THEODORE ROOSEVELT AMERICAN INNS OF COURT

PRESENTS

HOW TO PART WITH YOUR FIRM –NO MUSS, NO FUSS – A Primer for Partners and Associates

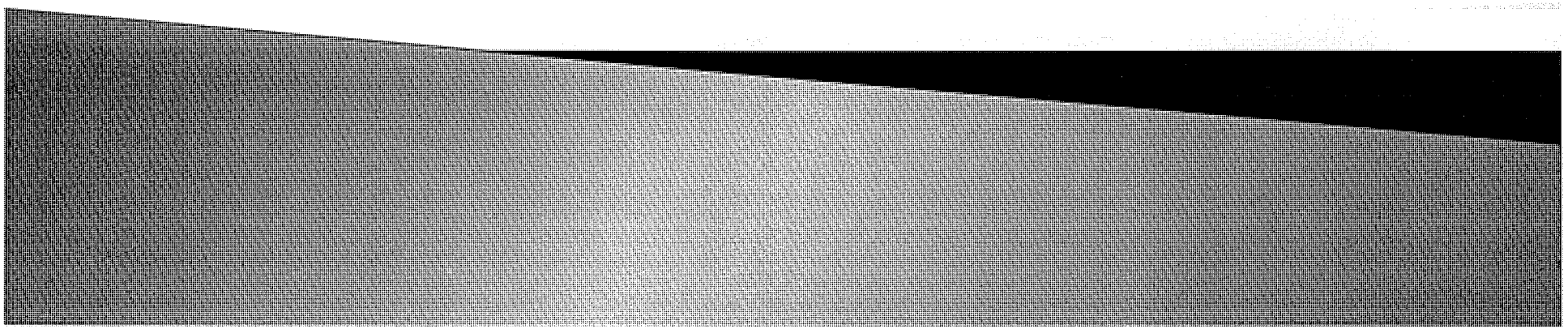
NASSAU COUNTY BAR ASSOCIATION

15TH AND West Streets, Mineola, New York

November 29, 2012

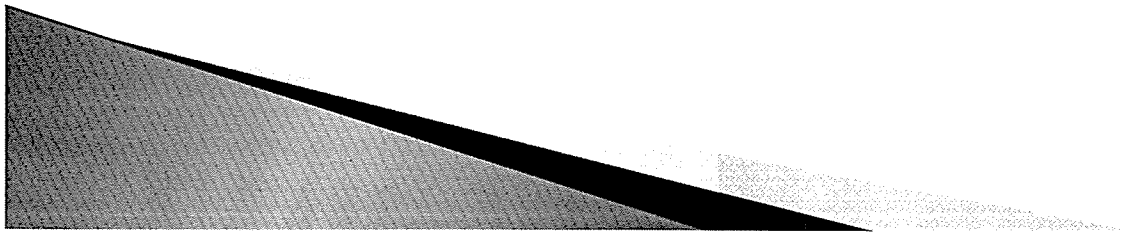
HOW TO PART WITH YOUR FIRM –NO MUSS, NO FUSS

A Primer for Partners and Associates



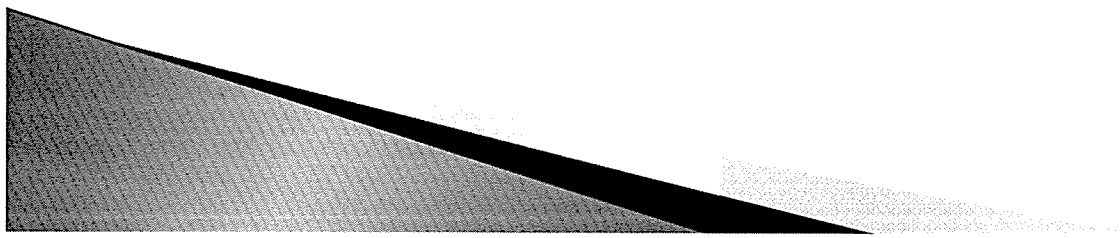
DISCLAIMER

- *The events and persons depicted in this movie are fictitious. Any similarity to any person living or dead is merely coincidental."*



Part I

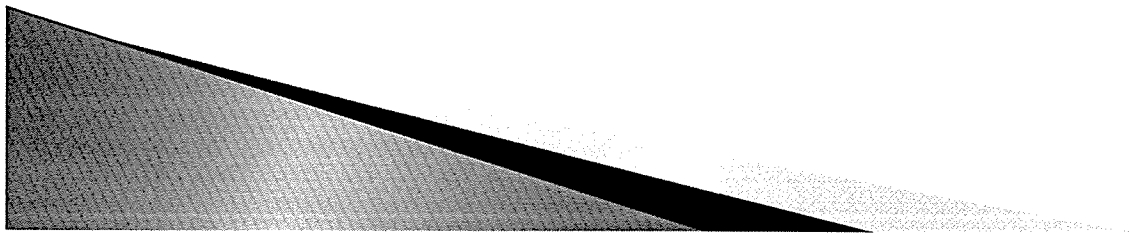
- A Time for Action

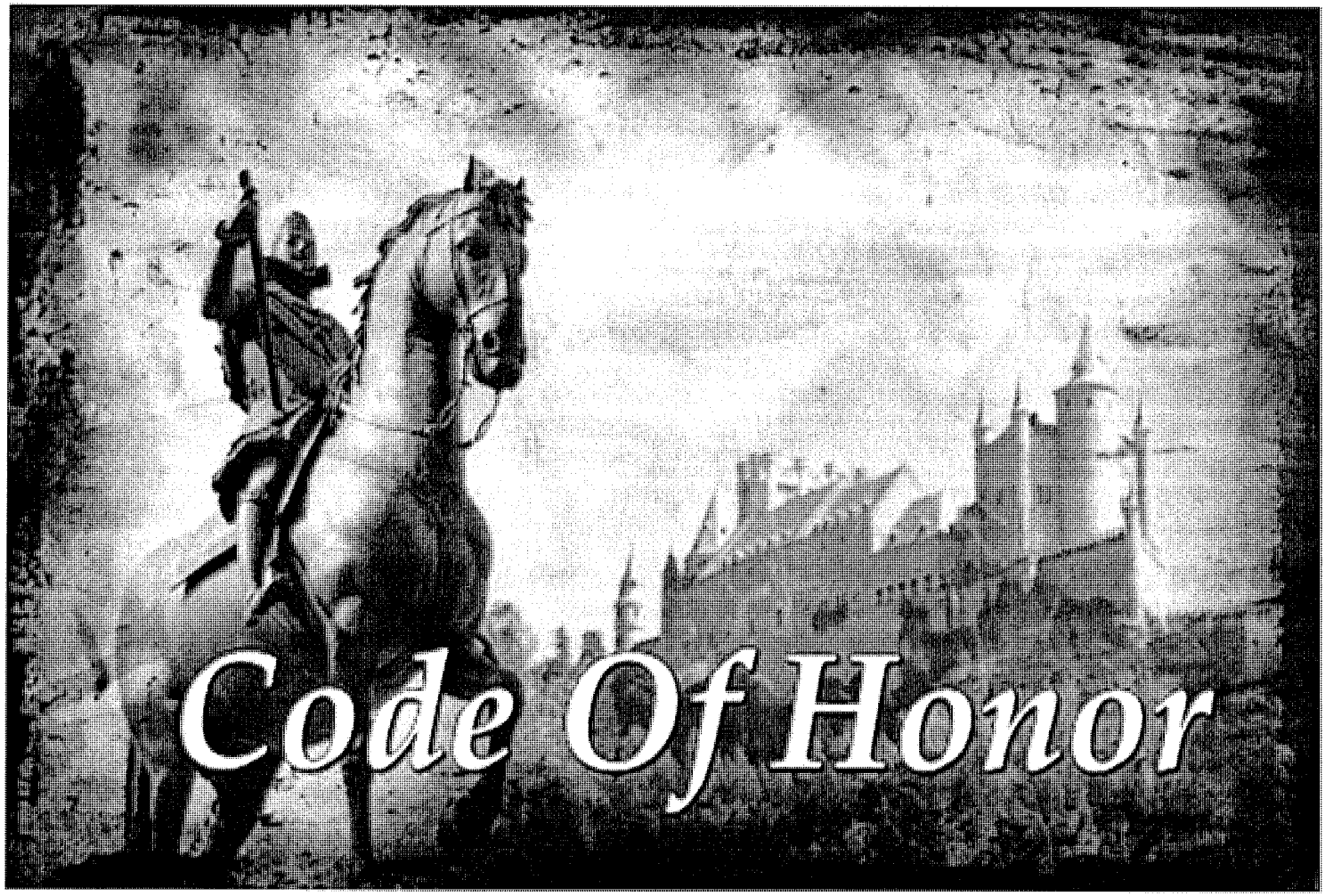


A Time for Action

- Everything you do is guided by this principle:

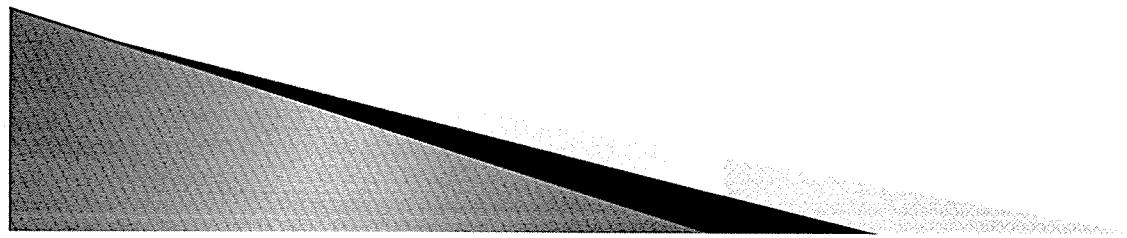
- Law partners, no less than any other business or professional partners, are bound by a fiduciary duty requiring "the punctilio of an honor the most sensitive" **Graubard Mollen Dannett & Horowitz v. Moskovitz**, 86 N.Y.2d 112 (1995), quoting **Meinhard v. Salmon**, 249 N.Y. 458 (1928)




Code Of Honor

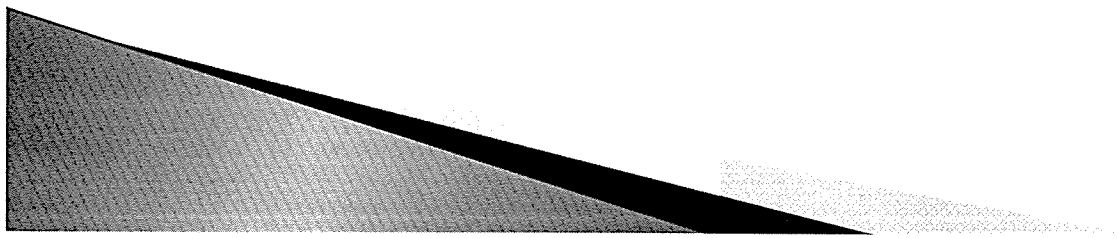
A Time for Action – The Courtship

- Can I talk to other firms/employers?
- ANSWER:
- Of course you can.
- In Graubard the Court of Appeals stated the obvious:
- *"Taking steps to locate alternative space and affiliations would not violate a partner's fiduciary duties. That this may be a delicate venture, requiring confidentiality, is simple common sense . . . "*



A Time for Action – The Courtship

- Can I give the new firm that is interested in me a copy of the firm's client list, accounts receivables, the firm's bank account number and the name, address, email, telephone number and facebook page of every client ?

