him he was crazy—both sides told him he was crazy—and in the end that's about what we got. So he was smarter than we thought he was. He was a retired bankruptcy judge, so I guess he knew what he was doing.

So the mediation failed in August of 2005, and we filed a lawsuit in September of 2005. Filed the suit against the partners, filed the suit against the banks for fraudulent transfer recovery and preference recovery, looking for about sixty million dollars from the partners and twenty-five million dollars from the bank. And those of you who are partners at large firms or want to be partners at large firms or I guess anybody, I think it would be pretty scary to be a defendant in a sixty million dollar lawsuit, especially if you have something to lose. And a lot of these folks had something to lose.

So immediately it got, as you might suspect, contentious. And at the same time, I don't know if this was a unique process, we calculated what we would be willing to accept in settlement, but we did not offer that settlement to the joint defense group people because we thought that they had not participated in mediation in good faith and we wanted to punish them, frankly.

So we sent out an offer to the other eighty or so lawyers and showed them a calculation which included how the settlement was spread among all two hundred lawyers, but we were only offering the settlement to eighty. Somebody got that to the joint defense group, and the joint defense group purported to accept the settlement on behalf of its members. And we said, well, that's very nice, but it wasn't made to you. Basically, they said your chart shows us on it, and so we filed a motion (a 9019 motion) to approve the settlement with those who had accepted, of the eighty there were about fifty. The joint defense group filed—each of the firms filed a bunch of motions—motions to enforce the settlement.

Now those of you experienced in bankruptcy and 9019 motions and settlement probably know that the estate or the trustee can negotiate a settlement; it has no authority to make a settlement without court approval. And there are plenty of cases that say a settlement can't be enforced against the trustee when there has been no court approval. So we went through this nasty process which involved some of the joint defense group people having suckered one of the trustee's partners into a meeting, they were friends because the trustee is from Akron, they were friends and some of these lawyers claim that in that
meeting he validated their acceptance of the settlement. So now we have supposed friends and former partners trying to sucker one of their own. So this went on and on.

Meanwhile, we filed a motion to withdraw the reference on the adversary because we wanted a jury trial, which you couldn't have in bankruptcy court without the other side consenting. We thought we would be better off with a district judge. Boy, were we wrong. It got to a senior district judge who required briefs very quickly and then sat on it for fifteen months and did nothing. The bankruptcy judge at the time kind of said to us, well, look, you wanted it to be in the district court, I'm not going to do anything until the district court rules on the motion to withdraw the reference because I don't want to make a contrary decision and therefore our settlements were on hold, everything was on hold for fifteen months. It got pretty messy.

The good thing about this—aside from the fact that a bunch of lawyers made a lot of money—was that we brought back into the estate, from the settlement with the partners, twelve million dollars. Just to put it in perspective, and although there are confidentiality provisions, people say, "Well did partners really pay anything?"

It's clear from the record that there was a five million dollar management liability policy, and it's clear from the fee applications for its counsel that they burned about a million dollars of that in the litigation. You would expect that an insurance company, if it were going to settle, was saving something, so you can assume that it was less than four million dollars of the twelve million that the insurance company was putting in. So that would mean real people like us paid eight million dollars into this. A lot of people were upset about that.

You know what? I heard from a lot of lawyers, a lot of partners who paid and a lot of associates and contract partners who were pleased with the result, that they thought people who should have paid money really paid money. It validated for us that there was something going on that wasn't right, that there was a control group who tried to take the firm in a direction or the business in a direction that wasn't—that the rest of the people didn't want.

Just a couple of quick really interesting nuances about this process and things we didn't think about at the beginning, but which came up. This was a partnership. It was a limited liability partnership, but it was a partnership. So when it came time for settlements and how settlements were being paid, there were many tax issues involved.

How were the payments from the partners being treated? We agreed, because we didn't really care, that they were a return of compensation. So they would be deductible for the partners because our
claims were that they were overcompensated, but we said, that’s fine, so pay it in and it will be deductible for you.

And they said, well, wait a minute, if you get the money, the firm, the estate has income, and if you hold on to it for a couple of years until the case is over, we all get K-1’s, so we’re going to pay tax on what we just paid in until you make the distribution, so we had to create a settlement—a qualified settlement trust. And the money is sitting in a trust for a couple of years until the case ends. So that took about six months to figure out, how that was all going to work out.

MS. FEINSTEIN: Do I get to tell the other side of the happy story?
MR. BERNSTEIN: Yes. So just where we are right now, I think in the materials that were published we had the affidavit of the trustee that outlined the history and how we got to the settlements. The settlement order provided a bar against any creditor making claims against these partners for any reason, so it was widely publicized. We spent fifty thousand dollars publicizing it in eleven cities and in the Wall Street Journal.

So now when Faye tells the other side of the story, I think you’ll be able to see from her perspective some of, if you haven’t seen already, the lessons to be learned from how firms are governed and how they change. I’m sorry if I took too much time.

MS. FEINSTEIN: No, that’s fine. We’re sitting at separate tables because I don’t know that anybody was pleased with the result of our insolvency, so you’ve got the trustee’s counsel over there and then you have a representative of one of those poor partners who had to actually write checks into this big party.

How many of you have ever been involved in an involuntary dissolution? A few. How many are sitting here thinking these are nice great ethics credits, but this is never going to happen to me, I don’t ever have to worry about it?

We are here to scare you just a little bit and hopefully to give you a couple of practical pointers so that you can keep this in mind. Arter & Hadden was a law firm that was more than a hundred years old. Altheimer & Gray, which is the firm I was most recently involved in, was a firm over ninety years old. Nobody ever thought it could happen to us.

Before Altheimer & Gray I worked at a small firm, a couple of my former colleagues are here, called Antonow & Fink. That was also a dissolution. That one didn’t end up in bankruptcy. I decided between Arter & Hadden, Antonow & Fink, and Altheimer & Gray, the lesson: Don’t ever work for a firm that starts with the letter “A.” That’s why I’m at Quarles & Brady now. That was a key determining factor.
MS. BAER: Or that you work at them, yes.

MS. FEINSTEIN: Oh, that’s right, and don’t hire her because it’s bad news.

But it’s interesting, Bob said that it was a great case for a bankruptcy lawyer. It was a God awful case for this bankruptcy lawyer, and it was a God awful case for every other partner and associate at the firm.

