
THE NEW YORK LAW JOURNAL

VOLUME 231
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MONDAY, FEBRUARY 7, 2005

A DIFFERENT KIND OF DIVORCE

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Law firms, like marriages, break up. Understand and secure your entitlements in your new relationship - and plan for its demise.

MAZEL TOV! Congratulations! The excitement is palpable. The engraved announcements are in the mail. You have grappled with the economic, emotional and pragmatic consequences and you are ready to begin your journey together. Will the relationship make it?

Sound like a marriage? It is, only not in the traditional form. Signing on the dotted line of a law firm partnership agreement is just as serious and daunting a task as saying "I do" to your beloved. Indeed, the chances are excellent that in as little as two years, both your marriage and your law firm partners will be very different from what they are today. And though hope springs eternal that even if one of you did choose to leave, the parting would be friendly and you would all remain on the best of terms, such is rarely the case. Animosity, hurt feelings and financial wrangling are the rule, not the exception, to partner departures.

Hopefully, one enters into a marriage cautiously, diligently, and fully cognizant of the time and effort that must necessarily be expended by each spouse so as to ensure that the path upon which they have set foot becomes a lifetime journey. "Making partner" and/or entering into a partnership with a law firm should be no less the thoughtful, thought provoking and thorough process.

Yet all too often, while the financial aspects of romantic relationships and their probable demise are meticulously planned via non-marital agreements, or pre-nuptial agreements, the same aspects of professional relationships are handled far less carefully.

Frequently, once offered the "gold ring" of "partner" (often achieved after a myriad of late nights, missed family holidays and vacations, and lost weekends), thoughts blur. With congratulatory words ringing in the ears and echoing through the minds, it is the rare newly elevated partner who thinks beyond the immediate self-aggrandizement and fulfillment of the

moment and plans for the day when she looks for the exit door.

That such a day will arrive is inevitable. Partners are no longer fixtures in their law firms. Indeed, few attorneys now practicing can still remember the days when marriage was sacrosanct and partners remained at one firm their entire career. Nowadays a marriage of 11 years is considered a "long term marriage,"¹ and the only real law-firm fixture is the proverbial "revolving door," as Chief Judge Judith S. Kaye eloquently, but wryly, noted, in *Graubard Mollen Dannat & Horowitz v. Moskovitz*.²

Law firms, like marriages, break up. Therefore, new partners are doing themselves a great disservice if they do not fully understand and secure their entitlements in their "new marriage," and plan for its ultimate demise.

Get It in Writing

Before saying "I do," make sure your intended proffers a well-drafted partnership agreement.³ To be sure, the newly minted non-equity partner or contract partner will often be provided little or no say in the terms of the deal and may simply be handed a multi-page document and be advised to sign it, or else.

Read and think before you sign even if there is no opportunity to renegotiate the terms of the agreement. Remember that courts will strictly construe the termination provisions of partnership agreements.⁴ So know to what you are committing yourself before doing it.

At a minimum, the written agreement should clearly and concisely answer the following top 10 law firm life questions:

1. What role will the new partner play in the firm? Are non-equity partners given a voice on firm governance, minor or superficial though it may be, or are they essentially partners in name only -- what one commentator has referred to as a "mushroom partner" (i.e. one who is kept in the dark), as opposed to a "management partner."⁵

2. What are the partner's personal financial obligations for the debts and liabilities of the law firm partnership? By signing on the partnership line are you also signing as a guarantor of the firm's rental lease or other outstanding liabilities?

3. What provisions have been made for determining and distributing the partner's compensation? What compensation model has the firm selected? Is compensation based on seniority, or do you "eat what you kill?" The majority of law firm compensation structures are based on a combination of objective and subjective standards that measure partners' monetary contributions in originating and maintaining their own clients as well as their service role to the firm and its existing clients.