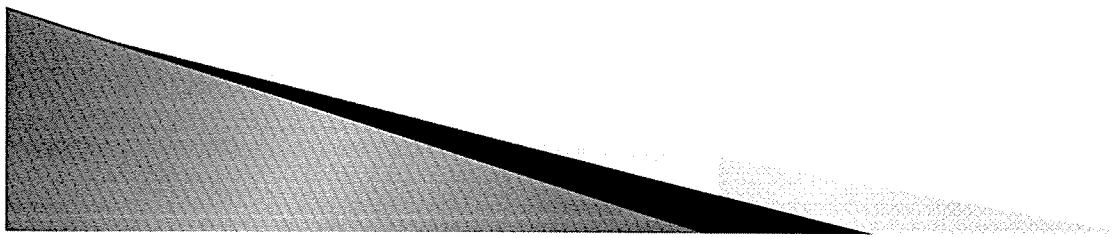



STORMS

A Time for Action – The Courtship

- The answer is:

- **NO**



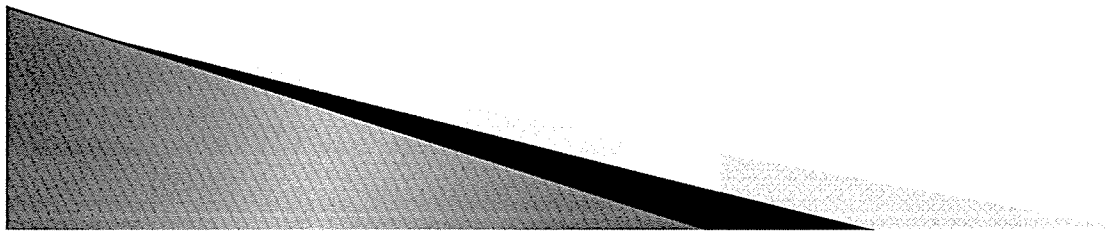
A Time for Action – The Courtship

- **Gibbs v. Breed, Abbott & Morgan**, 271 A.D.2d 180, (1st Dept. 2000)

- There, two partners committed a breach of their fiduciary duty to the Breed partners by supplying their soon to be new firm with a memorandum –

What they did:

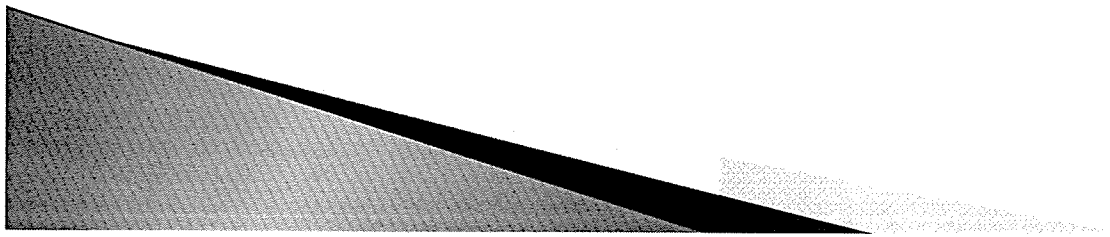
- (1) Described the members of Breed's T/E department; (2) The department's salaries;
  (3) Other confidential information such as billing rates and average billable hours, taken from personnel files.



A Time for Action – The Courtship

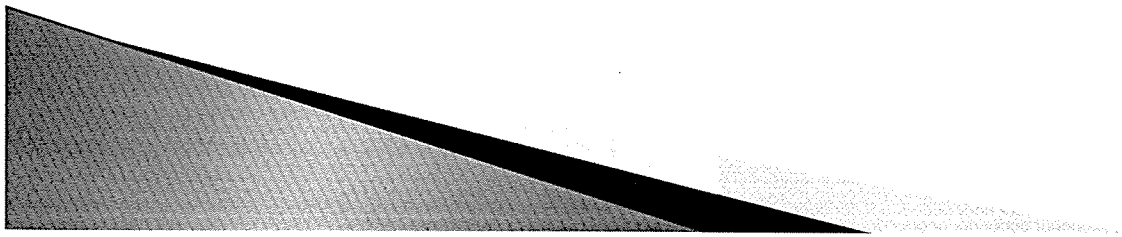
- Does this limit you to the extent that the only information that can be shared with a potential employer is your name, rank and serial number?

- There is a little thing called "Due Diligence" which is absolutely permissible and essential for your new partner/employer to evaluate you as a candidate



A Time for Action - The Courtship

- What can you disclose without exposing you and your new firm to trouble?
- Conflict Check
- **Conflict of Interest; Simultaneous Representation -**
- DR 5-105(d) While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101 [1200.20] (A), DR 5-105 [1200.24] (A) or (B), DR 5-108 [1200.27] (A) or (B), or DR 9-101 [1200.45] (B) except as otherwise provided therein.
- DR 5-105(ed) A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105 [1200.24] (D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105 [1200.24] (D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105 [1200.24] (D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105 [1200.24] (D).



A Time for Action – The Courtship

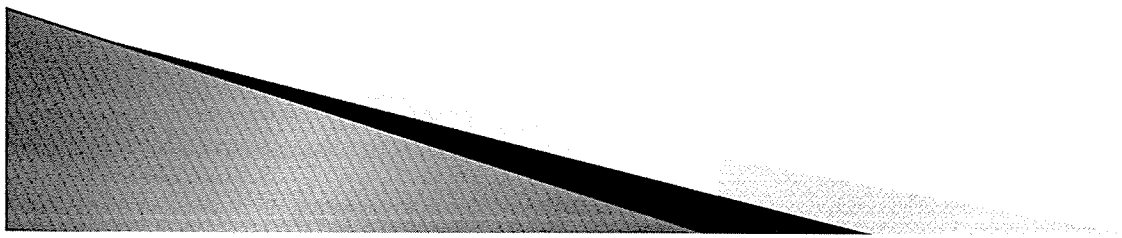
- NEW YORK STATE BAR ASSOCIATION Committee on Professional Ethics Formal Opinion #720

- When a lawyer moves from Firm A to Firm B, Firm B must request, and the moving lawyer may disclose, the names of clients represented and, depending upon the size of Firm A, the name of all clients of Firm A for a reasonable period of time, as long as such information is not protected as a confidence or secret of the clients of Firm A and disclosing this information does not violate any contractual or fiduciary duties of the lawyer to Firm A.

A Time for Action – The Courtship

- NEW YORK STATE BAR ASSOCIATION Committee on Professional Ethics Formal Opinion #723

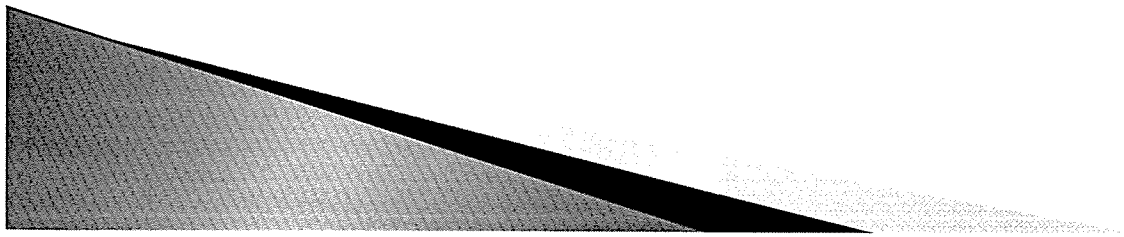
- This opinion addresses litigation conflicts that may arise specifically (1) when a lawyer moves to an opposing firm in the midst of ongoing litigation and (2) when a lawyer moves to a firm which subsequently becomes adverse to a client of the lawyer's former firm.



A Time for Action - The Courtship

- Any limitations on disclosing client's names?
- Yes - See **DR 4-101 - Preservation of Confidences and Secrets of a Client.**
- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

  In the unlikely event that the lawyer has some contractual obligation or fiduciary duty not to disclose the name of the client (i.e., representing a "Jane Doe" or you have a partnership agreement that limits disclosure)
- A mass disclosure MAY be disclosing a trade secret
- If this is a problem seek the client's consent

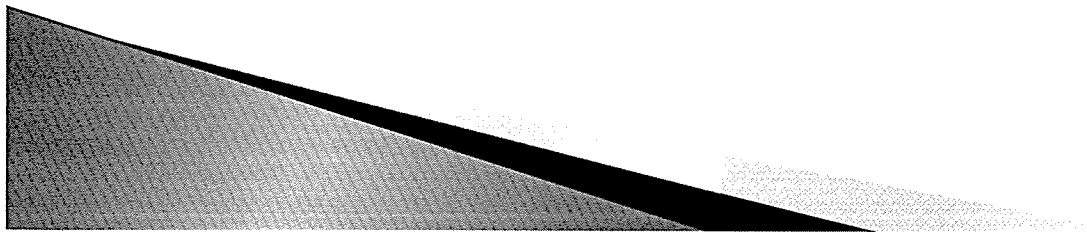


A Time for Action – The Courtship

- The Disclosure of Other Information

- Balancing test between the rights of attorneys to practice their profession and their client's rights to represented by a lawyer of their own choice.

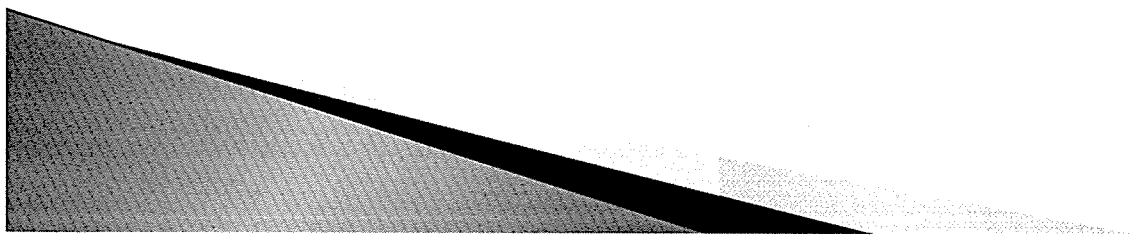
- Your hours billed
- Your billing rates
- Your gross billings
- Whether any of your receivables were "extraordinary"
- Percentage of write-offs (realization rate)



A Time for Action - Breaking the News

- When you have made up your mind to part ways-Who do you tell first?

