Leaks, Lies, and the Moonlight: Fiduciary Duties of Associates to Their Law Firms

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ARTICLES

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I. INTRODUCTION

Following news of allegations that a Ropes & Gray, LLP, associate engaged in insider trading, the law firm stated, "'We are

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deeply disappointed about this situation, which suggests an extreme breach of this person's duty of trust to our clients and to the firm.'"[1] A blog called the *Anonymous Lawyer* quoted the firm's statement and followed it with this fictional account:

> Well, no kidding. It's damn well a breach of the duty of trust to the firm. If an associate here found out some insider information we could use to make a killing, they better not be keeping it to themselves. They ought to tell a partner, tell the whole executive committee, give us all a chance to get in on it. If we can't trust our associates to bring us valuable opportunities to increase our own personal wealth, what do we really need them around for? I've spent years digging through client paperwork looking for information that I could use to make better investment decisions. And for an associate—not even a partner—for an associate to be running with this, without making the opportunity available to his superiors. . . . Well, it was a pretty easy decision to fire him. And it should serve as a warning to everyone else at the firm—you find a good deal, you bring it up the chain of command and let us all have a piece.[2]

As indicated by the actual statement from Ropes & Gray, LLP, firm leaders condemn associates who breach fiduciary duties to the firm, as well as to firm clients.[3] At the same time, the fictional blog post reflects the cynicism of commentators and associates who readily criticize and satirize the conduct and pronouncements of partners, especially leaders of large law firms.[4] Popular websites regularly include information and comments from disgruntled associates who question firm decisions and the manner in which firm principals treat associates and other employees.[5]

The steady stream of leaks of firm information has led some firm leaders to dissuade employees from disseminating information that the firm views as confidential. One firm's efforts to do so captured the attention of bloggers. In October 2009 the high-traffic blog *Above the Law* (ATL) excoriated a memorandum issued by the Washington, D.C.-based firm WilmerHale.[6] When

1. Anonymous Lawyer, http://anonymouslawyer.blogspot.com (Nov. 5, 2009, 9:22 EST).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Posting of David Lat & Elie Mystal to Above the Law, WilmerHale Warns

news of the memorandum first appeared on ATL, the comments on a discussion thread portrayed the memorandum as very draconian.[7] The following epitomizes the comments that decried the firm's effort to silence its associates:

> The firm has made it abundantly clear that no one should provide tips to ATL or post comments. The clear message is that if caught, you'll be fired. I, however, have already been "transitioned out[,"] so I have nothing to worry about other than feeding my family.
>
> . . . .
>
> Didn't you just love the scathing internal memo meant to scare the living &*^$ out of those who were even thinking about tipping ATL? Apparently it worked, because [the firm memorandum] didn't end up here (though it should have). I guess the few that were spared from the bloodbath are shaking in their boots.[8]

A firm spokesperson confirmed the firm had distributed a memorandum: "From time to time leaders of the firm communicate to employees that we have an obligation to protect the confidentiality of firm business and matters. This is nothing more than a general reminder of our obligation."[9]

The ATL piece questioned whether the memorandum was a simple reminder about attorney-client privilege or a scare tactic that could be viewed as heavy-handed and Kremlinesque.[10] By the end of the month, a follow-up ATL post revisited the issue after ATL obtained an actual copy of the WilmerHale memorandum. The ATL piece acknowledged the memorandum was a "little disappointing" and "not nearly as scary as [they] were led to believe."[11] Following cautionary words to firms that attempted to clamp down on leaks, the ATL post printed the

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Associates Against Talking to ATL—But Has It Worked?, http://abovethelaw.com/2009/10/wilmerhale-warns-associates-against-talking-to-atl-but-has-it-worked? (Oct. 13, 2009, 17:40 EST).

7. A general theme throughout the comments concerns the intent of the memorandum to chill open discussion of matters. *Id.*

8. *Id.*

9. *Id.*

10. *See id.* (questioning why the lawyers at WilmerHale and certain other firms, "strive so mightily to keep people in the dark about what's going on in their workplaces").