Bob also said it was a challenge if you have to pay out. Every partner had to pay. Every single one—income partner, equity partner, retired partner. I’m not so sure about contract partners. We didn’t have very many of those. But everyone had to pay because if you didn’t pay, you didn’t get a release. And in order to get a release and not to be sued by a trustee or a creditors’ committee or a creditor outside the bankruptcy, you paid—you basically bought a release.

The Altheimer & Gray scenario, to be kind of politically correct, started kind of in an economy like ours. There were a lot of differing views. If you put together ten partners in a room, each one will give you a different story about why the firm didn’t make it, but one of the main reasons was in an economy like ours, we had departments that were ramped up with a lot of associates, we had a merger and acquisition practice that had over thirty-five attorneys, we had a real estate practice that had a lot of attorneys, and a lot of them were sitting around not charging time.

You can’t keep paying lawyers as a business without having them generate billable hours. You all heard about “will the billable hour die?” but without billable hours right now or without money coming in, you just can’t keep paying. And in our firm we did keep paying because everybody thought, oh, it’s going to change, it’s going to change tomorrow; it’s right around the corner. Nobody wanted to let anyone go because they thought, well, when that deal does come in, for example, we worked on the Montgomery Ward transaction, when a transaction like that comes in, you need a lot of people to work on it, so we can’t fire people, then what are we going to do.

So for a good couple of years a lot of people were earning money that maybe weren’t charging enough time to justify the monies that they were earning. At the same time, the law firm was expanding rapidly. We had a management committee that determined that we should continue to open offices notwithstanding that we weren’t generating enough business. In fact, six months before the firm went into its bankruptcy, we opened an office in California and an office in Paris. Not six months before the firm’s demise.
It's interesting because when you hear about the management committee or the executive committee or the "they," one of the lessons to be learned is don't look at it as "they" and "me" or "us." When you're in a partnership, you are "they." You're going to be "they" when the firm falls apart, so you need to demand disclosure of financial information and disclosure of the decision-making process because otherwise you'll have nobody to blame but yourself and you'll never see it coming.

The big lesson to be learned is keep your eyes open and look out for what's coming because it wasn't a surprise. The day we announced our dissolution it was a surprise to everyone except those on the management committee. We were called into a big room, partners first, and then associates and staff and told tomorrow's your last paycheck. You can imagine the look on everyone's face. But the management committee—they knew it was coming, and they had to know it was coming for many months and the signs were there.

And the signs may not be an e-mail that comes and says, okay, the firm has lost so many dollars over the last month, but you know when it's coming, you know that you have people sitting around not working. You know when the expenses are skyrocketing.

Our major expense in the last probably two years before we dissolved was to renegotiate the lease and do a total revamp on our space. The landlord was one of the three petitioning creditors, and this took place at a time when the firm just wasn't generating enough money to pay for all of that. So keep your eyes open, demand information. When you're looking to move to another firm, even in good times, you want to try to know exactly what's going on because when you sign on that partnership agreement, you are "they" and if there is a problem later on, you will pay.

Just to talk about a couple of the interesting things that went on in our bankruptcy. This was filed as an involuntary. We had one hundred fifty attorneys in Chicago, and we had about another two hundred or two hundred fifty internationally. We had offices in Eastern Europe, China, our Paris office of course, which opened six months before we blew up, and in London as well. Part of the problem was that nobody knew what was going on with all these other offices. And some of the offices were actually not self-sustaining, so they were able to drag down the rest of the firm.

But when the involuntary was filed by the landlord and two other creditors, it actually was converted to a voluntary 11. And one of the

5. *In re Arter & Hadden*, LLP, No. 03-23293 (Bankr. N.D. Ohio).
reasons the decision was made to do that was to avoid having to deal with people like Bob. We didn’t want to have to deal with a trustee.

I’ve actually tried to block out the entire bankruptcy and the dissolution. And in fact, I’ve blocked out most of the names of my former partners because it was such a God awful experience, but I sat down before this to reread the case docket and read some of the pleadings to remind myself of what it was like. I think the most interesting thing to me is that, you know, you start with this, oh, my partner, my family, my friend. The minute the firm goes into dissolution, it’s every man and woman for themselves. It was a big free-for-all.

The disclosure statement described the partners as lawyers being inherently litigious people. Well not only are they inherently, or were we inherently, litigious, we were pissed off at each other and all of a sudden, you know, everybody knew that there was going to be a pay-out, but everyone wanted the other people to pay more than they did. So everybody was jockeying for position. We had everyone breaking up into groups, partners with counsel. This was free employment for lawyers in Chicago. Every lawyer in Chicago was working on this case from one perspective or another.

There was a creditor’s committee represented by counsel. There were groups of equity partners that each had their own separate counsel. There were non-equity partners that had their own counsel. There were retired partners that had their own counsel. There were contract partners that had their own counsel. And the firm had created some investment partnership vehicles—we had about four of them—they banded up into one group, and they had their own counsel because there were obligations owing from the firm to the investment partnerships and from the investment partnerships to the partners. It was a total zoo. We had meetings in a room like this where everybody would get up and yell at everyone else, and it was all in an effort to jockey position.

The primary concern, of course, was to limit exposure. The concerns were that equity partners were liable on the bank debt. Our lender also was owed about thirty-five million dollars, and the loan documents actually required the signature of every equity partner and they agreed to be bound up to a percentage limitation on their debt. The equity partners knew that they were exposed to bank debt, so the goal was to collect those receivables and get as much money to the bank as possible. And so that became the concern.

Secondary concern, of course, we have to do the work, we have to not commit malpractice while we’re talking about dissolution. We have to figure out where we’re going. Where are we going to work
tomorrow? We have to get consent to take the files. We have to get consent to take the client while we’re all splintering into different groups.

One of the other reasons, I forgot to mention, for the dissolution, we also had a committee that elected to dissolve. We did not then have outside counsel. Ultimately the partnership had its own counsel separate from the partners.

But one of the reasons for the dissolution was that the firm had been looking for merger partners. Similar, I think, to the Brobeck firm out in California, they were looking for merger partners and a lot of firms did not want to merge with us because of our financial situation. And I understand.