- A. Your Wife or Husband?
- B. Your Mother
- C. Your Clients
- D. Your soon to be former partners/bosses



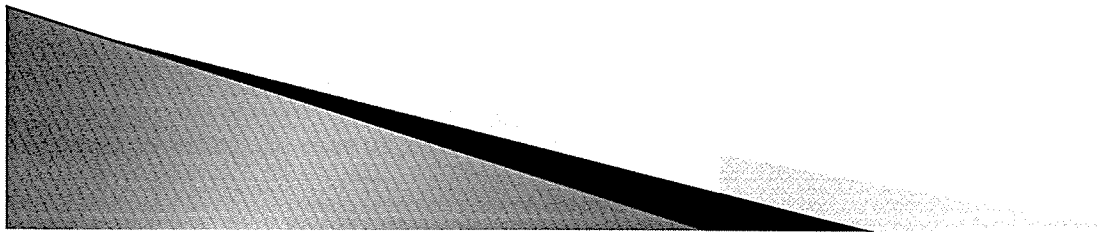
A Time for Action – Breaking the News

- If you said your Wife or Husband
  - ***You're a smart man or woman***

If you said – your mother

  - ***You're a good boy (OR GIRL)***

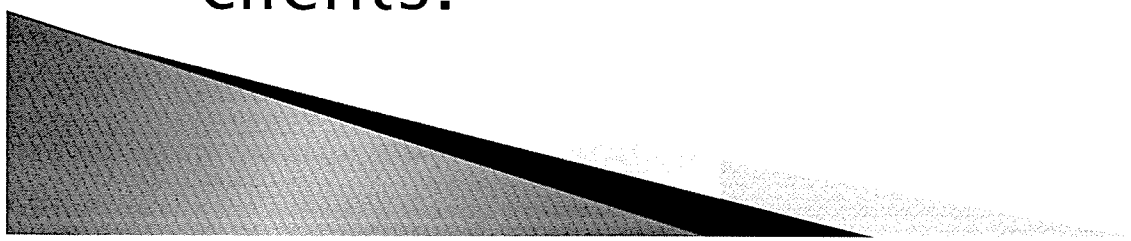
- If you said your client
  - ***You are in a whole heap of trouble***
- If you said your partners/employer
  - ***You are correct***



A Time for Action – Breaking the News

- **Graubard Mollen Dannett & Horowitz v. Moskovitz**

- While the court commented "Ideally, such approaches would take place only after notice to the firm of the partner's plans to leave." The clear import of the decision is that it is not only "ideal" but mandatory to tell your partners before you tell your clients.



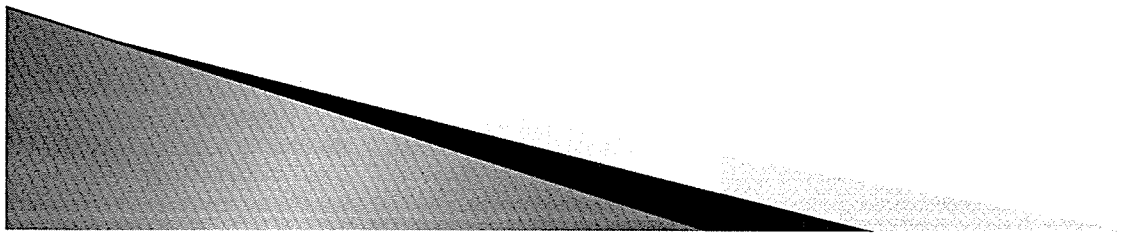
A Time for Action – Breaking the News

- The Court also added:

- ". . .secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties."

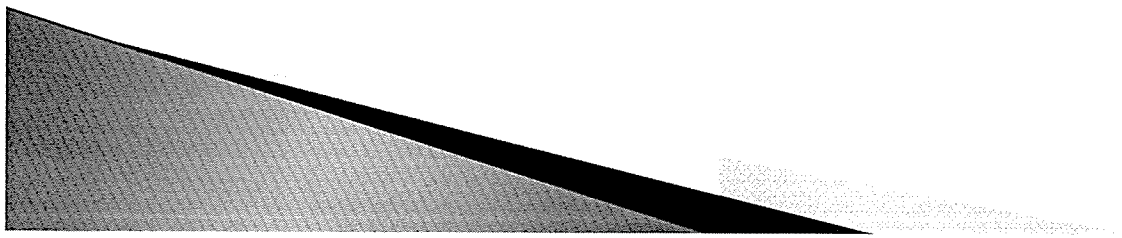
A Time for Action – Breaking the News

- "[P]re-resignation surreptitious 'solicitation' of firm clients for a partner's personal gain—the issue posed to us—is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value—the loyalty owed partners (including law partners), which distinguishes partnerships (including law partnerships) from bazaars."
- (We will address post departure solicitation)



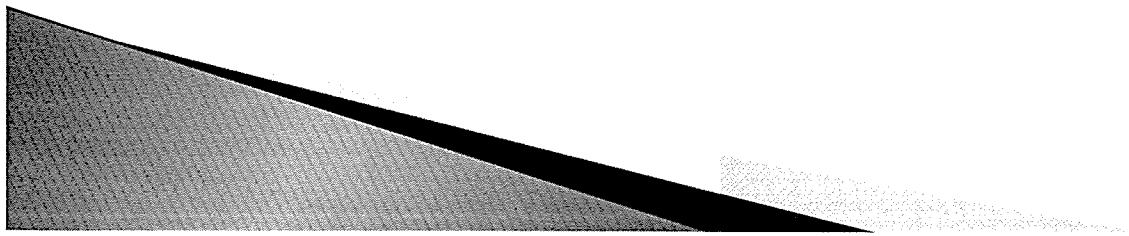
Part II

- Next Step – The Transition



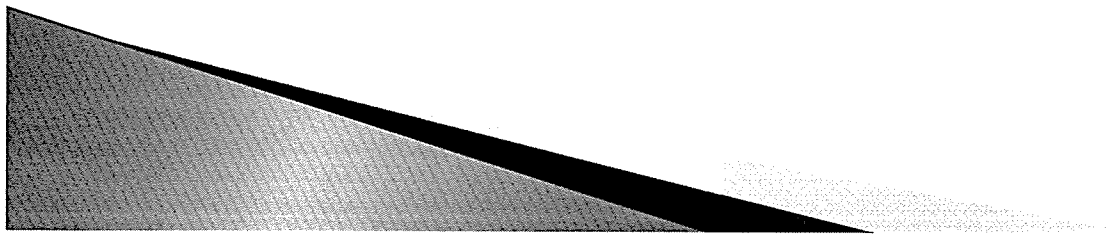
Next Step – The Transition

- Now that you have told your partners/employer – what's next?
- Dissolve the firm?
- Not necessary – assuming an oral agreement existed between the parties to create and maintain a partnership – thus, created a partnership at will which either partner could dissolve at any time by expressing an intent that the partnership was not to continue. Briscoe v. White, 34 A.D.3d 712 (2d Dept. 2006); Partnership Law § 60).



Next Step – The Transition

- But keep in mind:
- "Dissolution is not termination." *Scholastic, Inc. v. Harris*, 259 F.3d 73, 85 (2d Cir.2001) (citing Partnership Law §§ 60, 61). Instead the partnership "continues" in existence until the "winding up" of its affairs is completed. Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 477 B.R. 318 (S.D.N.Y. May 24, 2012)

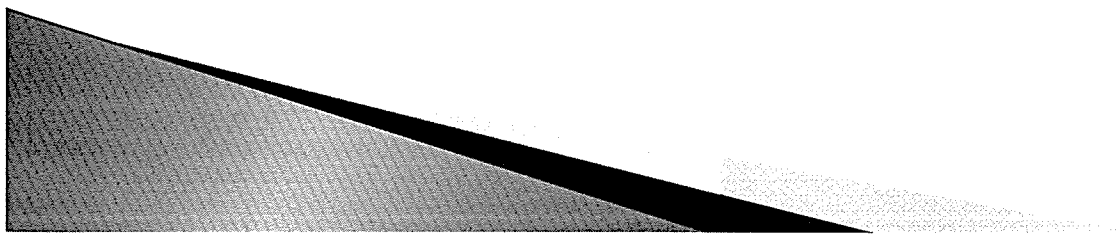


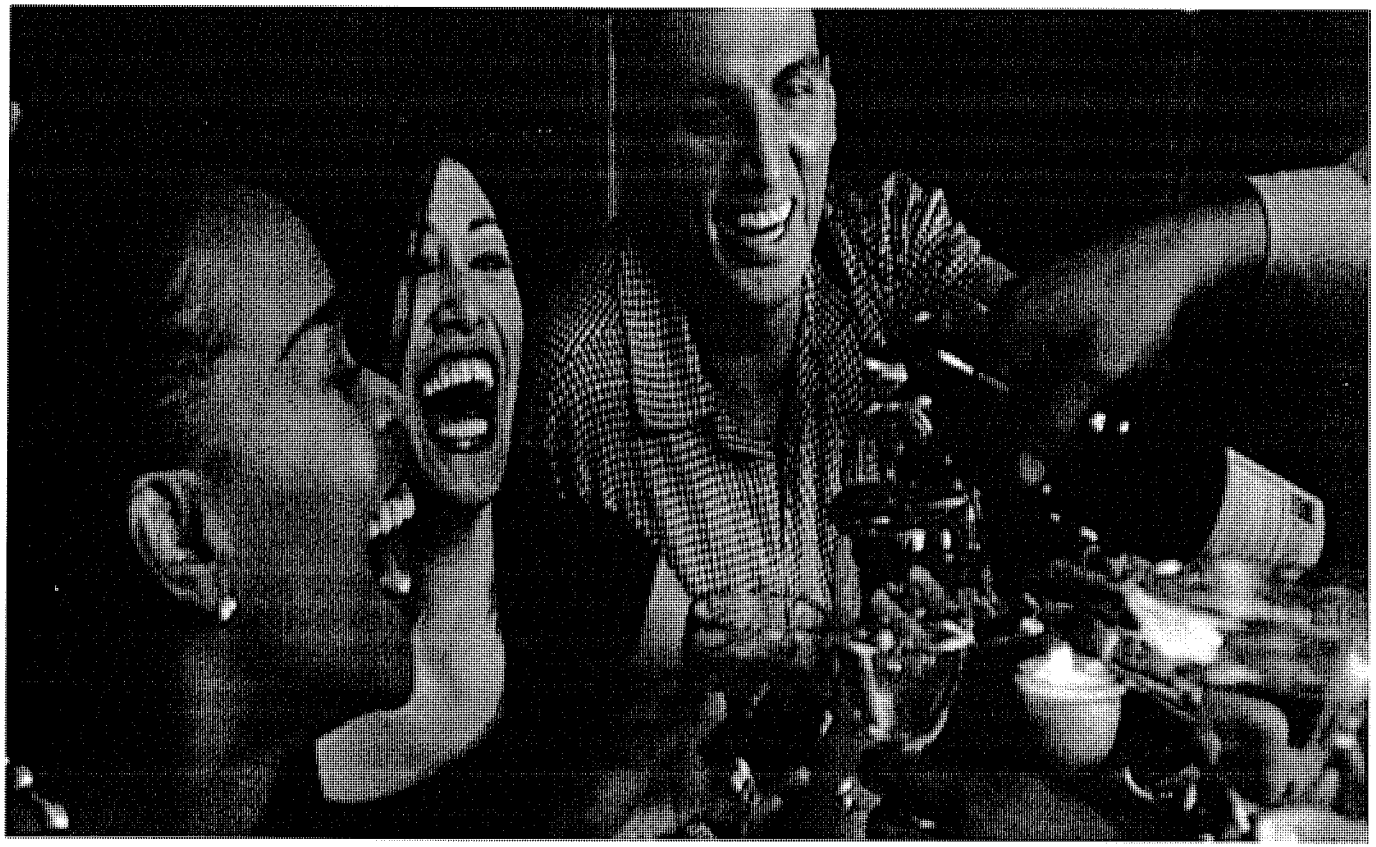
Next Step - The Transition

- Post-dissolution, former partners generally do not owe fiduciary duties either to one another or to the dissolved firm. But there is an important exception: they have a continuing duty to each other as they wind up the partnership's affairs, including winding up the partnership's unfinished business. *See, e.g., Ajettix Inc. v. Raub,* 9 Misc.3d 908, 912, 804 N.Y.S.2d 580 (Sup. Ct. Monroe Co. 2005) ("[O]n dissolution, partners owe a continuing fiduciary duty to one another with respect to dealings effecting the winding up of the partnership *and the preservation of the partnership assets.*") (emphasis added); *see also King v. Leighton,* 100 N.Y. 386, 3 N.E. 594 (1885).
- This duty is codified in section 43 Partnership Law, which says that, "[E]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." Partnership Law § 43(1).