11. Posting of David Lat to Above the Law, Congratulations to WilmerHale on a Major Pro Bono Win (Plus the WilmerHale Warning, and Thoughts on Law Firms Trying to Crack Down on Leaks.), http://abovethelaw.com/2009/10/congratulations-to-wilmerhale-on-a-major-pro-bono-winplus-the-wilmerhale-warning-and-thoughts-on-law-firms-trying-to-crack-down-on-leaks (Oct. 30, 2009, 16:14 EST).

memorandum. The WilmerHale memorandum first discussed firm efforts to keep associates informed, stating that notes of internal firm meetings were improperly funneled to the outside media. The memorandum ended with the following:

> We continue to believe that we must and should communicate broadly with the firm community. And, we will. We also recognize that, with near unanimity, you each have respected our commitment to the confidentiality of firm business and matters. This recent event, however, leads us to reiterate what almost everyone knows. We each have an obligation to the institution of WilmerHale, and we each have an obligation to protect the confidentiality of information provided to us. That this is true has been obvious to many. We hope it will be for all.[12]

This memorandum and the controversy surrounding it raises questions related to associates' duties to their firms and their perceptions of those duties. Specifically, to what extent do associates owe fiduciary duties to their firms? Do they generally recognize and fulfill those duties? Surprisingly, few authors have tackled this topic in the last twenty years.[13] To fill the gap, this Article addresses these issues. Part II introduces the topic by examining the status of associates. Part III applies agency principles to the firm-associate relationship, examines specific duties, and discusses cases involving alleged breaches of duty by associates. The conclusion considers associate duties in the current legal, organizational, and socio-technological environment

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12. *Id.*

13. In 1985, Professor Leonard Gross wrote the seminal article on associates and their fiduciary duties, which included empirical data from a survey of 201 associates in Illinois firms. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259 (1985) (reporting on such issues as fiduciary duties between associates and firms); *see also* Cindy Holland, Comment, *The Liabilities and Ethical Responsibilities of a Law Firm Associate*, 16 J. LEGAL PROF. 241 (1991) (examining the roles of law firm partners and associates). In 1988, Professor Vincent R. Johnson authored an article concentrating on liability concerns that arise when departing partners and associates solicit law firm clients. Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1 (1988). Other articles focused on ethics concerns of supervised lawyers. *See, e.g.*, Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259 (1994) (highlighting the need for the prevention of attorney misconduct through self-regulation). Most recently, Douglas R. Richmond, a legal malpractice and ethics expert, published a thoughtful article that focused more on ethics than fiduciary duty issues. Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199 (2007).

in which associates practice. The Article closes with observations on the importance of firm partners considering the effect of firm culture on associate attitudes and conduct.

II. STATUS OF ASSOCIATES

Over the last twenty years, the structure and composition of law firms have radically changed.[14] In 1991, Professors Marc Galanter and Thomas Palay used the tournament theory to analyze the economics and dynamics of law firms.[15] At the time, their model focused on two classes of lawyers: partners and associates.[16] The associates who successfully competed in the tournament acquired the trophy of partnership status.[17] Associates who did not "make partner" tended to leave the firm.[18] Economic and organizational changes have changed the tournament. Now, lawyers in law firms fall into an array of categories, including non-equity partners, permanent (staff) associates, and "of counsel" lawyers.[19] To account for this new set of players, Professors Galanter and William Henderson suggest a more complex and elongated tournament that applies to both partners and associates.[20] In discussing the fiduciary duties, this Article uses the term "associates" to refer to the lawyers on the partnership track as well as other associates who are commonly called permanent or staff associates.[21]

14. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 3 (1991).

15. *Id.*

16. *Id.*

17. *Id.* at 101.

18. *Id.*

19. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 58 (1991).

20. *See* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1877 (2008) (advancing a core–mantle model of the "firm in which a core of owner-partners is surrounded by a much larger mantle of employed lawyers that includes [associates on the partnership track], non-equity partners, permanent associates, of-counsel and de-equitized former partners").

21. This Article does not discuss the duties of "of counsel" lawyers largely because their status, rights, and responsibilities vary from firm to firm. Many firms use the term to designate and recognize a senior lawyer who is not an equity holder. Firms also use the term to refer to retired or part-time lawyers. Depending on the circumstances, "of counsel" lawyers may be employees or independent contractors. The lawyer's relationship to the firm and communications with third parties will affect the lawyer's duty to the firm and the firm's liability for the acts and omissions of the "of counsel" lawyer.