The rumor has it, that it was, well, until the firm is dissolved, ceases to exist, we’re not going to merge with these various groups because it never would be—if you’ve ever watched any dissolution—it’s never everybody goes to the same place. A big chunk of lawyers go to one firm, and another chunk goes to another. But these other firms didn’t want to get sued for interfering with our contractual relationships. So, in essence, the dissolution was a way to prime the merger for various of our groups. There were big groups that went to some of the other larger firms, as there were quite a few smaller groups that had splintered. So that was another basis for the dissolution. But, you know, you would think that the primary concern at the same time as protecting yourself against exposure is continuing to do your work. And it was quite a challenge.

I remember dealing with the dissolution issues, packing up the office, trying to find a new firm, trying to figure out who we’re going to hire as counsel and the legal fees we had to pay for that, and then sitting in the office between 6:00 and 10:00 o’clock at night actually doing the work for the clients because once this became public, the phone calls are coming from the clients, what’s happening to my cases? Where are they going? Where are you going? How is this going to work?

An interesting dynamic with that is you had this inherent conflict between the exposure of the clients to the firm on their receivables, and the potential exposure for possible preferences and fraudulent conveyances and the need to take these clients to another firm and actually do the work and have another firm accept the potential exposure of coming to them with your work. It was quite a challenge.

I know some of the rules that we’re going to talk about have to do with protecting your clients’ confidential information, how you deal with file transfer. We were actually in such a crammed situation that
I’m not too embarrassed to say that the actual rules on what we were supposed to do and weren’t supposed to do kind of fell to the bottom of the list when you were trying to protect yourself and protect the files and protect the clients.

We actually had a procedure that we put in place for the transfer of files. We had to get consent from the client in writing to transfer the files. Not easy because if you’re out there trying to get these people to sign a letter, it’s not always easy to get the right person to sign the letter at the right time. And so one of the other things to keep in mind is always keep good lists of your clients and the right client contact that you need to deal with in certain situations because if you need to find someone to sign your letter that says, yes, I would like you to continue to work on my matter and I would like you to take the file, you better have the right person signing that letter.

The other challenge was finding the files. Like most large law firms we had a storage facility off-site, we had a floor above all of our operating floors where we threw all the files, and we had file drawers all over the office. So it was a question of gathering the files for each client that we may have ever worked on because you didn’t want to leave them there to just be left and potentially destroyed. And so you need to know where your files are. When you send your files off-site, keep a list of what you’re sending. Keep a list of every client you’ve ever worked for and what files you have generated and where they are.

In the effort to collect the receivables, the rule was that you could not take files until the receivable was paid. Well, that created another interesting dynamic between the clients and when they were going to pay and how they were going to pay and how you were going to take the files. So in some situations we left the files behind, taking maybe only enough paper so that we could keep working because you have to keep working because otherwise you’re going to get sued for malpractice, which is another interesting story that generated from this. But the most important thing again is to remember you must keep working on your matter.

On the collection of receivables, as it turns out, clients look for every opportunity not to pay the bill. And when they get hit with a collection letter from a law firm that’s in a Chapter 11, the initial response is, well, they’re in a Chapter 11, why should we pay the bill? I can’t tell you how many clients said that.

That would be bad enough, but the client then said not only are we not paying the bill, but we think we got lousy service and we had motions to modify the stay so as to initiate malpractice actions against
some of our partners. That was very ugly. And I know from personal experience that it creates many sleepless nights and all it is about is money. Money. Unfortunately when they say money is the root of all evil, that is quite true.

Let's just talk for a minute about paying up. I can talk about this because it is public record. Just to give you a little example of how the formulas were calculated. Again, the rationale behind paying up was to buy a release, and I will tell you that those who did not pay into the partnership fund or those who signed an agreement to pay and didn't pay were sued. And they were sued for many more dollars than they had agreed to pay.

Because, if you haven't already looked through it, if you look through the affidavit of the trustee that Bob put in the outline, you will see the potential exposure for the partners was potentially the bank debt, something they may have signed for, fraudulent conveyances, monies that allegedly were taken out in draws that were underserving over several years prior to the filing, and anything else that the creditors' committee can throw into the mix. So we're talking about lawsuits for many millions of dollars. And the partners individually did not have to write checks for many millions of dollars.

So in the end, when you sat down and you did the cost benefit analysis that you counsel your clients to do all the time, you came to the conclusion that it was much better to write a check than to have to worry about the potential lawsuits and the potential exposure.

We had a liquidating agent that was hired in the Chapter 11 and after many months and many meetings with the partners and the creditors' committee, they came up with a formula for contributions. Not everybody was pleased, but in the end the formulas were accepted. They were built into the plan of reorganization, which was voted on and was confirmed.

Non-unit partners, we're looking at non-equity partners, were lucky. They had negotiated amounts that ran anywhere from a thousand dollars up to thirty-five thousand dollars, and it was based on their income for the three fiscal years prior to the bankruptcy filing. If you were up there in the thirty-five thousand dollar range, I'm sure you weren't pleased. People that had to pay a thousand dollars really were lucky. And I will tell you this was in addition to monies that we had to lay out for a defense fund. We were actually a member of ALAS, we had a big self-insured retention, and we all did have to lay

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out monies to hire all these lawyers to defend us. And so that was a
nice expense up at the front end, plus the checks.

Retirees. I got a phone call the day after the firm announced from
one of my former partners who was retired, and he called and said,
“Hey, what’s going to happen to my retirement checks?” I said, “Bob,
we’re in bankruptcy, there’s no money, there’s no draw, there’s no pay
for the employees, we’re not getting anything.” He said, “Yeah, but
where’s my retirement check?” I said, “You’re not getting one.” That
was a shock. But they also had to pay in. Retirees paid two thousand
dollars plus a percentage of distributions that they may have re-
ceived—over fifty thousand dollars during the year prior to the
bankruptcy.

Equity partners, of course they bore the biggest brunt. They had
formulas that were quite complicated. A quarter of their contribution
was based on their percentage share of the secured creditor’s debt
based on the loan documents with the bank. Half of their contribution
was based on their distribution in the three years prior to the bank-
ruptcy, and a quarter of their distribution—of their monies that they
had to put in—was based on their uncollected accounts receivable and
work-in-process and write-offs that existed at the time of the
bankruptcy.

One of the other reasons we had a problem was we had so much
crap on our books that nobody ever intended or could collect. You
know all that stuff that you put on your time sheets and you say,
“Okay, this is great, I have all this nice billable time” and then you
can’t collect it, and then it doesn’t get written off or it does get written
off. I know we had some partners with receivables in the seven figure
range for single clients. That counted into the amount that they had to
contribute.