Next Step – The Transition

- What to do after it is done
- A. Start planning your going away party?





Next Step – The Transition

- B. Take that nice long vacation that you had to forgo because Judge Spatt set a trial date last August?

- C. Clean out every file you can get you hands on together with your stapler, a few boxes of pens and that painting from the reception area that you had your eye on all these years?; or

- D. Discharge your fiduciary obligations?

Next Step – The Transition

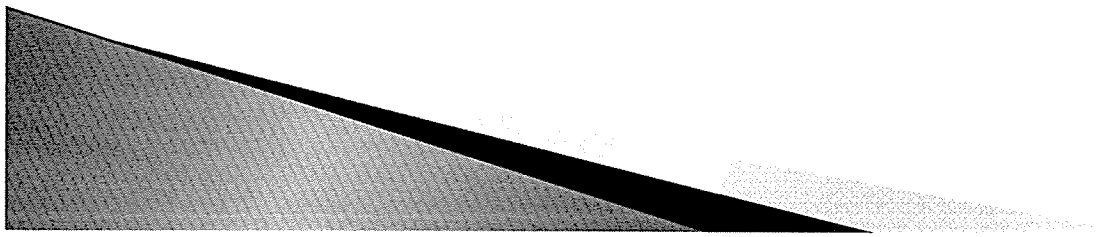
- If you answered "A"
- You will be told by your partners while they slave away to not let the screen door hit you on the way out
- If you answered "B'
- See Response to Answer "A"
- If you answered "C"
- You do not subscribe to "no muss no fuss" and would rather invite years of costly and painful litigation while your new employer thinks about transitioning you out the door.

Next Step - The Transition

- Discharging your fiduciary obligations and for an associate, always remember you have duty of loyalty to your employer

- First you must advise your clients
- ABA Model Rule 1.4 **Communication**

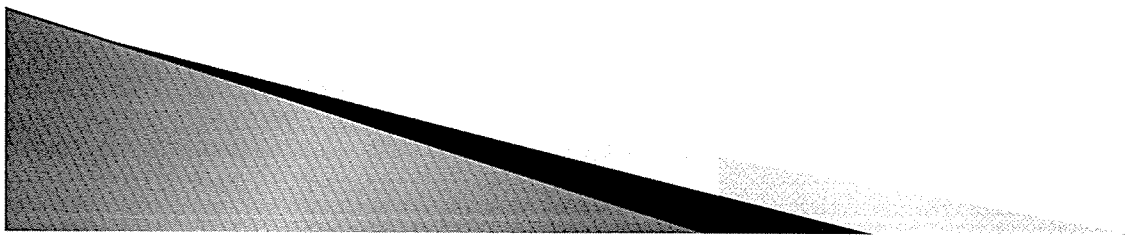
- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Next Step - The Transition

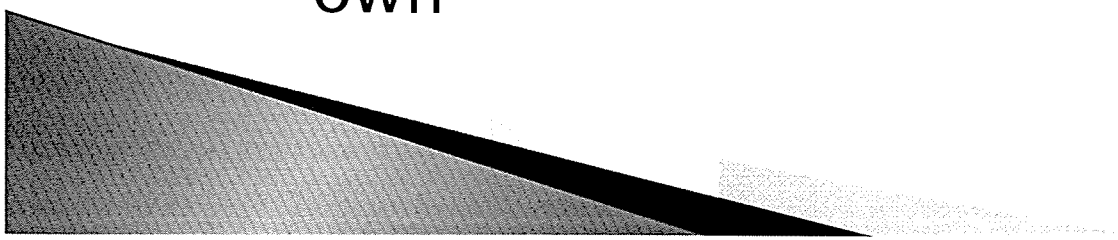
- ABA Formal Opinion 99-414 says that clients should be notified when a lawyer who is responsible or plays a principal role in a client's representation leaves the firm. On the question of who gives notice, the opinion indicates it is the responsibility of the lawyer, and sometimes the firm has that obligation as well. The opinion recommends joint notice, but that may not always be feasible.

- Opinion 99-414 advises that timely notice is important so that the client can make a decision about who will continue the representation. Some cases say the lawyer must notify the firm before notifying clients.



Next Step – The Transition

- The Disclaimer:
- Tell the Client after you announce that you are leaving:
- A client has a right to representation of his or her choice. In connection with that, there are three options:
- (1) A client may stay with the firm and you will ensure a smooth transition to a new lawyer in the firm
- (2) A client may stay with you; or
- (3) A client may choose a new lawyer on his/her own

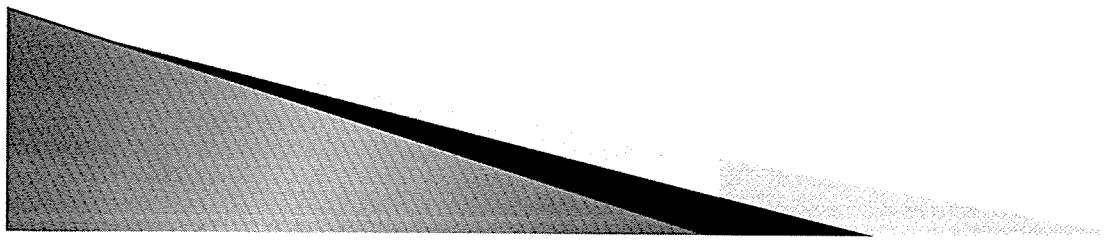


Next Step – The Transition

- Now that the news is out – What's next?

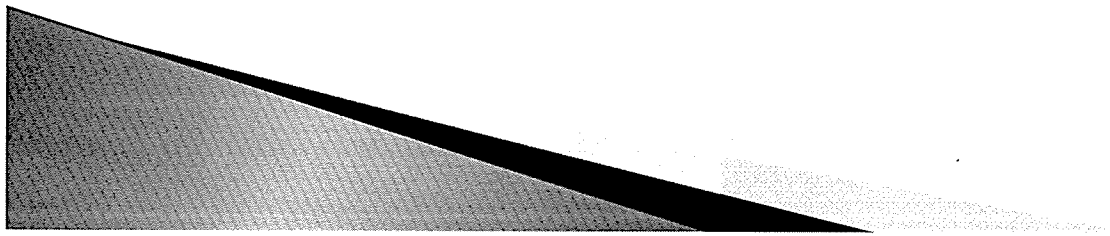
- If Client wants its file do you simply send it to the client?
- NOT NECESSARILY

- Judiciary Law § 475 – Attorney's right to place a lien on the file.



Next Step – The Transition

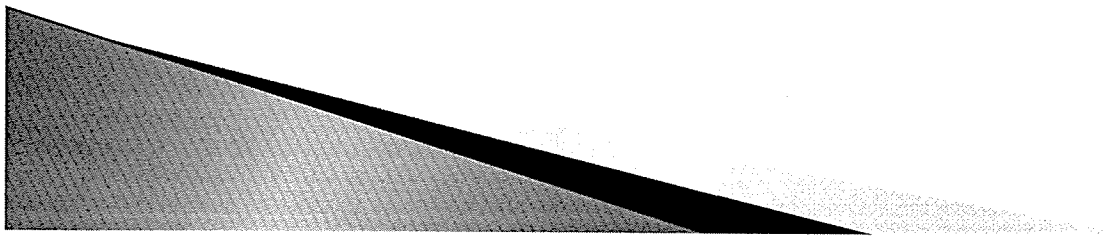
- Client wants to stay with the old firm. Do you:
- A. Beg him/her to come with you, telling him the soon to be old firm is a disaster and a malpractice case waiting to happen?
- B. Beg him/her to stay and tell him you will discount his/her fees owed to the old firm as an incentive?;



Next Step – The Transition

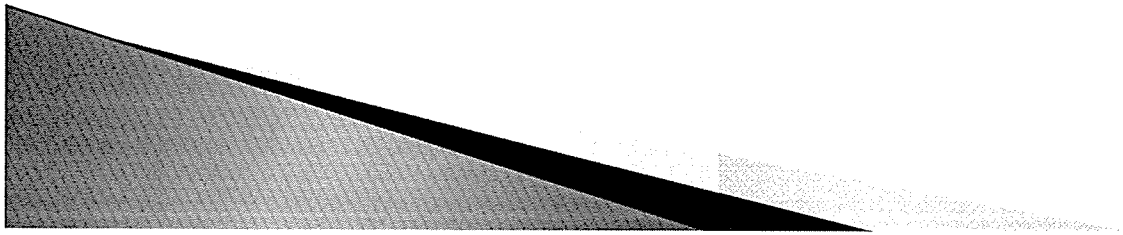
- Or

- C. Take steps to assure smooth transition of the client's case?



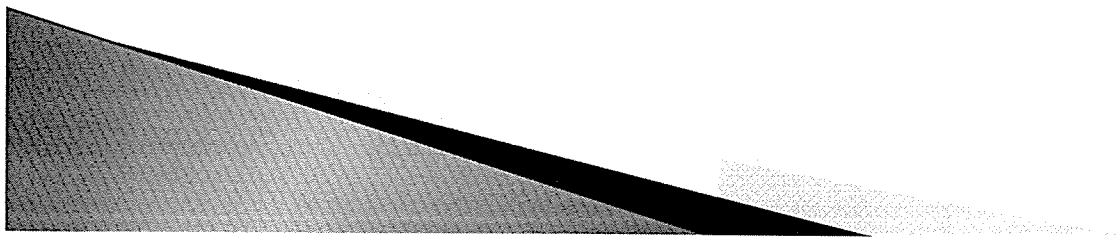
Next Step – The Transition

- The answer is of course "C"
- Write up a memo stating basic facts of the case and present procedural posture including upcoming deadlines and court dates
- Put the file in order
- Introduce client to new attorney who will be handling the case



Next Step – The Transition

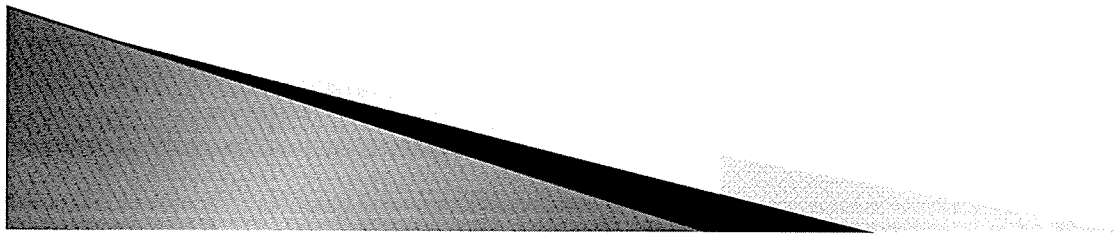
- If the client thinks you are the greatest and says she could never live with another lawyer other than you …



Next Step – The Transition

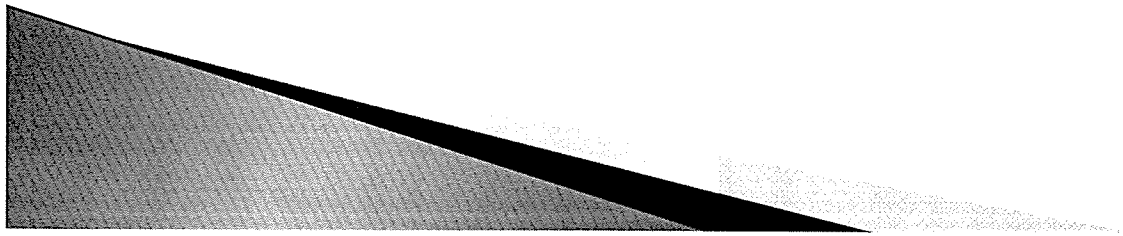
- Can you simply just remove the files from the firm?