Generally speaking, the term "associate" refers to a "salaried lawyer-employee who is not a partner of the firm."[22] Typically, the law firm pays the associate's overhead, although the salary may be based on a formula that accounts for an overhead calculation.[23] Another distinguishing feature is that the law firm, as an employer, "has the right to control the associate in the law firm's business."[24] This control includes assigning and monitoring work performed by the associate.[25]

Given the associate's employment status and the supervisor's right to control the associate's work, an associate functions as an agent of the law firm.[26] The Restatement (Third) of Agency defines an "agency" as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[27]

The associate is an agent of the law firm, supervising lawyers, and clients.[28] Agency law also treats an associate as a "sub-agent," a particular type of agent who is subject to more of the

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22. Fla. Bar v. Fetterman, 439 So. 2d 835, 838 (Fla. 1983).

23. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 260 (1985).

24. *Id.* (citing the RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958)).

25. *See id.* at 260–61 ("[T]he associate's superior ... can direct the associate regarding the type of work that should be done, how it should be done, and when it should be done.").

26. *See generally* Hilliard v. Riverside Methodist Hosp., No. 95APE04-473, 1996 WL 17578, at *4 (Ohio App. 10th Jan. 16, 1996) (referring to the agent-principal relationship between a law firm and an associate). In *Hilliard*, the court declined to rule that a law firm associate is a "fiduciary to the firm as a matter of law." *Id.* According to the court, the existence of an agency relationship should not turn on job title, but the "realities of each situation." *Id.*

27. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). According to the reporter's notes, the "black letter for this section is consistent with the substance of the definition in Restatement Second, Agency § 1, except for the introduction of 'assent,' ... [and changes] to reflect contemporary usage." RESTATEMENT (THIRD) OF AGENCY § 1.01 reporter's note a (2006).

28. *See* Cindy Holland, Comment, *The Liabilities and Ethical Responsibilities of a Law Firm Associate*, 16 J. LEGAL PROF. 241, 242 (1991) (maintaining that under the Restatement Second of Agency, the associate may be a "sub-agent" because the partner is both an agent of the firm and the client). This Article does not analyze fiduciary duties that lawyers owe clients. For a recent discussion of lawyers' fiduciary duties to clients and reconciling the law of agency and the law governing lawyers, see Sande Buhai, *Lawyers As Fiduciaries*, 53 ST. LOUIS U. L.J. 553 (2009).

principal's control than a nonservant.[29] As both agents and sub-agents, associates owe fiduciary obligations to their firms, "consistent with those that servants and agents traditionally have owed to principals."[30]

III. ASSOCIATE'S FIDUCIARY DUTIES

Applying the Restatement (Third) of Agency, an associate as an agent owes a fiduciary duty to act loyally for the firm's benefit in all matters connected with the agency relationship.[31] This over-arching standard of loyalty unifies more-specific rules of loyalty.[32] The more-specific rules impose a duty on agents not to receive a material benefit from a third party at the principal's expense[33] and prohibit the agent from acting as or on behalf of an adverse party.[34] Another specific loyalty rule prohibits agents from competing with their principals.[35] The last loyalty section under the Restatement (Third) of Agency states that an agent has a duty not to use property of the principal for the agent's own purposes or those of a third party.[36] This same section recognizes the agent's duty to not use or communicate confidential information of the principal for the agent's own purposes or those of a third

29. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 261 (1985) (citing RESTATEMENT (SECOND) OF AGENCY § 2 (1958)).

30. *Id.* at 262 (citing H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP §§ 65–69 (1979)).

31. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). Some courts have declined to treat associates as fiduciaries of their firms. For a discussion of the split, see William Jordan, *Law Firm May Not Bring Breach of Fiduciary Duty Claim Against Associate for Disclosing Confidential Information*, 32 PROF. LIAB. REP. 256, 256–57 (2007).

32. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).

33. *See id.* § 8.02 ("An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position.").

34. Restatement (Third) of Agency clarifies that an "agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship." *Id.* § 8.03.

35. The Restatement (Third) of Agency describes this duty not to compete as follows:

> Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship.

Id. § 8.04.

36. *Id.* § 8.05.

party.[37] In addition to the loyalty duties described above, the Restatement imposes other duties upon agents, including the duties of care, competence, and diligence.[38] Agents also owe their principals duties of obedience[39] and good conduct.[40] The following section examines these duties, focusing on the duty of loyalty owed by an associate as an agent of the principal, the employer-firm.