In addition, there was a premium, and I notice that you had this in
your bankruptcy as well, a premium to the estate. The management
committee members did have to kick in a little more based on their
role in running the firm, and that had to do with their involvement
over the two years prior to the bankruptcy.

In exchange for all of this money that was collected, we got a con-
firmed plan—we got a very, very broad release, nobody could touch
us for anything ever that had anything to do with work we did prior to
the confirmation of the plan. And so in that respect I would say that
people were pleased with the way it ended.

If I could give you a couple of other pointers, so that you shouldn’t
go home and say this is all nice and well and good, and I’ll never have
to worry about it again. If somebody asks you to become an equity partner of your firm, think about it long and hard.

When I was asked to become an equity partner of my current firm, I just started to laugh and I said, you know, I don't know if I could do this again. And I went home and I said to my husband, I don't know what to do. And he said, well, you said you would never do that again. And I said, yeah, but the problem is I think I have at least ten years before I'm going to retire and either I'm a team player or I'm not. And if I don't want to keep moving around, and if I want a commitment from my firm, then I need to make a commitment back. So I think I'm going to do this again, but this time I'm going to be smarter and this time I'm going to pay more attention and this time I'm actually with a firm that discloses there are no—I don't know because I'm assuming—there are no secrets. We have a lot of paperwork, a lot of numbers, a lot of accounting, a lot of discussion, a lot of disclosure, open management, and that's very important.

But you need to think about it because you don't have to be an equity partner. I remember when I graduated from law school, I thought well, I'll do this, I'll be an associate for seven years and then I'm going to make partner. I know I'm going to make partner. It's not all it's cracked up to be because you may have the wonderfulness of having this exposure, whether it's in a bankruptcy or outside of a bankruptcy. And so think long and hard about it. If you're ever involved in a situation, if you think that your firm is having problems, sometimes the smell test is the best test. If it smells bad, maybe it is bad, and think about getting out.

Those who got out early were better off than those who stayed until the end. So you might think about making a move, and doing it without that pressure of the dissolution, because it can happen and it can happen anywhere.

If there is a dissolution, get a lawyer. Lawyers should never ever represent themselves in a dissolution. You need to get somebody uninvolved; get somebody outside the firm. In our situation, as I said, it was fair employment for lawyers in Chicago—but sometimes you might need a lawyer from another state or another city—but you need to have representation.

And one of my former partners, Jimmy Chatz, is back here and we used to make a speech to lenders—and I use this all the time, so you taught me something—and he used to teach lenders that when you go to collect your debt, you need to change your expectation. You can't have the same expectation that you had when you initiated your loan at the end in a workout. If you think that you're going to collect all of
your interest and all of your penalties and all of your premiums and all of your late fees and all of your legal fees, you’re setting yourself up for disaster and disappointment. You must change your expectation.

Well, if you ever get involved in a dissolution proceeding, you have to change your expectation from being pissed off at everyone because when this started, everybody was angry, everyone blamed everyone else. You need to get off that, expect to pay something, negotiate the best deal that you can and get out. When you change your expectation, then there is life afterwards.

I remember when I came home the day that the management committee announced that it was our last draw. I announced this to my children and to my husband. My son was just graduating from high school, about ready to start college, and he was catatonic, he couldn’t even talk because he was worried, what about college? He was about to enter the University of Michigan at Ann Arbor. And I said, well, the good thing is that we don’t have to pay that first year in advance, we can pay it monthly. And the second thing is, I will find another place, it’s only a question of how long it’s going to take. There are lots of opportunities out there for lawyers.

Of the one hundred fifty attorneys that left Altheimer & Gray in a rush, every single one was placed within a month. We all found places to be. We may not have found what was ultimately the last place we were going to be, but we all were placed. And so there are always opportunities.

So be a little scared. Be a little protective. Pay attention. And now we’re going to hear about moving when you don’t have that big hammer over your head and somebody’s telling you you have to go.

MR. BERNSTEIN: One quick question. Was Altheimer a general partnership?

MS. FEINSTEIN: It was a limited partnership.

MS. BAER: I’m going to focus now on the happy news. You’ve kind of heard the disaster scenario, but making a move can be a very successful and a very pleasant venture, and I really just want to focus on some practical things to think about.

Amazingly, some very practical things often don’t get done because when lawyers move, they’re often taking business and there are a lot of bad feelings and bad feelings can cause very bad decisions. But again, I want to focus on the positive. What can you do to make this a positive and non-liability type experience?

The first thing to think about—when you’re bringing laterals into a firm or when you’re becoming a lateral—think about the culture of
the firm you’re going to. The typical culture I think about in the bankruptcy context is the difference between somebody who’s never seen a conflict in their life and somebody who says, “Yeah, we don’t represent that client, but we’d like to and, therefore, no, I don’t want you to take on this representation.” When you’re making a move, you need to know the culture from which you are coming and you need to know the culture which you’re going to. It can make a tremendous difference in whether or not that move makes any sense for your business and whether or not that move is going to be successful for other reasons as well.

In addition, every law firm from a one-person firm to a thousand-person firm and then some needs to have a loss prevention partner. If you’re a sole practitioner, guess what, you just got nominated. If you’re in a multi-thousand person firm like mine, I’ve got this great guy I can call, every time I have a question and ask, “Now wait a minute—is that a conflict or not, do I have to put it on my affidavit of disclosure, and what does this mean?” There is somebody who reads the journals—reads every case that ever comes out on ethics and conflicts—that person to go to who can counsel you right within your firm or somebody your firm hires to do that.

Be smart. Always have a loss prevention partner. When laterals are coming into the firm, from day one you must train them. I don’t care if this is a multi-billion dollar rainmaker. They have to understand what your firm does, how it does it, and how they’re going to fit in. In fact, I think it’s pretty fair to say oftentimes your tremendous rainmakers are not necessarily the most careful of lawyers when it comes to thinking about conflicts and ways in which to approach whether you can or can’t take a case. You always think you’ve got to be able to take this case, you’ve got to be able to bring in this client, there’s got to be a way. You need to understand that’s not always the case. When you’re bringing in a senior person with tremendous experience and tremendous books of business, they need to understand what the rules and regulations of the firm are, so they don’t get you in trouble.