- Not a suggested course of action
- But you can (assuming no partnership agreement tells you otherwise) take "desk files" – copies of material maintained in clients files like forms and material you have written. Gibbs 271 A.D.2d at 185.



Next Step – The Transition

- You MUST work out a transition plan with your old firm
  - Prepare an Excel spreadsheet identifying (1) client name; (2) client number; (3) present status; (4) fees owed or held by firm; (5) client's intentions *vis a vis* representation

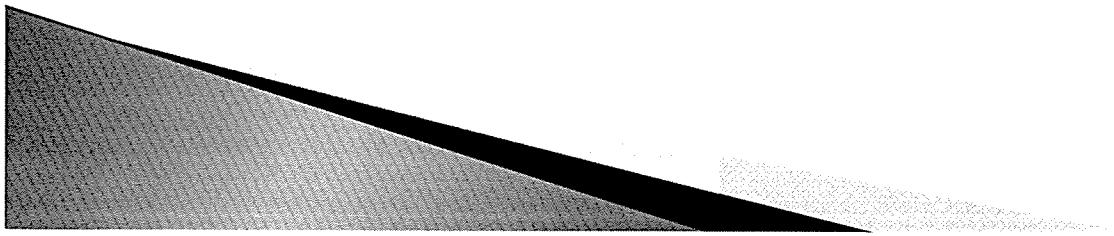


Next Step - The Transition -Get What is Yours

- An associate has very few, if any rights. As an employee the associate must be paid until he/she departs. Connolly v. Napoli, Kaiser & Bern, LLP, 12 Misc.3d 530, 817 N.Y.S.2d 872(Sup. Ct. NY Co. 2006) (associate is not entitled to an accounting)
- When employment has ended, the employer must pay the wages by the regular payday for the pay period worked. If asked, the employer must mail the final wages to the employee; and
- A: Section 193 of the Labor Law states:
- 1. No employer shall make any deduction from the wages of an employee, except deductions which:
- a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
- b. are expressly authorized in writing by the employee and are for the benefit of the employee, such as: (i) Payments for insurance premiums; (ii) Pension or health and welfare benefits; (iii) Contributions to charitable organizations; (iv) Payments for United States bonds; (v) Payments for dues or assessments to a labor organization
- **So for you employers out there - pay the employee's salary until his or her last day.**

Next Step - The Transition -Get What is Yours

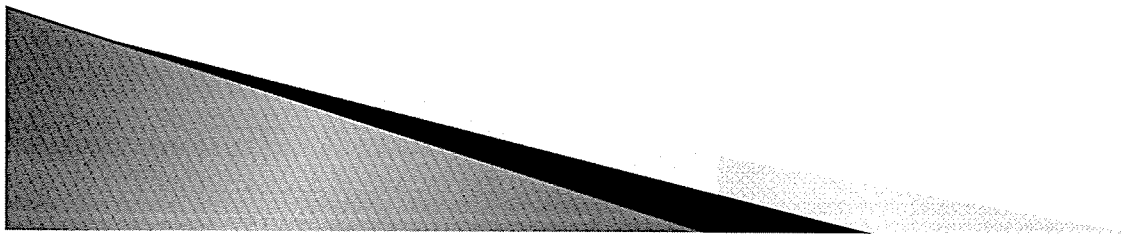
- As for Partners:
- Conceivably you are entitled to an accounting valuing the accounts receivable, money in the bank, WIP and the value of fixtures, furnishings and computers against the firm's debt.
- Good Will is not a distributable asset with respect to accounting claims. McQuillan v. Kenyon & Kenyon, 271 A.D.2d 511, 705 N.Y.S.2d 671 (2d Dept. 2000) app. dismissed in part and denied in part by 95 N.Y.2d 897, 716 N.Y.S.2d 36 (2000) But see Dawson v. White & Case, 88 N.Y.2d 666, 649 N.Y.S.2d 364 (1996)



Next Step - The Transition -Get What is Yours

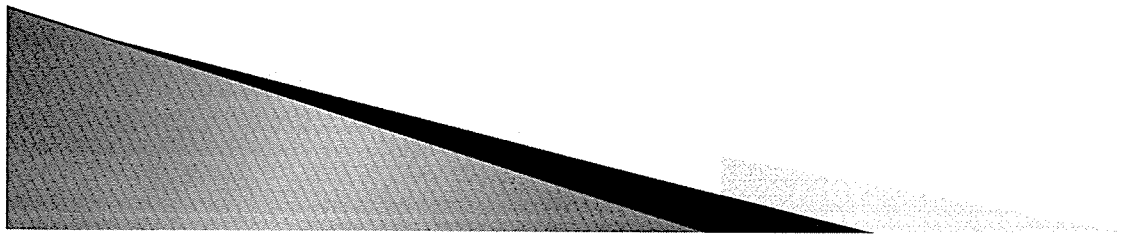
- Normally, your partnership agreement will be your guide in connection with the rights of and obligations of the departing partner.

- But what if you have no partnership agreement and you find it hard to resolve issues with your partners?



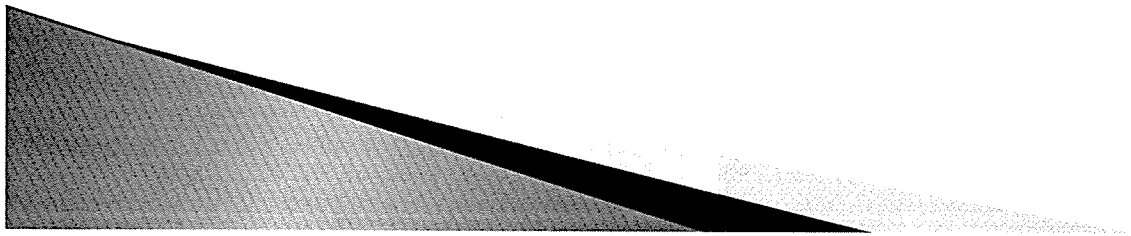
Next Step - The Transition - Get What is Yours

- In that instance you need guidance on how to approach the situation armed with knowledge.



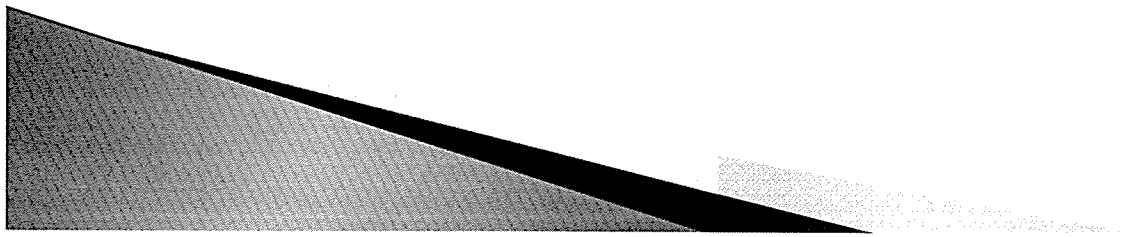
Next Step - The Transition -Get What is Yours

- First, let's determine if there is really a partnership.
- By default, if there is no partnership agreement the NY Partnership law will be applied. **Community Capital Bank v. Fischer & Yanowitz**, 47 A.D.3d 667, 850 N.Y.S.2d 508 (2d Dept. 2008)



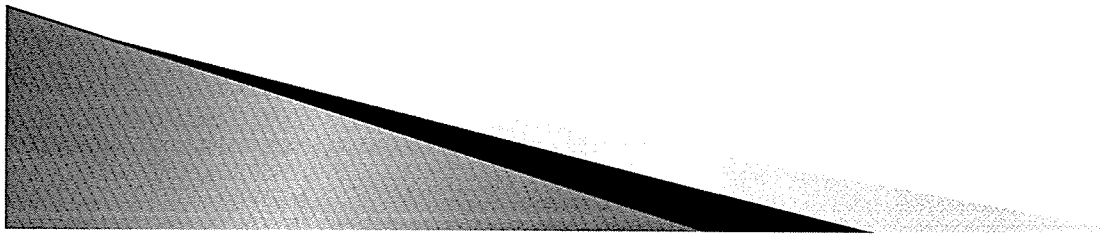
Next Step - The Transition -Get What is Yours

- **Community Capital Bank v. Fischer & Yanowitz**
- "A partnership is an association of two or more persons to carry on as co-owners a business for profit" (Partnership Law § 10[1]). When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties (see *Brodsky v. Stadlen,* 138 A.D.2d 662, 526 N.Y.S.2d 478 [2d Dept. 1988]).



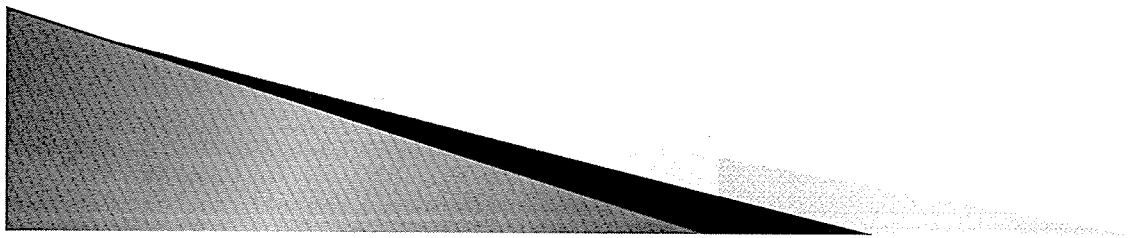
Next Step - The Transition -Get What is Yours

- **Community Capital Bank v. Fischer & Yanowitz**
- "An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses"



Next Step - The Transition -Get What is Yours

- Partnership Law § 27 provides that "a person is estopped from denying the existence of a partnership when he, by words spoken or written or by conduct, represents himself, or consents that another represent him, as a partner in an existing partnership"



Next Step - The Transition -Get What is Yours

- Is it necessary to make a capital contribution to be a partner?
- NO
- **Missan v. Schoenfeld**, 111 Misc.2d 1022, 445 N.Y.S.2d 856 (Sup. Ct. NY Co. 1981) citing Matter of Rosenberg, 251 N.Y. 115 (1929) "It is not necessary to the constitution of a general partnership that the partners should be proportionate joint owners of its assets. The capital may vest and remain in one or more of the partners who have furnished it."

- "Accordingly, this Court determines that the plaintiff has met his burden of establishing a partnership relationship and therefore an accounting of this law practice is decreed. However, the exact financial status of each of the partners, their rights to a percentage of the partnership profits, fees and other assets have not been established and remain issues in the case as well as those concerning plaintiff's knowledge of and waiver and/or consent not to share or participate in the Shubert case and the fees resulting therefrom. Those issues must be tried."

Next Step - The Transition -Get What is Yours

- When is a "Partner" not a "Partner" ?