A. *Duties of Care, Competence, and Diligence*

Assuming the facts support the existence of a fiduciary relationship between the associate and the firm, the associate owes the firm a duty to exercise reasonable care and handle firm business in a diligent, competent, and professional manner. Arguably this duty includes practicing law in accordance with applicable ethical rules of professional conduct. Applying agency law to the firm-associate relationship, Professor Leonard Gross describes the duty of good care as follows:

> An agent impliedly warrants to his principal that he possesses the requisite skill and experience ordinarily required to perform the service. He also promises to exercise reasonable care, skill, and diligence in serving the principal. The law firm associate, as a servant of the firm, warrants to the law firm that he possesses and will exercise the skill of the ordinary attorney. An attorney with a particular speciality, such as a patent attorney, warrants to the law firm employing him that he will practice his specialty with the knowledge and skill of an ordinary attorney in his specialty. If the associate is negligent, his employer, the law firm, will be liable to the client who is injured by the associate's negligence. If the law firm is liable to the client because of the associate's negligence, the firm may obtain indemnity from the associate for its loss.[41]

Understanding their liability for injuries caused by the acts and omissions of firm lawyers, law firms obtain legal malpractice insurance that provides coverage for work performed in the course of firm employment.[42] Therefore, few cases arise where firms

37. RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006).

38. *Id.* § 8.08.

39. *Id.* § 8.09.

40. *Id.* § 8.10.

41. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 262–63 (1985) (internal citations omitted).

42. A typical legal malpractice policy will define "insured" to include lawyers who

pursue claims against associates who fail to practice with reasonable care, diligence, or competence.[43]

In order for a firm to recover on a breach of fiduciary duty claim, it would have to establish damages caused by the breach. If the loss is covered by legal malpractice insurance, possible damage to the firm would be the out-of-pocket and deductible amounts that the firm paid. Firms would be hard-pressed to pursue such a claim against an associate. For example, a plaintiff's firm recently agreed to pay $1.5 million to settle claims by two former clients alleging that an associate failed to exercise diligence on their behalf.[44] Firm managers would not be inclined to sue the ex-associate if litigation would reflect poorly on supervising lawyers who had a duty to monitor associates. Even if the firm could establish a breach of fiduciary duty and damages, a judgment against an associate-defendant may be uncollectable.[45]

A different type of damage occurs if a firm loses fees because of an associate's lack of care and diligence. In one such case, the law firm sued an associate the firm hired to work on the firm's litigation files.[46] Contending the firm sustained damages, including the loss of fees, the firm asserted breach of fiduciary duty, fraud, and unjust enrichment claims.[47] The court rejected the breach of fiduciary duty claim, concluding that hiring an associate to run a department at the law firm did not establish a fiduciary relationship characterized by "overmastering influence"

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perform work on behalf of the named insured, the law firm. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 36:7 (2010 ed.) (explaining that the term "insureds" or "additional insureds" is used to refer to persons "who are afforded the benefits of coverage[] because of their relationship to the named insureds"). For an analysis of lawyer mobility and the changing definition of "insureds" under legal malpractice policies, see Susan Saab Fortney, *Insurance Issues Related to Lateral Hire Musical Chairs*, PROF. LAW., June 2000, at 65.

43. For a discussion of cases in which firms sued associates and the justification for allowing such cases to go forward, see *Kramer v. Nowak*, 908 F. Supp. 1281, 1289–92 (E.D. Pa. 1995). In applying New Jersey law and generally applicable principles of agency, the court concluded that supervising lawyers may sue subordinate lawyers for their negligence in representing clients. *Id.* at 1292.

44. Martha Neil, *Law Firm to Pay $1.5M to Settle Claims That Ex-Associate Dropped Cases*, A.B.A. J., Oct. 19, 2009, http://www.abajournal.com/news/article/law_firm_to_pay_1.5m_to_settle_claims_that_ex-associate_dropped_cases.

45. For example, the former associate (whose conduct resulted in the $1.5 million settlement) left law practice to run a ski resort. *Id.*

46. Edelstein & Diamond, L.L.P. v. Orloff, No. 1310 Jan. Term 2004, Control 120187, 2005 WL 1648191, at *1 (Pa. Com. Pl. June 29, 2005).