For example, introduce them to the docket people because you know what happens when you don’t docket something—it’s a malpractice case for blowing the statute of limitations. Introduce them to the conflicts people. I do a lot of debtor work. You have to do affidavits; you have to keep them up to date every quarter. The senior people need to know how it works and how to do it. It’s not good enough if the junior associates, who are the ones who maybe have to wade through thousands and thousands of names, look through them; the
senior people need to know what the rules and regulations are, how it works, and do it right so that you don’t have a problem down the line.

It was interesting when Faye mentioned that they opened up offices in Paris and the like. I think one thing you always have to think about when bringing in laterals, especially bringing in laterals who have a different practice area or who are in a different physical location, you need to know what they’re doing. You need to monitor them from day one. If they’re bringing in IP work and your firm doesn’t do IP work, you need to understand and be counseled on what kind of work is IP work and where are the pitfalls. Where do you have problems with clients that you need to be careful of so that you set up the appropriate systems to not have those pitfalls.

If you’re opening up a Paris office, don’t open up a Paris office with three lawyers in Paris who speak French if nobody in the U.S. office does. Put somebody from your home office over there to supervise, to understand, to have them incorporate the office into your culture. It becomes “the firm,” not “them” and “us.”

In addition, it’s good, once laterals come in, to have practice group meetings. Again, especially in the circumstance where you don’t know this area of the law, the rest of the firm needs to understand the area of law; the new people need to understand the firm’s culture.

One thing I think is a very practical suggestion that probably offends rainmakers who come in, especially as a group with a bunch of people, is to put an existing lawyer who’s been at the firm on the team of the big litigation that the big rainmaker’s brought in. Integrate. Cross-culture. The worst thing I think anybody can do in terms of liability purposes is bring in a new team with a new kind of case, a new kind of specialty, and then not supervise them and all of a sudden one day you get a phone call that there is a problem. Don’t be dumb. Really think about what you’re doing. Make loss prevention a part of the practice.

I have to admit, I do not sit down and read all of this stuff that comes through my office, but I do go to—and do counsel all of you to go to—these sessions; go to sessions if you have a bigger firm within your own firm. I guarantee you once a month or once every couple months, they’ll do a session on some legal ethical issue. Don’t think just because you’re a bankruptcy lawyer you don’t need to do this stuff. Every lawyer needs to be aware of what this is and what you can do to make sure you understand it and not have problems down the line.

One other thing that I find kind of amazing that I’ve experienced in moving firms is how short-sighted both the firm that has partners and
associates leave and the firm that brings in new people can be about this exchange. For example, oftentimes when an individual leaves a firm, their phone is shut off, their e-mail is shut down, and when you call the receptionist the next day at the firm and you say, “Is Jan Baer there?” it’s like, “I’m sorry, she no longer works here.” “Well, can you give me her contact information?” “Well, I really don’t have that” or “Well, yes, she’s at ‘X’ firm,” and that’s it.

We understand oftentimes when there are moves, especially when business is moving with people, there are bad feelings, but that is a really stupid thing for both the law firm that’s been left and the new law firm to do. Keep the voicemail on. Put your own message on the voicemail that says, “This lawyer has left, she’s at such and such firm. If you have any questions about your case, call ‘X.’” They’re going to call the lawyer’s individual line, and if they’re not on the top list of clients that the lawyer calls to try to move over, they’re going to need to find somebody. You don’t want the person they find to be the receptionist who’s part time who’s been there for a week and has no idea.

Same thing with e-mail. The firm controls the e-mail system. Put a message on the e-mail informing clients where this person has gone and informing them what they should do if they have questions. We realize oftentimes firms don’t want to advertise where people have left and gone to for fear that the work is going to go there, but better that happen than the work be sitting, a deadline get passed, and it get missed.

One little thing that I learned from moving firms about deadlines is when you’re taking cases, obviously you have your docketing system, your calendar system, and you know what client deadlines are. Your former firm may not know that, but they really should because if a deadline is missed, not one firm is going to get sued, two firms are going to get sued. The same thing if you don’t take a client with you. You have it in your docket and you know there are deadlines—when you see a deadline approaching, never, never, never assume that somebody else knows that deadline besides you. Send an e-mail. Make a phone call, “Hey, you remember such and such? I just noticed on my calendar that they’ve got the statute of limitations coming up” or, “Hey, I just noticed on my calendar that their UCC filing is going to be expiring.”

It’s difficult, and emotions get involved a lot of the time, but at the end of the day, it’s the client. It’s the client’s case and it’s the client’s deadline and if any of those things are missed, both firms and the
lawyers are going to get sued and you want to do everything you can to prevent that.

MS. FEINSTEIN: Those things happen more often than we'd like to admit. Especially when you have younger lawyers moving around that may be going without their own clients, they don't feel the investment in the client and they don't appreciate the fact that they're leaving things behind and that they need to inform people specifically of the status of various matters.

I had an associate that went and left and he was working on quite a few pieces of litigation, and I said, "I'd like to have all of the files in my office with all of the correspondence in them." And he said, "Oh, the correspondence, it's all on my hard drive, it's all in archive files." I said, "Print it off and get it in the file." He said, "Oh, well, can't you just search my archive files when you need something?" No. It literally took him a week to print all of that, and that's all he did. He did not do anything else. When he left, it was very difficult to piece together what settlement discussions had been going on and what dates had been agreed to. And so is this concept of don't assume anything is really not important when you are the one left behind and somebody else has left that's been working with you on something.

MS. BAER: Another thing is, think through it a little bit. I mentioned a moment ago the UCC filing. You might know that if you're in the middle of the lawsuit, the discovery's due in forty-five days. What you might not remember if you're involved in a corporate transaction is, you know, I did that deal two years ago, the UCC's going to expire in California at such and such time. It's not written down anywhere. I guarantee you the client's not going to remember.

And, I mean, as a bankruptcy lawyer, again, you know how many times you've gotten involved in a situation, the first thing the creditors' committee does is they check to see whether or not the secured lenders are in fact secured. It's amazing how many times they're not, and it's not because they didn't file it up front, it's because it expired and nobody renewed it. In fact, I strongly counsel you all: Think about, find out what's your firm's system for making sure of that. Is there a system? If there's not, I don't care if you're a bankruptcy lawyer or if you're a tax lawyer, you all know what that means. It's something you need to get put in place and keep in place.