4. In what manner may the partnership relationship be terminated, be it voluntarily or involuntarily?⁶ Who at the firm has the authority to recommend and effect a partner's removal? How must such action be taken? In the same vein as the circumstances under which a partner

may be asked to leave -- what are the financial ramifications thereof? Indeed, what if anything, and when, if at all, is a departed partner to receive monies owed and due?⁷

5. Does the agreement contain any monetary deterrent to competition, i.e., a restrictive covenant? Such clauses are usually unenforceable, as they run afoul of the ethical prohibitions against restricting an attorney's right to practice law.⁸

6. What is the mechanism for notifying clients of the partner's departure? What freedom, if any, does the departing partner have to contact his clients once he has left?

7. Similarly, what restrictions, if any, have been placed on the solicitation of colleagues -- partners, associates, staff?⁹ Can you take your "right hand" associate or secretary with you?

8. How much notice must be given by the departing partner of her imminent withdrawal and exodus from the firm, and concomitantly, how much warning must be received by the terminated partner? Absent such a notice, there may be significant disruption in the attorney's and the firm's ability to deal with clients in a professional manner, and swiftly and properly transfer client files and matters.

9. What are the rights of the partner and the firm's obligations in the event of a bankruptcy, or upon a partner's retirement, or in the event of disability, or upon death?¹⁰

10. And last, but not least, have any continuation provisions been put in place? Absent such, the remaining partners may find themselves without a firm. A simple continuation clause simply provides that the partnership shall not be terminated by any of the traumatic life events detailed in point 9.

Conclusion

Whether entering into a marriage, or accepting a partnership position, certain rights, fiduciary obligations and risks are inherent in such momentous life steps. Neither the excitement of the moment, nor sense of relief or self-achievement should outweigh or put asunder the diligent process needed to fully secure such privileges and responsibilities in a well-crafted written agreement, paying particular attention to the points taken up in this article. And remember that no truer words have been spoken than these, as found in John Heywood's Proverbs:¹¹ "Look ere ye leap."

1. See Shortis v. Shortis, 274 A.D.2d. 880, 711 N.Y.S.2d 578, at 580-581 (3d Dept. 2000) (a case involving an 11-year marriage in which the court states: "(t)his being a long-term (11-year) marriage."

2. 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179 (1995).

3. Or risk suffering at the hands of a court's own particular view of what is an impartial resolution of the issue in dispute.

4. See N.Y. Partnership Law '69(2).

5. Leslie D. Corwin, "Written Partnership Agreements Set Forth Rights and Obligations: Covering 'Life Events' Such as Governance, Departures and Retirement Plans," *New York Law Journal*, Feb. 2, 2004, special New Partners pullout section, at p. S8.

6. Ruskin v. Cadwalader, Wickersham & Taft, 10 N.Y.L.J., Dec. 23, 1997, col. 1, p.1.

7. Some typical departure benefits include: a return of the partner's capital paid over a period of years; or the payment over time of a partner's percentage of the firm's assets as of the departure with any such payments not to exceed a fixed percentage of the firm's revenues.

8. Graubard v. Moskowitz, 86 NY2d 112, 629 N.Y.S.2d 1009 (1995); but see, Hanger v. Clifford Chance Rogers & Wells, California Superior Court, No. RG03120659. Note that DR2-108 of the New York State Code of Professional Responsibility provides that an attorney shall not "participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits." See also, Cohen v. Lord Day & Lord, 75 N.Y.2d 95, 551 N.Y.S.2d 157 (1989); and Denburg v. Parker Chapin Flattau & Klimpl, 82 N.Y.2d 375 (1993).

9. A departing partner's solicitation of his partners, associates and other co-workers to join him at a new firm is not a breach of his fiduciary duty.

10. N.Y. Partnership Law ' (62(1)(b). As concerns retirement, in particular, the agreement may provide a mandatory retirement age; permit each partner the discretion to retire when he sees fit; employ a series of "step down" phases to retirement; and even condition payment of benefits on a non-competition clause, which in the retirement scenario is permissible. See, DR2-108 of the New York State Code of Professional Responsibility.

11. 1874 edition.

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