47. *Id.*

on one side and "weakness, dependence, or trust, justifiably reposed" on the other.[48] These cases and others against associates reflect courts' unwillingness to allow law firms to pursue actions simply by cloaking conduct as a breach of fiduciary duty by employed lawyers.

B. *Duties of Obedience and Good Conduct*

An associate, as a firm employee, is generally obligated to follow firm policies and procedures. As a supervised person, the associate is obligated to obey all reasonable instructions of the law firm regarding the manner in which the associate practices law.[49]

For an associate practicing law, professional obligations under applicable ethics rules temper this duty of obedience. The American Bar Association Model Rules of Professional Conduct (Model Rules) and disciplinary rules based on the Model Rules require that a supervised lawyer abide by the applicable rules of conduct and not simply follow instructions of a supervising lawyer if the subordinate knows that the conduct is unethical.[50] If the ethics question is debatable, the Model Rules allow the supervised lawyer to follow the supervising lawyer's orders.[51] For example, an associate is subject to discipline if the associate follows instructions to shred documents clearly covered by a discovery request. On the other hand, the disciplinary rules allow the associate to follow the supervisor's instructions to withhold a document if it is questionable as to whether the discovery request actually covers the subject document.

Various commentators have analyzed the Model Rules' approach to reconciling the duties of the associate to both follow instructions and comply with the ethics rules.[52] Others have

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48. *Id.* at *2 (citation omitted).

49. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 266 (1985) (explaining that an associate, as a servant of the law firm, owes a duty of obedience to the law firm and each partner).

50. Model Rule of Professional Conduct 5.2(a) explains that a supervised lawyer is bound by applicable ethics rules notwithstanding the fact that the lawyer is supervised by another lawyer. MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2009).

51. Model Rule of Professional Conduct 5.2(b) allows associates to follow instructions given by supervisors when the ethics question is arguable and the supervisor's direction and proposed course of action is reasonable. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2009).

52. *See generally* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007) (explaining

tackled the ethical dilemma for an associate who is threatened or actually terminated for failing to follow instructions that the associate believed to be unethical.[53] These commentators generally recognize that the associate's conundrum derives from the conflicting duties as an agent: duties to the principal-supervising lawyer, duties to clients, and duties to the legal system to follow the dictates of professional rules of conduct.[54]

An associate owes the employer a duty of good conduct. Although "good conduct" may be in the eye of the beholder, conduct that reflects poorly on an individual lawyer and the lawyer's employer may breach the associate's duty to the firm and provide a basis for termination.[55] For example, an associate fails to fulfill this duty of "good conduct" if the associate engages in illegal conduct, such as insider trading or prostitution.[56] Some crimes involving moral turpitude may no longer be the basis for professional discipline if the conduct does not reflect adversely on the lawyer's fitness to practice law.[57] Nevertheless, a law firm may

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an associate's conformity with the instructions of a superior from a social psychology perspective); Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887 (1997) (arguing that Rule 5.2(b) should be repealed).

53. *E.g.*, Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777, 778–79 (1988) (proposing that attorneys should be protected providing they reasonably interpret the rule). Courts are split on the issue of whether an associate can maintain an action for wrongful discharge based on blowing the whistle on unethical conduct. *See* Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 796–97 (2009) (discussing the unpredictability of whistleblower claims).

54. For practical recommendations for associates who have been instructed to engage in unethical behavior, see Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 205–06 (2007).

55. Darryl Van Duch, *An Associate's Slide from Megafirm to Prostitution*, NAT'L L.J., Mar. 24, 1997, at A7.

56. In 1997, bar regulators filed a disciplinary complaint against a former Winston & Strawn lawyer who entered a guilty plea to a misdemeanor prostitution charge. *Id.* The Illinois regulator alleged that the associate engaged in an activity that "tends to bring the legal profession into disrepute." *Id.* The associate left the law firm eight months before her arrest for prostitution. *Id.* If the associate had engaged in prostitution while employed at the firm, would that conduct constitute a breach of her fiduciary duty of "good conduct," even though the prostitution did not relate to the practice of law? By contrast, insider trading relates to the practice of law and the expectation that lawyers should not misuse confidential information.