I'm going to move on to the other thing about switching firms that always comes up, and I imagine Thomas will get into more of the ethical cases that go with it. That has to do with how. How do you switch firms, communications, conflicts, and move files?
Faye mentioned, for example, this issue about liens. Client owes the firm money. Client’s moving to the new firm with the lateral candidate. I guarantee exactly what the old firm’s going to say, “Damn it, I’m not giving a piece of paper until they pay their entire bill in full!”

Well, that’s all fine and good, and under the law you are, in fact, entitled in some states to assert that, but if that file is needed for an immediate court deadline, or even if that file is needed for some work in the very near future, at the end of the day you’ve got to be practical about this and work something out. Just standing on your laurels and saying, “They need to pay me before they get their file” doesn’t always work; it buys you a lawsuit.

In terms of communicating with clients when you’re moving firms, the first question is when? When can you communicate with a client that you are moving firms? Can you communicate with a client before you’ve told your firm? The general answer—and it varies from state to state—but again, the general answer is you shouldn’t. You should not communicate you’re moving until after you’ve told your firm and then immediately you can communicate that you’re moving.

Now sometimes some cases don’t seem to find a big problem with you happening to mention to a client, “You know, I’m going to be moving firms.” Nothing more than that—anything more than that becomes solicitation. And even after you’ve told the firm that you’re leaving and you then communicate with the client you’re leaving, you still have to be very, very careful of solicitation. And in fact, I think the general rule is do not solicit clients until after you have, in fact, moved and then pursuant to the appropriate ethical laws, you can in fact solicit your client.

The important thing is communicating, but remember what you’re communicating—it is the client’s choice what they want done with their case. The client needs to be communicated with by the person who’s moving and should also be communicated with by the firm that’s there—and the same message: It’s your choice, it’s your case. Your options are the following: “This new lawyer is at this new firm, he’s willing to take it;” “We’re here at the firm, three associates that used to work on the case are here, and we’re willing to keep the file;” or frankly if you’re not—if all the tax lawyers have left and this is a tax case—the last thing you want to do is say, “Hey, it’s a tax case, but our litigators can handle it; it’s okay, we can handle that.” You know that that’s just a recipe for trouble.

It’s really funny when you read the ALS Journal and you read ethical cases. They always say some things that are really nice in theory, but practice is another issue. For example, the best communication
when a lawyer is leaving is to communicate to a client jointly. The lawyer that's leaving and the firm that's being left jointly communicate that this is happening. I've never seen that. It's a great idea, but unfortunately it's usually not all that pleasant. But the point that I think is being made is that you should do what you can. Get your emotions out of it; be practical because when you get upset and you get emotional and you get angry, you may make the very wrong decision for the future.

Other things to think about in terms of the files again, as I mentioned, the client has a lien on the files. Remember who owns the files. The client owns the files. The firm does not own the files. If the client wants his files to move, the client can communicate that message. The way to do it is, as Faye mentioned, you send a letter. The client sends a letter to the firm saying please allow my files to move. It is not the firm who is being left with the decision as to the movement of those files. The only exception would be circumstances where some of the materials are really not client materials. It's an internal memorandum on "X" part of the law that may affect this client, but it wasn't done by the client, it wasn't done for the client, and it wasn't done with the client paying for it.

What about your chron files? Is it appropriate to take your chron files with you when you move? Prevailing case law seems to say yes. Again, it varies from jurisdiction to jurisdiction.

What about—and as a bankruptcy lawyer you'll like this one—your form files? What about all of those wonderful petitions and motions and memorandums on first day pleadings and the like? Can you take those? That one is a real tough one. Generally speaking, I think the case law would suggest that the firm owns the form files. Obviously a client owns an individual client's files, but the form files become a little bit messy. And again, before you think about taking those, before as a firm you think about stopping somebody from taking them, you really need to get counseling in your jurisdiction as to what the rules and regulations are.

Last but not least, I'm going to mention conflicts and then I really need to move on to Thomas up here. Something that I thought was very clever when I was reading up on this was if you are bringing a new lawyer into your firm, obviously you're going to run a conflicts check on all of the cases he brings in, obviously you're going to run a conflicts check on all of the major cases he's worked on, but run a conflicts check on his firm. Identify every case that your firm has had or your firm's clients have had adverse to his firm because there are a lot of interesting cases out there about a situation where maybe he
didn't work on the file, but his partner did and whether or not when you're on the other side you can then become adverse. Sometimes it's difficult to do, but by this time you should have a pretty good computer system set up so that you can run things like that.

MR. MCGARRY: Everyone need a stretch here? Write this down: 1.6,\(^7\) 1.7,\(^8\) 1.8,\(^9\) 1.9,\(^10\) and 1.10.\(^1\) Now we've covered most of the material just there. Those are the rules, the kind of central rules we're going to be talking about. They track the fiduciary responsibilities of lawyers in the public trust, so they're very important to the lawyer in transition.

Now why am I qualified to talk about this? I've been at the same firm for twenty-five years, and when I started at Hinshaw it was probably eighty lawyers and now it's nearly five hundred and in twelve or thirteen states, I'm not sure. I better check that out, Faye.

I certainly know I'm in California, so I'm worried about the fiduciary law that my partners use. And I'd like to ask more questions about all these things. I've maybe raised things. We haven't answered an awful lot, and it's really incredible food for thought.

We understand that lawyers are in transition quite often for many reasons. So are clients. You know, when you talk about the transitions, it's a voluntary association between a lawyer and a client and it's terminable at will. And I get hired a lot to get involved, unhappily, in wranglings over attorney/client disputes on files and those attorneys' liens that you're talking about or the possessory liens where there're disputes of the former firm wanting to get paid before that lawyer leaves and so forth. And of course I don't really like those fights one bit. I also get hired in disqualification proceedings, and that is often a very difficult moment for lawyers who have a lot on the line, including their attorney ethics.

So let me sort of segue in. This is a business law focus and yet the things I'm going to discuss are lawyer ethics, they're very peculiar to lawyers. We're a self-regulated business, if you will, and a profession. The preamble to our rules reminds us that legal services are not commodities and so we have very special rules.\(^12\) And the public trust is involved in everything that we're going to be discussing here.