- ANSWER:

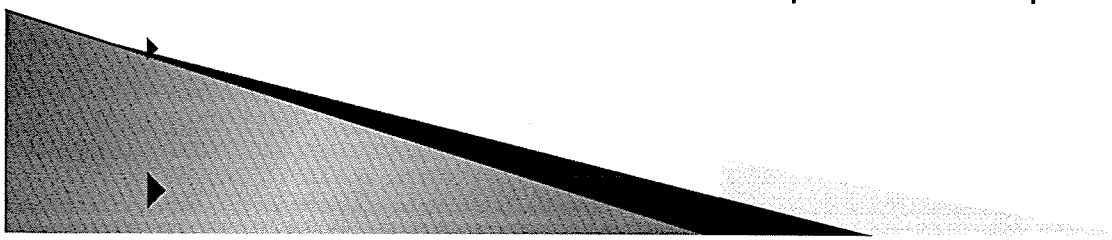
- When he/she is a "Contract/Income Partner"

Next Step - The Transition -Get What is Yours

- What is a "Contract/Income Partner" anyway?
- Basically an employee with a glorified title
- **Zito v. Fischbein Badillo Wagner Harding**, 11 Misc.3d 713, 809 N.Y.S.2d 444 (Sup. Ct. NY Co. 2006)
- Defendant contended that plaintiff was always an at-will, salaried employee, and not a partner of the firm, although he was allowed to use the title "contract partner." It asserted that plaintiff was never a party to any firm partnership agreement, never guaranteed or agreed to be responsible for any of its debts, did not share in its losses, never received an IRS Form K-1 (partnership form) from it, and never had an equity interest in it.

Next Step - The Transition -Get What is Yours

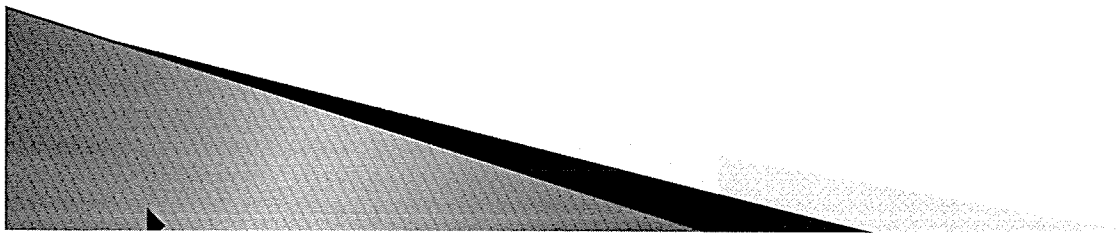
- **Zito v. Fischbein Badillo Wagner Harding,**
- The indicia of partnership may be ascertained through the presence of the following facts: (1) joint control over the enterprise;(2) profit splitting; and (3) loss sharing. Even where the first two elements are present, the absence of the third may support a finding of no partnership because "evidence that they agreed to share losses ... is an essential element of a partnership." Here, the absence of any of the foregoing factors, especially the third, militates in favor of a finding that movant was not a partner of FBWH, within the meaning of the Partnership Law. Thus, movant cannot be held personally liable for alleged wrongs by FBWH or its partners. In addition to the Employment Agreement, movant submits a copy of his I.R.S. Form W-2 (Wage and Tax Statement), issued to him by FBWH (O.S.C.Ex.B). This stands as an affirmative indication that he was an employee of that firm; not a true partner, for a partner would have had to receive a Form K-1 to record his partnership distribution for the tax year.



Next Step - The Transition -Get What is Yours

- **Zito v. Fischbein Badillo Wagner Harding,**
- "Again, absent evidence that movant undertook to share *losses* of the firm, or other indicia of partnership, the mere fact of his election to be called a "contract partner" does not make him a partner for liability purposes. Any practice by FBWH to spread overhead costs throughout the payroll, asserted by plaintiff's counsel, does not constitute loss sharing; and does not prove the necessary elements of partnership."

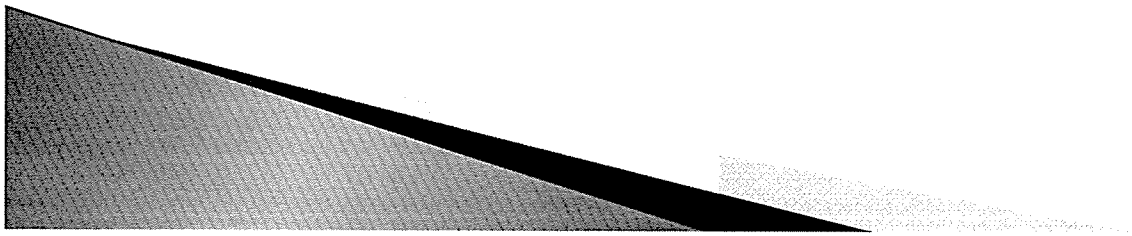
- **But** (AGAIN ON THE ISSUE OF LOSSES)
- What if there were never any losses to share?



Next Step - The Transition -Get What is Yours

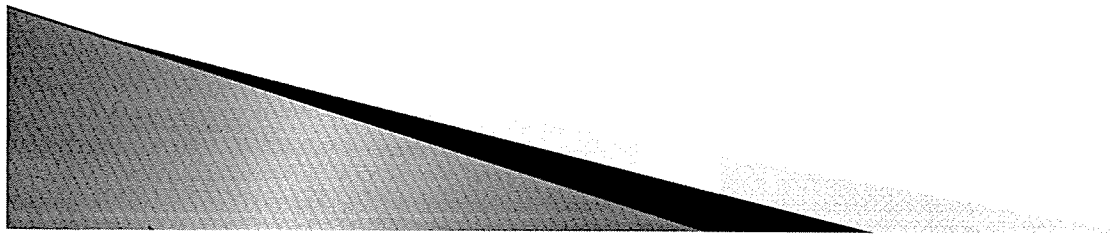
- See **Dundes v. Fuersich**, 13 Misc.3d 1223(A), 831 N.Y.S.2d 347 (Sup. Ct. NY Co. 2006)

- "As previously recognized, a joint venture may exist even where there is no explicit agreement to share losses if 'there was no reasonable expectation that there would be any losses'" (*Cobblah v. Katende*, 275 A.D.2d 637 [1st Dept 2000]); *see also P.F.G. Industries, Inc. v. Tel-Glass, Inc.*, 49 A.D.2d 112, 114 [1st Dept 1975] [failure to allege agreement to share losses was not fatal to joint venture that involved a single transaction that was concluded profitably]).



Next Step - The Transition -Get What is Yours

- AND
- Lynn v. Corcoran, 1994 WL 123519 (Sup. Ct. Nassau Co. 1994), affirmed, *219 A.D.2d 698, 631 N.Y.S.2d 754 (2d Dept. 1995)*
- Income partners are entitled to many of the same benefits as equity partners, but there are differences. Income partners attain partnership status without assuming any risk. Typically, their privileges include: (1) The right to attend firm meetings, except on specific topics that are overseen only by equity partners: (2) The right to serve on most firm committees, except the compensation and management committees: (3) The right to receive paid benefits-which equity partners typically have to pay for themselves: (4) The right to see the firm's financial picture. (New York Law Journal, August 24, 1993, p 5, col 1).
- The same article describes an equity partner as follows: An equity partner should be seen as an entrepreneurial business person who, through marketing, delegating and supervising, contributes more to the bottom line than he or she takes ... An equity partner is expected to ... bring in new clients and expand the current client base.



Next Step - The Transition -Get What is Yours

- Lynn v. Corcoran,

- In Lynn, the issue was not cut and dried as the Court stated:
- "There are sound reasons for rejecting plaintiffs' argument and for denying summary judgment. The facts established by Corcoran, both contested and uncontested, are consistent with both equity and contract partner status. One indication here is uncommon to interim income or contract partners, to wit, Corcoran's name appears in the partnership title. It is also undisputed that he, Corcoran, was required to indemnify outgoing partners of Lynn Ledwith Quinlan & White, and to assume responsibility for overhead on the partnership's lease. In addition, he expanded the client base of Lynn, Ledwith & Corcoran, and there is a factual dispute concerning Corcoran's agreed compensation. He alleges that he was to receive the same percentage compensation above draw as an acknowledged equity partner, Peter K. Ledwith, albeit less than the compensation received by Lynn.

- There is no written partnership agreement, and the demarcation lines between equity and contract or "income" partner are blurred in the present case. Defendant Corcoran's status cannot be stated as a matter of law. Factual issues are presented. Thus, plaintiffs have failed to meet their burden of proof to make a prima facie showing of entitlement to judgment as a matter of law (see, *Zuckerman v. City of New York,* 49 NY2d 556, 562). The case relied upon by plaintiffs does not advance their position on this motion. *Mazur v. Greenberg* cannot establish entitlement to summary judgment, as it was determined upon the "totality of the circumstances" and the "weight of the evidence."

Next Step - The Transition -Get What is Yours

Contract/Income Partner: Factors

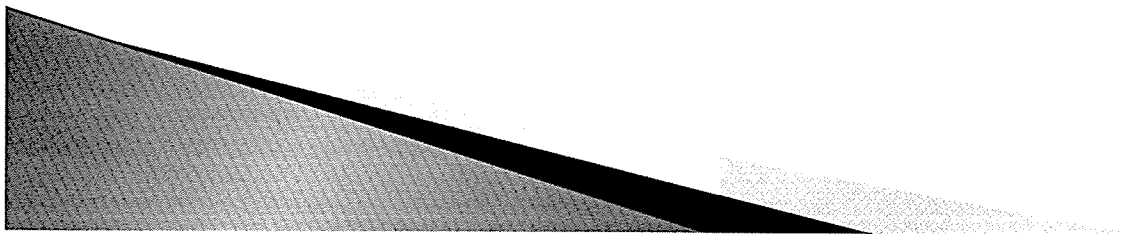
- Was the "partner" expected to bring in business?
- Did the "partner" share in profits through some sort of distribution system?
- Did the "partner" receive a K-1 or a W-2 at year's end? *But* see **Dundes v. Fuersich**, supra (the court recognized that tax documents and documentary evidence of compensation as an employee were merely some proof, and not conclusive, on the issue of whether a person is an employee or a partner.)
- Did the firm hold out to the public the worker as a "partner" ?
- Did the "partner" sign off as a partner on official documents? i.e tax filings, Worker's Compensation forms)
- Did the "Partner" hire and fire employees?