57. Unlike the Model Code of Professional Responsibility, the Model Rules of Professional Conduct do not treat all crimes as "misconduct" for the purpose of professional discipline. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2009) (noting that some criminal offenses, such as those involving personal morality, have "no

maintain that such conduct justifies terminating the associate because the publicity surrounding such a crime affects the firm's reputation and client relations. Beyond termination, it is unlikely that a firm would pursue a breach of fiduciary claim against an associate unless the firm would be able to establish collectable damages.

C. *Duty of Loyalty*

The general fiduciary duty of loyalty "requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship."[58] As applied to associates, this principle generally requires that the associate "act for the firm's benefit rather than for" the associate's "own benefit or for the benefit of another party whose interests are adverse to those of the firm."[59]

An associate may violate this general duty of loyalty and the more specific duties of loyalty when an associate moonlights without the firm's permission. Moonlighting may take different forms. For example, an associate might provide legal services to persons who have no connection to the law firm that employs the associate. Depending on the circumstances, this conduct could violate the associate's duty of loyalty to the firm. For example, an associate may be liable for breach of fiduciary duty if the associate diverted the business from the firm or used law firm resources in representing persons who are not clients of the firm.[60] Recently, a West Virginia-based firm brought such a claim, alleging that a

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specific connection to fitness for the practice of law").

58. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).

59. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 264 (1985).

60. For an interesting case involving moonlighting by an associate and imposition of restrictions in the associate's employment agreement, see *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 598 S.E.2d 717, 719 (S.C. Ct. App. 2004). In that case, the firm escaped liability for the conduct of an associate who, without authorization, performed legal services for an entity. In this representation, the associate allegedly misappropriated funds and committed professional malpractice. The firm's letter of agreement with the associate stated that the firm was employing the associate's "total and best professional efforts." *Id.* The firm also imposed "strict procedures for keeping track of all the professional activities" of the associates. *Id.* at 720. The firm's efforts in monitoring the associate's conduct evidently helped it successfully defend against the vicarious liability claims because the client was unable to offer evidence that the associate had apparent authority for work performed. *Id.* at 722.

former associate, when employed by the firm, collected attorneys' fees from firm clients.[61] To deter associates from diverting business or moonlighting, firms may adopt policies forbidding associates from practicing law for their own accounts.

Unauthorized representation of firm clients might also constitute a breach of fiduciary duty. In *Prince, Yeates & Geldzahler v. Young*,[62] a law firm asserted a breach of fiduciary duty claim against a former associate who "represented certain clients . . . without disclosing the representation to the firm while simultaneously using firm resources[,] filing pleadings in the firm's name in connection with [the] matters," and retaining fees derived from the representation.[63] The Supreme Court of Utah concluded that the district court erred in denying the law firm's motion for summary judgment on the breach of fiduciary duty claim.[64] In reaching that conclusion, the court declined to opine on whether "all 'mere employee[s]' owe fiduciary duties to their employers to not compete with the employer's legitimate business interests."[65] Rather, the court recognized a fiduciary duty that arises due to the nature of the relationship between a lawyer and the employer-firm.[66] As stated by the court:

> In the relationship of a lawyer and his or her employer, there does exist a duty of honest and ethical behavior. Because of the privilege granted to engage in the practice of law, we impose upon members of our bar a fiduciary duty that encompasses the obligation to not compete with their employer, which we define as any law firm or legal services provider who may employ them in a legal capacity, without the employer's prior knowledge and agreement.[67]

The court explained that "[t]o hold otherwise would imply that attorneys are free to join law firms, derive benefits from that association, and essentially operate as sole practitioners while

61. Martha Neil, *Associate Collected Law Firm's Legal Fees, Suit Says*, A.B.A. J., Nov. 11, 2009, http://www.abajournal.com/news/article/associate_collected_law_firms_legal_fees_suit_says.

62. Prince, Yeates & Geldzahler v. Young, 94 P.3d 179 (Utah 2004).

63. *Id.* at 182.

64. *Id.* at 185.

65. *Id.* at 185 n.2.

66. *Id.* at 185.

67. *Prince*, 94 P.3d at 185. The court also held that the appropriate remedy for the breach would be disgorgement of the fees charged and collected by the associate while employed at the firm. *Id.* at 186.

simultaneously receiving a salary and using firm resources for their independent legal activities."[68] As recognized by the Supreme Court of Utah in *Prince*, the nature of the law practice affects the analysis of the fiduciary duty of associates.