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8. Id. R. 1.7.
9. Id. R. 1.8.
10. Id. R. 1.9.
12. Id. at Preamble.
And that is what the central focus will be when I talk about the rules because the rules are really the embodiment of how we’re going to act properly towards clients and keep the trust and also, you know, deal with these very essential parts of the trust dealing with confidences and avoiding conflicts of interest.

So those rules—the numbers I gave you were the Illinois Rules of Professional Conduct, you knew that. Those of you who practice outside of Illinois, I’ll try to make it relevant, and you can actually pipe in if you have any comments, but say if you’re in Ohio, and I’m not certain if you are a Model Rule state, I assume that you are, there are some differences in Illinois between the Model Rules and the Illinois version of the rules and they are material in this particular field of lawyer transitions.

Now, so that I get the most current information to you today, I did talk to Professor Vitullo who’s retired from the College of Law but has attempted and I think successfully taught generations upon generations of young lawyers coming into the profession on ethics. And he reminded me that the Illinois version of the rules, which is very small, this pamphlet has the judicial rules and so forth, disciplinary commission rules, but our rules are only about fifteen pages long from end to end.

We are going to be adopting, our Supreme Court has on its docket, new rules. A modification of our rules is going to take the Illinois version of the rules. Professor Vitullo reminded me there are about eight controversial pieces but by and large they’re going to stick to the original Illinois version, but they’re going to add a series of comments so our rules will now be a document about one hundred fifty to one hundred sixty pages long.

And it’s really helpful to us to adopt these comments. It really is. Because now you won’t be just reading a rule like a tax code, you know, Rule 1.6, thou shalt not reveal confidences, you’re going to have some helpful comments. And naturally you could always refer to the Model Rules when you needed help or call that guru in the firm who has these on his desk and so forth, but now our rules are going to have a little more help adding to fulfill our obligations in the public trust.

So with that—and I’m talking about our rules dealing with lawyer transition—basically rules regarding coming and rules regarding going. And it’s basically the same rule. But I mentioned those first rules,

13. Id. R. 1.6.
1.6 Confidences;¹⁴ 1.7 Conflicts of Interest Between Clients;¹⁵ 1.8 Conflicts of Interest Between the Lawyer and the Client are Prohibited Transactions;¹⁶ and 1.9 which are conflicts between a lawyer and former client or clients of the law firm and a former client.¹⁷

And what I want to just focus on for a second is Rule 1.9—the ABA Model Rules version.¹⁸ It seems to be, in their opinion, sufficient to deal with former clients in the context of dealing with transitional lawyers leaving a client and then going to a new firm adverse to the former client. So if you wanted to get some help in the Model Rules on a departing lawyer’s obligations with respect to former clients at the past firm, you won’t find it in Rule 1.10 as we have in Illinois,¹⁹ but you’ll have to look at Rule 1.9 in the Model Rules.²⁰ So they figure two rules cover what we have in three. I think ours is very helpful.

The most important rule I wanted to describe today is Rule 1.10, and there are others, but Rule 1.10 is the rule dealing with imputed disqualifications affecting a law firm when a lawyer joins the firm.²¹ And again, you know what we’re dealing with—they use a very clinical term to sort of deal with these—disqualification, but really this is an ethical problem, it’s a serious ethical problem.

And I can tell you that if you use the sort of litigation term “disqualification,” which is, you know, disqualification in the courthouse, you may find also that of course the rules are going to be used as the basis for the disqualification. And judges do, after deciding these cases, unfortunately refer lawyers to the disciplinary commission. I’ve seen that happen. I’ve defended lawyers at the ARDC who first went through the Circuit Court or the Federal Court and were disqualified, and second the matter was referred over to the commission.

So we’re dealing with rules of ethics. We’re dealing also with rules of discipline. There is a nice feature that we have in Illinois, which is very helpful, which is not found in the Model Rules. We make a very important distinction: Illinois rules allow screening, the screening process.²² So this is a very important concept for lawyers in transition. And there is much, much more we can say about lawyers in transition in terms of the due diligence dance that’s done on both sides.

¹⁴. Id.
¹⁵. Id. R. 1.7.
¹⁷. Id. R. 1.9.
²⁰. ABA Model Rules of Prof’l Conduct R. 1.9.
²². Id.
And one of the more important pieces is how are we going to join your clients in our firm and which clients of yours cannot come in the door. And then when you do come in the door, what can we do to prevent disqualification, infection; the virus could result in a breach of fiduciary duty and a disqualification.

So, you know, I could bore you and read the rules line by line. They're very simple, and they're not hard to read yourself. They're a little hard to follow because, as I said, it's coming and going.

But by and large, the firm will be disqualified if the matters brought in the firm, which are adverse to the firm's existing clients, are substantially related to current representation, so you obviously can't go directly adverse to an existing client. But when the lawyer comes in the firm and brings in a client who may not have a matter that's directly adverse, but it could also be a substantially related matter, it has to be analyzed. That's the key analysis.

And the second prong beyond being directly adverse or not directly adverse to the clients that are meshing into the firm is that we can't use confidences. We can't use information from the prior representation—in fact this is broader than confidences—that are not publicly known or otherwise confidential under Rule 1.6.23

So you also have to kind of roll back to Rule 1.6 on confidences in your screening. The lawyer has to give it a gut test naturally because one of the major points is whether the lawyer actually believes that he can act in such a manner that would not result in disloyalty.

So we do allow ethical screening. That means isolating a lawyer in a quarantine situation. What I wanted to tell you about that—and I'll talk about effective screening in just a minute—but I want to just move along from the joining a law firm problem, which is covered under RPC 1.10 and 1.10(b),24 to leaving a law firm. That is, when you depart a law firm, you may represent—when you join the new firm—you could represent a person with materially adverse interests to those of a client represented by the prior firm if the matters are not the same or substantially related. And no information from the firm that you possess is protected by Rule 1.6.25

Finally, the client can always waive—and sometimes that's your last ditch thing to do is to try to get an informed waiver of those things. Please remember, even though it's not required in Illinois, to get these in writing; the Model Rules require writing. And in court, I'll tell you

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23. Id. R. 1.6.
24. Id. R. 1.10.
25. Id. R. 1.6.
what, if you don’t have it in writing, your words can and will be misstated at your trial, so be advised of that.

And I think in the new rules and Professor Vitullo knows because he looked and I looked and we’re not really remembering everything, all the changes, but Illinois is not adopting the Model Rule position on having these conflicts waivers in writing. Okay? So we’re required to make disclosures.