Next Step - The Transition -Valuing the Firm

- Date of Valuation- The date of dissolution under McKinney's Partnership Law § 74
- No good will or valuation as a going concern. See Bitetto v. F. Chau & Associates, LLP, 10 Misc.3d 595, 807 N.Y.S.2d 260 (Sup. Ct. Nassau Co. 2005) (Austin, J.)
- Entitled to "Liquidation Value" (i.e. partnership assets - outstanding liabilities X each partner's relative interest in the partnership). See Cohen v. Akabas & Cohen, 79 A.D.3d 460, 917 N.Y.S.2d 117 (1 Dept. 2010)
- Uncollected fees of a dissolved partnership are assets subject to distribution. See Jackson v. Hunt, Hill & Betts, 7 N.Y.2d 180, 183, 196 N.Y.S.2d 647 (1959)

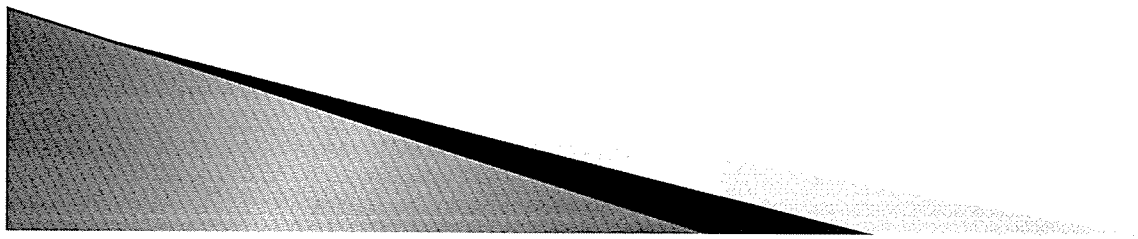
Next Step – The Transition –Valuing the Firm

- Partners in limited liability partnership (LLP) are personally liable for withdrawing partner's share of partnership assets under Partnership Law provision governing liability of partners in such a partnership, absent a written agreement to the contrary. Ederer V. Gursky , 9 N.Y.3d 514, 851 N.Y.S.2d 108 (2007); McKinney's Partnership Law §§ 26(b), 74."



Next Step - The Transition -Valuing Contingency Cases

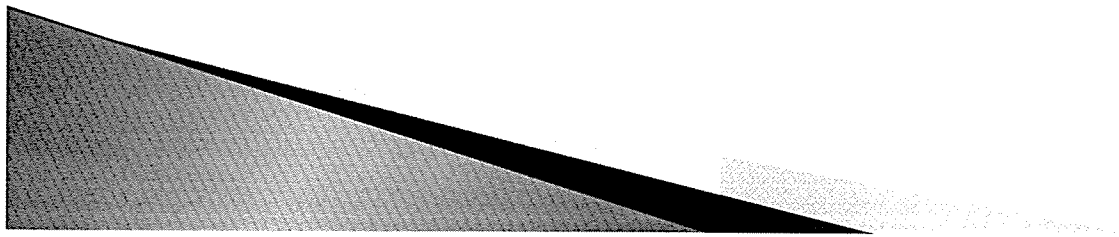
- Pending contingency fee cases of a dissolved partnership, absent a contrary agreement, are assets subject to distribution. Indeed, a withdrawing partner is still entitled to a portion of the contingency fee, but not a right to a full partnership share. The outgoing partner is "only entitled to 'the value of his interest at the date of dissolution * * * with interest, or, at his option * * * in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership' (Partnership Law § 73)" Liddle, Robinson & Shoemaker v. Shoemaker, 309 A.D.2d 688, 768 N.Y.S.2d 183 (1st Dept. 2003).



Next Step - The Transition -Valuing Contingency Cases

- NO COMPENSATION RULE

- New York's Partnership Law codifies the "no compensation rule" in § 40(6): "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs." The Legislature elected to modify the no compensation rule only where dissolution of the partnership was caused by death, which is the only time there can be a "surviving" partner; a partner who winds up business on dissolution for any reason other than death is not a surviving partner, so the modification is not applicable here. *See, e.g.,* *Geist v. Burnstine,* 19 N.Y.S.2d 76, 77 (1st Dep't 1940)



Next Step - The Transition -Valuing Contingency Cases

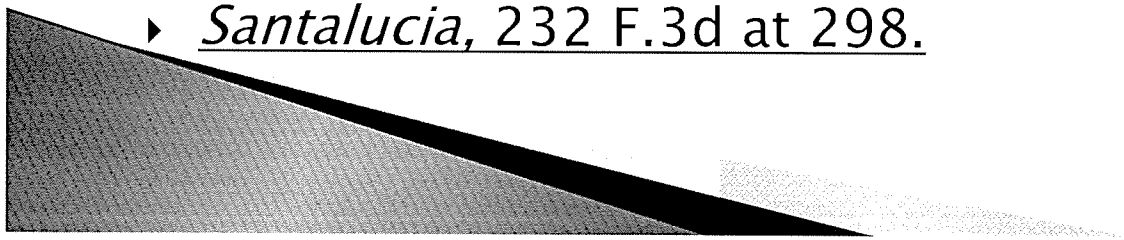
- NO COMPENSATION RULE - what does it mean?

- New York Courts have found a way to avoid the harshest application of the no compensation rule—at least in the limited context of "unfinished business" claims arising out of contingent fee legal representations. They have done so, not by rejecting the rule outright, but by reducing the profits for which a former partner must account by an amount that reflects the value of his post-dissolution "efforts, skill, and diligence" in concluding the matter. *See, e.g.,* Kirsch v. Leventhal, 181 A.D.2d 222, 226, 586 N.Y.S.2d 330 (3d Dept. 1992); Murov v. Ades, 12 A.D.3d 654, 656, 786 N.Y.S.2d 79 (2d Dept. 2004). The Second Circuit has adopted this approach. Santalucia v. Sebright Transp., Inc., 232 F.3d 293, 298 (2d Cir. 2000). The New York Court of Appeals has never considered whether the decision in *Kirsch* runs afoul of the "no compensation" rule codified in Partnership Law § 40(6).

Next Step - The Transition -Valuing Contingency Cases

- NO COMPENSATION RULE - what does it mean?

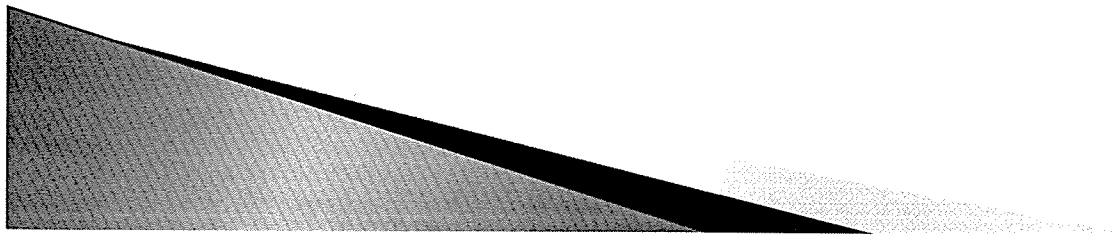
- The dissolved firm is entitled only to the value of the case at the date of dissolution, with interest, that is, the departing lawyer must remit to his former firm the settlement value, less that amount attributable to the lawyer's efforts after the firm's dissolution.
- To arrive at the value of a dissolved law firm's interest in a contingent fee in a case concluded after dissolution, a court must evaluate the efforts undertaken by the former law firm prior to the dissolution date, or any other relevant evidence to form a conclusion as to the value of the case to the law firm on the dissolution date, and the portion of the fee collected by the law firm would then be distributed to the members in accordance with their pro rata interest in the firm.
- *Santalucia,* 232 F.3d at 298.



What about unfinished business claims for hourly cases?

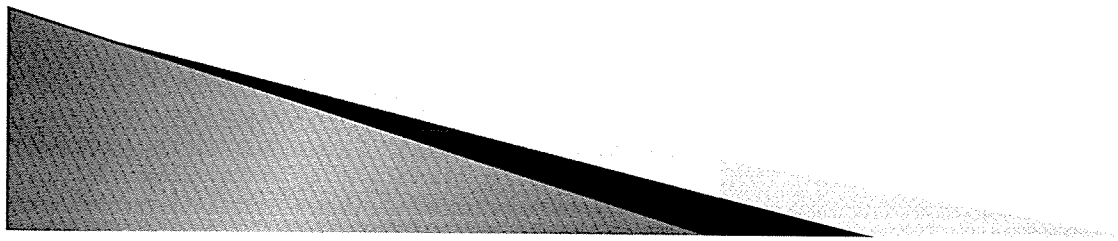
- The duty to account under the unfinished business doctrine is *not* based on principles of quantum meruit—the dissolved firm's equitable claim for compensation for the value of work actually performed prior to dissolution. Only one court has adopted a quantum meruit approach – *Aurnou v. Greenspan*, 161 A.D.2d 438, 555 N.Y.S.2d 356 (1st Dep't 1990)—which has been repudiated by all courts including the First Department.

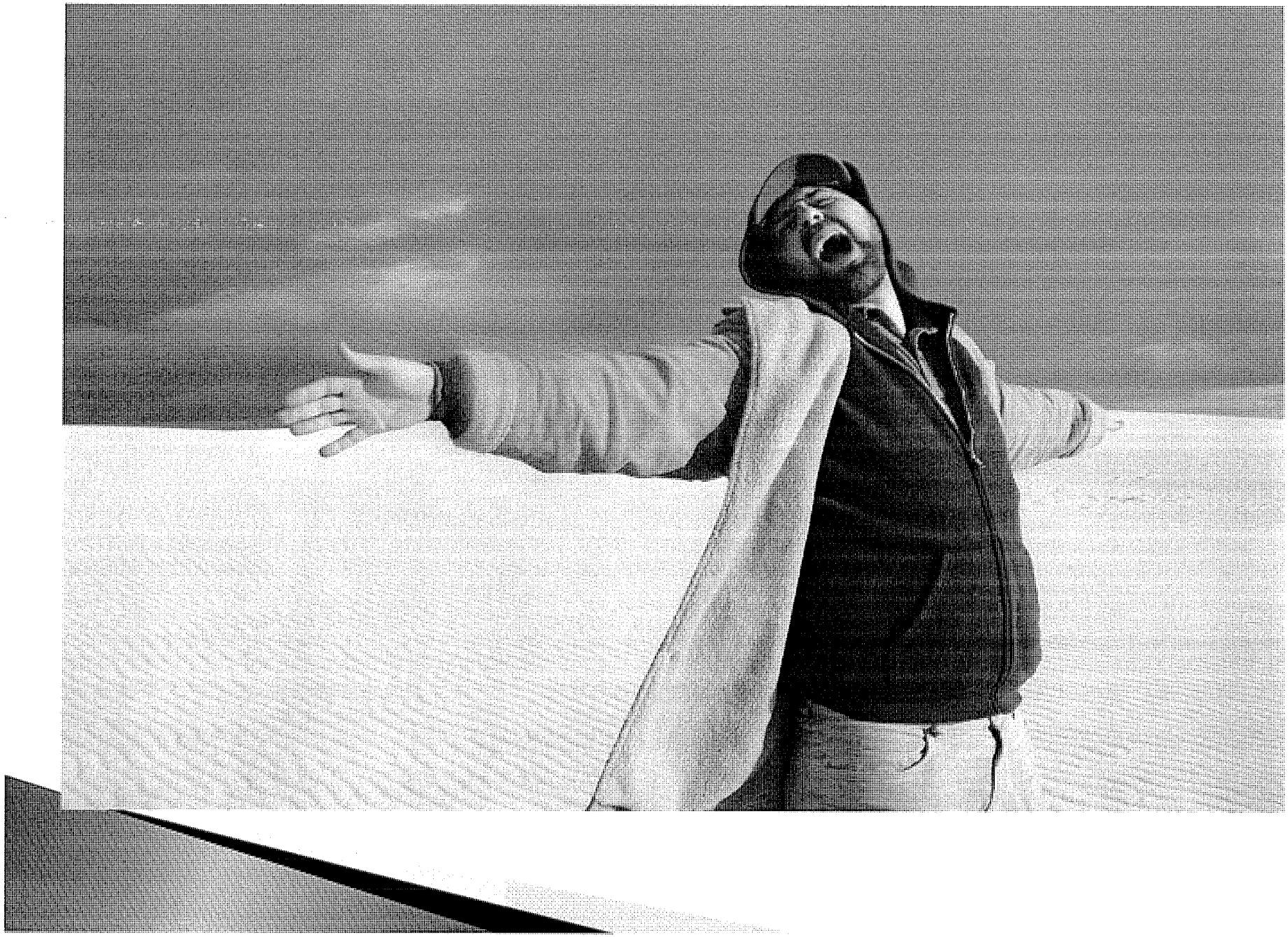
- In Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 480 B.R. 145 (S.D.N.Y. 2012) Judge McMahon concluded that the New York Court of Appeals would, if confronted with the issue, conclude that all client matters pending on the date of dissolution are assets of the firm—regardless of how the firm was to be compensated for the work . . . All executory contracts for the provision of client services by a partnership are presumed to belong to the partnership, rather than individual partners. "A law partnership not only possesses fixed assets in the form of typewriters, bookcases, etc., *it possesses assets in the form of cases and legal matters.*" *Matter of Lester (Berman)*, 61 A.D.2d 935, 936, 403 N.Y.S.2d 33 (1st Dep't 1978).