Similarly, in the case of *Johnson v. Brewer & Pritchard, P.C.*,[69] the Texas Supreme Court considered the nature of law practice and legal ethics principles in evaluating a breach of fiduciary duty claim against a former associate who referred a large personal injury case to another firm, rather than referring the matter to the associate's own employer-firm.[70] In evaluating the firm's claims against the associate, the court examined the complexities involved in imposing an absolute duty of loyalty on employees, especially when the employee is a lawyer who owes ethical and fiduciary duties to clients. The court explained that the "employer's right to demand and receive loyalty must be tempered by society's legitimate interest in encouraging competition."[71] Given lawyers' ethical obligations to provide competent representation, the Texas Supreme Court rejected an "absolute fiduciary duty upon associates of a law firm to abstain from directing [prospective clients] to a firm other than the associate's employer."[72] Rather, the court imposed a narrower duty, holding that associates owe "a fiduciary duty to [their] employer[s] not to personally profit or realize any financial or other gain or advantage from referring a matter to another law firm or lawyer, absent the employer's agreement otherwise."[73] In balancing interests, the court stated, "A firm's legitimate interest in demanding loyalty from its associates should not outweigh competing considerations of the public's interest in encouraging lawyers to assist those who need legal advice in securing the most appropriate representation for the particular type of case and market competition."[74]

Societal and client concerns related to competition and access to

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68. *Id.* at 185 (noting that the associate was an at-will employee who could leave at any time and, presumably, clients could follow him).

69. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193 (Tex. 2002).

70. *Id.* at 193.

71. *Id.* at 201 (citing Augat, Inc. v. Aegis, Inc., 565 N.E.2d 415 (Mass. 1991)).

72. *Id.* at 202 (illustrating why the lawyer's ethical duty to provide competent representation may lead a lawyer to refer a case to another law firm rather than the employer-firm).

73. *Id.* at 197.

74. *Johnson*, 73 S.W.3d at 203.

legal services are also weighed in cases in which firms allege breach of fiduciary duty by associates who solicited firm clients. These claims appear in various reported cases involving breach of fiduciary duty claims against associates and fall into two categories. The first category of cases involves breach of loyalty claims against associates who solicited firm clients at a time the associates were employed by their firms. The second category of claims involves claims for conduct occurring after termination of the associate's employment at the firm.

Because lateral movement of lawyers is a daily reality, it is important to consider an associate's liability exposure for conduct arising before and after termination of employment.[75] While courts have provided some guidance, an examination of cases reveals that the lines marking proper conduct are not perfectly clear.[76] As noted by the court in *Kopka, Landau & Pinkus v. Hansen*:[77]

> Prior to his termination, an employee must refrain from actively and directly competing with his employer for customers and employees and must continue to exert his best efforts on behalf of his employer. But *an employee may even make arrangements to compete*, ... except that he cannot properly use confidential information peculiar to his employer's business, before he leaves his employ. [These rules] balance the concern for the "integrity for the employment relationship" against *the privilege of employees to prepare to compete against their employers without fear of breaching their fiduciary duty of loyalty*.[78]

The court cited authority, including the Restatement (Third) of Agency, for the proposition that the determination as to whether a

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75. A developing body of law relates to lawyer mobility and issues related to lawyers "grabbing" business. For a thorough discussion on the issues, see ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY (2d ed. 1998 & Supp. 2008).

76. *See* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 99 (1988) (referring to the "jurisprudential uncertainty as to the nature of the fiduciary obligations" that a departing lawyer owes her former colleagues). Professor Johnson identifies a number of reasons why the issue of client solicitation is less likely to be addressed and resolved through informal resolution when an associate leaves a firm, as compared to when a partner leaves a firm. *Id.* at 15–16.

77. Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065 (Ind. Ct. App. 2007).