Now, effective screening under Rule 1.10(e)26 again, I mention that this is not found in the Model Rules, the Model Rule states may or may not allow screenings, so be careful you look at your own jurisdiction. Therefore, if you’re in a multi-district practice, you’re going to have to look at the rules across the board. Be very careful about that. Although, if you’re ever in a quandary about what rules apply, you might find some help in the rules themselves. I think it’s 8.527 that is the conflicts of laws section in the rules.

So where the conduct predominates might afford you the rule, watch because as you see, you go to California, California is not a Model Rule state and they have statutes that affect lawyer/client relationships. So be very careful about leaving Illinois if you’re going to rely on the screening process.

A lawyer will be deemed screened if the lawyer has been isolated from the confidence and secrets. In big firms, it’s a little easier because you can actually have geographic isolation when you’re in the same firm.

It was an Illinois case, and I think it’s in the handout materials in an article by Tom Sukowicz, my partner. He points out one case in Illinois, I think in the first district, which held that a four-member law firm really couldn’t do an effective ethical screening.28 The protocol just didn’t operate. It wasn’t practical. So practicality will also be part of that.

The lawyer has to be isolated from all contact with the client or any agent, officer, employer of the client, and any witness for or against the client. The lawyer has to be precluded from discussing the matter. All the lawyers must be isolated on discussions, and the firm has to take affirmative steps to accomplish that.

What you can do is—we have in the handouts and I’m going to give you some resources you might look at later on for practical guides—but we at my firm and other firms, because we’ve seen protocols that

27. Id. R. 8.5.
have failed and judges have found inadequate, we take very much care in putting physical evidence on the file to warn that the file is restricted, the secretaries are notified, everyone signs off. The isolated lawyer gets a copy of the protocol.

The file is maintained in an area that’s restricted from the isolated lawyer. We also—I want to make this point very carefully about electronically-stored material because you can do this in most firms that have IT help and if you’re in a small firm you may have to get this help—but you can isolate a person’s access to electronically-stored materials. I think that should be an important feature of the screening protocol. Then you have to honor it. Just having a protocol in place is not enough to fulfill ethical requirements.

Now, timing is of the essence on the screening. And it goes both ways. In other words, before the association, you have to have the protocol in place. The screening that has occurred following the admission of a new partner into the firm has been deemed to be inadequate by some of the cases. I think there are some in our handout. On the other hand, it is also in the common law rules regarding disqualification that the client seeking disqualification of the firm has to do so timely as well; otherwise a waiver can be implied.

Now I want to run down a couple other rules quickly, disciplinary rules, really ethical rules that deal with transitions of lawyers specifically. And then I want to talk about the fiduciary law because I think we have to all circle back to the fiduciary responsibilities we hold to clients.

First off, Rule 1.11, which I didn’t cite in the opening, but it’s in sequence, deals with lawyers’ transitions from government agencies to private sector and vice versa.

Rule 1.12 deals with lawyers and arbitrators, adjudicative officers who go from the bench into the practice and vice versa. I’m not going to read them all but basically—and it also deals with law clerks, if any of you are associated with judicial law clerks or retaining law clerks or they’re coming into your firm, be careful—you must look at Rule 1.12 to screen those law clerks. And one of the important features of that requires notice to the judge that you’re hiring this law clerk. So we even have ethical rules that cover specifically law clerks if they change.

29. See SK Handtool Corp. v. Dresser Indus., Inc., 246 Ill. App. 3d 979 (1st Dist. 1993); Van Jackson, 114 F. Supp. 2d 731.
30. SUP. CT. OF ILL. RULES OF PROF’L CONDUCT R. 1.11.
31. Id. R. 1.12.
Arbitrators, there is a special rule on arbitrators who act as partisans, basically are advocates and they're not stuck with the same responsibility.

I want to make a couple comments about when you're leaving a law firm and then on the race to get out of the law firm, treating your partners, and the Restatement of the Law, Third, Governing Lawyers.

The Restatement of the Law Governing Lawyers—and when I talk to lawyers, I know many of you are not aware that there is a restatement of the law in this field. Section 9, it's a 2000 Restatement, sets forth suggested protocols for departing a law firm. And they do say that you should give—and I think this is what you should follow because as you were saying, we're all kind of grappling for a rule of thumb and what you said pretty much jibes with the Restatement. But basically it says the departing lawyer should give notice to his firm that he intends to solicit the client. It does not prohibit solicitation once you've given notice, it doesn't require you wait any further before soliciting his own clients, so it's a little practical difference between, you know, what you were saying is good manners versus what the Restatement says is sort of the legal framework of the fiduciary law.

And finally I'd like to say if you look at the materials in the handout, the Dowd & Dowd opinion, the First District Appellate decision, it is something that's vital reading; it's essential reading. The lawyers who were leaving, taking Allstate, the largest client of the firm, and one of them happened to be an officer of the firm and they got caught up in a pretty terrible lawsuit and were found guilty of business torts, if you will, and as a result paid an awful lot of money plus punitive damages. One of the other underpinning problems of that is that I want to remind you too that when the ARDC now is charging lawyers, they're also charging lawyers for breaches of fiduciary duty. And the duties—fiduciary duties to partners.

And I will tell you that's something to look into very carefully. If a law firm complains about a departing lawyer's misconduct in departing, any dishonest act in leaving a law firm, any solicitation that was pre-termination solicitation, the ARDC puts some of the most seasoned attorneys or prosecutors on investigating those particular allegations, and they do and have prosecuted departing lawyers.

I'd like you all to know about Freivogel on freivogelonconflicts.com. It has a great bibliography in this area. It has a topical

index, it will have departing law firms, and you can get state by state case law on lawyers in transition.

And I gave you in the handout the chapter from the IICLE,\textsuperscript{34} that was originally authored by Mike Coffield and he was quite a well-regarded lawyer's lawyer in this city and represented a lot of lawyers in transition. I think that was his specialty. And so please look at his handout. There is a checklist in there for departing or leaving a firm.\textsuperscript{35}

And I hope we get a chance to ask each other some questions.

\textsuperscript{34} Illinois Institute for Continuing Legal Education

\textsuperscript{35} Michael W. Coffield & Christopher C. Kendall, \textit{Lawyers in Transition: Liability Issues Relating to Lawyer Mobility}, \textit{Attorneys' Legal Liability} § 17.27 (2007).