Part III

DISSOLUTION/ POST-DEPARTURE



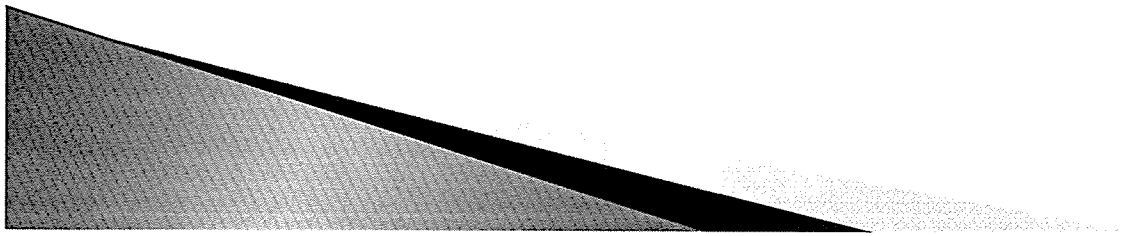


WHAT CAN YOU DO AFTER DISSOLUTION?

- Can the departing partner take on new cases?
- YES
- "After dissolution, each former partner is free to practice law individually, and has the right to accept retainers from persons who had been clients of the firm." Matter of Silverberg, 81 A.D.2d 640, 438 N.Y.S.2d 143 (2d Dept. 1981) (citing *Talley v. Lamb,* 100 N.Y.S.2d 112 (Sup.Ct. NY Co. 1950)) One must be qualified to recognize a former partner's duty to account for his use of partnership property after dissolution. This qualification is so implicit in the nature of a partnership that it should go without saying. A departing partner is not free to walk out of his firm's office carrying a Jackson Pollack painting he ripped off the wall of the reception area, simply because the firm has dissolved. Partnership property remains partnership property, dissolution notwithstanding, and a former partner of the dissolved firm must account for any benefit he derives from his use of a partnership asset, even if he is not among the "winding up partners" charged with winding up the firm's affairs.

ISSUES AFTER DEPARTURE

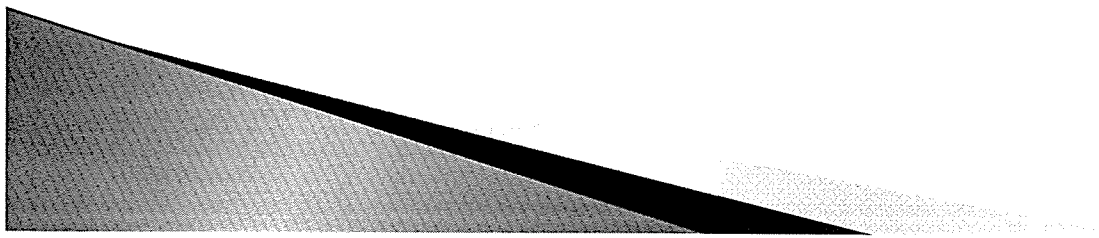
- Now you contact the firm's clients and discuss your new position:



ISSUES AFTER DEPARTURE

- Can you tell them to abandon the sinking ship that was your soon to be former firm and follow you to the new Eden?

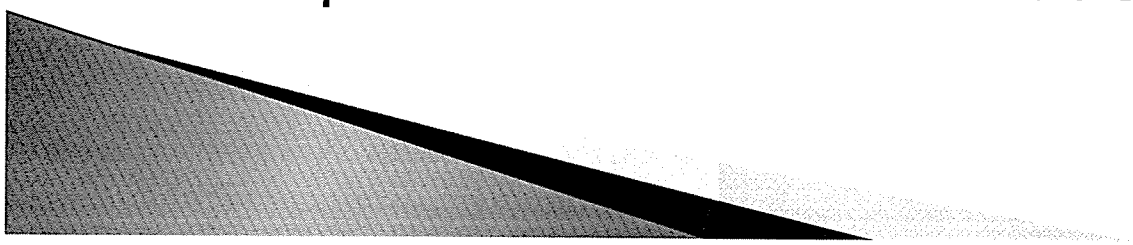
- If you answered "yes, that is exactly what I would do!!"
- You are just not thinking.



ISSUES AFTER DEPARTURE

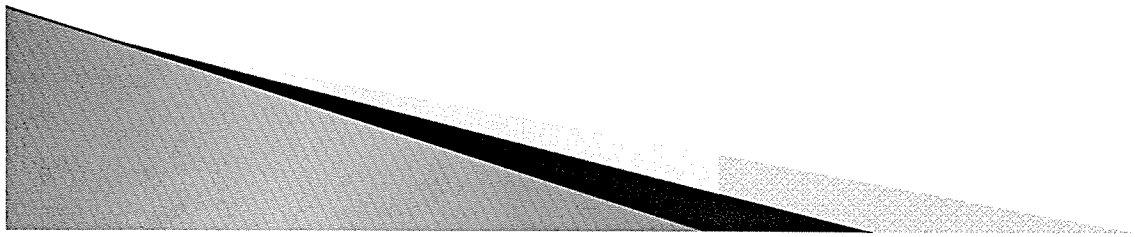
- But that is not to say that you must remain silent.
- **ISSUE TO KEEP IN MIND**
- Whatever you do remember there are still rules addressing attorney advertising whether you are doing so in connection with joining a new firm or not.
- GENERAL RULES – SEE ADDENDUM

- Attorneys can send announcements through their new firm to those clients that the attorney had worked with at the old firm.
- There is also no prohibition to in person or telephone solicitations with such former clients.



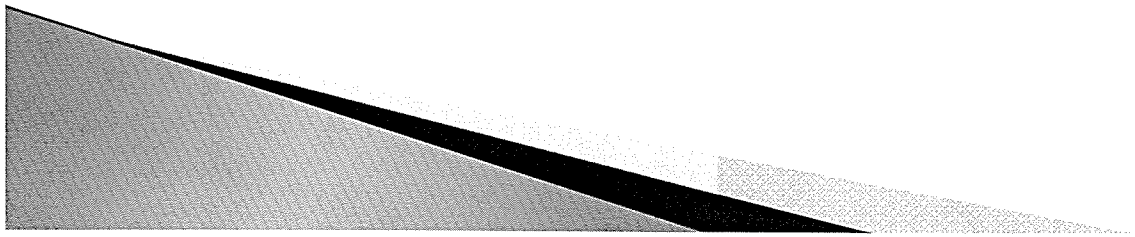
ISSUES AFTER DEPARTURE

- *NEW YORK STATE BAR ASSOCIATION Committee on Professional Ethics* Opinion #411 - 08/28/1975 (71-75)
- Topic: Announcements; clients of former firm
- Digest: **Not** improper to send announcement to clients of former firm with whom a professional relationship has been established
- Code: DR 2-102



ISSUES AFTER DEPARTURE

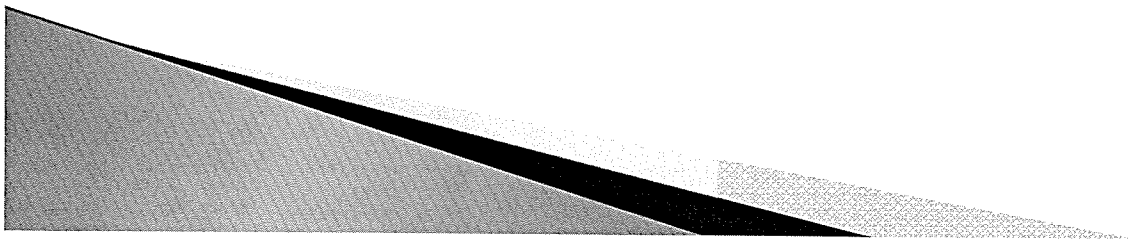
- QUESTION
- May an attorney send announcements regarding the opening of his own office to clients of the law firm with which he was formerly associated and for whom he performed professional services and may he be retained by such clients?
- OPINION
- For the reasons set forth in N.Y. State 83 (1968), N.Y. City 384 (1936) and N.Y. County 109 (1916) it would not be improper for a former employee to send formal announcements of his establishment of a new office to those clients of his former employer to whom he is personally known, and for whom he performed professional services while employed by his former firm.



IMAGE

ISSUES AFTER DEPARTURE

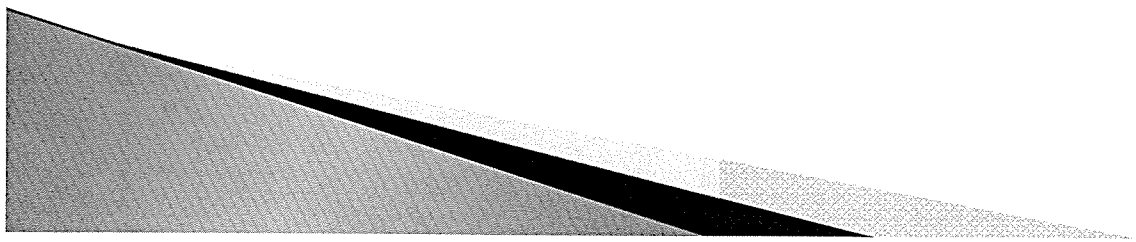
- For limitations on this activity, see N.Y. State 305 (1973) and DR 2-102.
- 305- Lawyer **may** properly confer with a prospective client who is already represented by counsel in the same matter, without first notifying the lawyer previously retained; lawyer may not replace or serve as co-counsel with lawyer previously retained, unless that lawyer consents or his employment is terminated
- As to new matters, the client always has the right to choose an attorney. As to matters worked upon by the former firm, reference is made to N.Y. State 305 (1973). The opinion should be read in full, since it gives the subject extensive treatment and lists numerous authorities, limitations and restrictions on the subject. See also N.Y. City 384 (1936); Model Rule 7.3



ISSUES AFTER DEPARTURE

- What if it all ends badly?

- A cause of action for breach of fiduciary duty is governed by a six-year statute of limitations where the relief sought is equitable in nature (*see* CPLR 213[1]), or by a three-year statute of limitations where the only relief sought is money. However, a partner may not maintain an action at law for any claim arising out of the partnership until there has been a full accounting and a balance struck, or an express agreement to pay. Wiesenthal v. Wiesenthal, 40 A.D.3d 1078, 1080, 838 N.Y.S.2d 581 (2d Dep't 2007).



Hopefully It Will All Work Out!

NO MUSS, NO FUSS

THE END