78. *Id.* at 1070–71 (quoting Potts v. Review Bd. of the Ind. Employment Sec. Div., 475 N.E.2d 708, 712 (Ind. Ct. App. 1985)). The law firm sued the associate after the associate resigned from the firm and was joined by other associates and support staff.

former employee's conduct was tortious is "extremely fact-sensitive."[79] Based on the facts presented in the case, the court concluded that the former associate's actions prior to termination of the agency relationship amounted to preparation to compete and thus did not contravene a duty to the principal-firm.[80] The court upheld the summary judgment for the associate because there was no evidence that the associate directly and actively competed with the firm while still employed.[81] This conclusion is consistent with other court opinions that have recognized the propriety of an associate preparing to depart from a firm.[82]

D. *Disclosure and Use of Confidential Information*

As noted above, the duty of loyalty encompasses a duty to refrain from self-dealing and disclosure of confidential information. Confidentiality extends to client information covered by the ethics rules and privileges. As agents of clients, lawyers must preserve the confidentiality of information relating to the fiduciary relationship with clients.[83] As agents of their law firms and partners, associates must also preserve information acquired while the associate was employed by the firm. This may include firm policies that are intended to be confidential, such as an internal policy for screening "unworthy" clients.[84]

Associates have a duty not to use confidential firm information

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79. *Id.* at 1071.

80. The associate's preparation to compete included questioning firm employees about their desire to leave the firm and gathering information on their salary requirements. *Id.*

81. *Id.* at 1072.

82. *E.g.*, Wistow & Barylick, Inc. v. Bowen, No. Civ.A. PC 94-6341, 2002 WL 1803926, at *9 (R.I. Super. July 24, 2002) (concluding that the defendant-associate did not breach a duty owed to the firm because the associate had a right as a matter of law to prepare to depart from the firm without disclosure).

83. For more guidance on the confidentiality responsibilities of lawyers, see RESTATEMENT OF LAW GOVERNING LAWYERS ch. 5 (2000). Examples of improper disclosure would be a litigator producing protected information without screening it and a transactional lawyer recklessly forwarding to a journalist an e-mail that included confidential information from a corporate client.

84. Presumably, such information would be confidential because firm leaders would not want prospective clients to know the criteria that a firm uses for evaluating financial worthiness and risks associated with potential representation. *Cf.* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 265–66 (1985) (suggesting that an associate would breach the duty of loyalty by disclosing confidential firm billing policies).

for personal gain.[85] This duty applies while the firm employs the associate and extends after employment terminates. Although restraints on competition by agents generally lapse with termination of the agency relationship, Professor Robert Hillman, the preeminent expert on lawyer mobility, points out that agency law determines the extent to which information acquired during the relationship may be used after termination of the relationship.[86] In evaluating firm claims against former associates who allegedly used confidential firm information after leaving the law firm, a number of opinions have noted the difficulty in distinguishing between conduct amounting to a breach of fiduciary duty and allowable pre-competitive activities.[87]

Changes in law practice, technology, media, and electronic communications have blurred lines between the handling of disclosure and use of information when associates are working at a firm, preparing to leave a firm, and utilizing information after termination of employment at the firm. A high-profile case against the prestigious New York-based firm of Sullivan & Cromwell illustrates how dissemination of firm information takes different twists when associates share information with traditional newspapers and media outlets, as well as blogs and websites. The case began in 2007 when Aaron Charney, while still employed by Sullivan & Cromwell, filed a discrimination suit against the firm.[88] Mr. Charney alleged discrimination based on his sexual orientation

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85. This includes using information to usurp business opportunities and trading on insider information. Recently, court documents filed in insider-trading cases in Ontario and New York alleged that Gil Cornblum, a former Sullivan & Cromwell lawyer, sought and shared confidential information about pending corporate deals. Martha Neil, *Lawyer Raided Sullivan & Cromwell Offices for Inside Info Years Ago, Court Filings Say*, A.B.A. J., Oct. 28, 2009, http://www.abajournal.com/news/article/lawyer_raided_sullivan_cromwell_offices_for_inside_info_court_filings_say. Mr. Cornblum committed suicide on the eve of his scheduled plea. *Id.*

86. ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY § 3.2.1 (2d ed. 1998 & Supp. 2008) (analyzing the different approaches used in the Restatement (Second) of Agency and Restatement (Third) of Agency).

87. *See* Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 N. ILL. U. L. REV. 1, 25 (2009) (citing opinions in which the courts noted the difficulty in drawing lines between permissible and impermissible conduct). "Distinctions are especially difficult to draw where the clients involved were served by the departing lawyers while still with the firm." *Id.* at 19.

88. For an account of the case, see Bruce Jackson & Debra G. Buster, Charney v. Sullivan & Cromwell: *What Lessons Lie Here for Your Firm?*, LAW J. NEWSLS., Nov. 2007, http://www.agg.com/media/interior/publications/charney_pub_short.pdf.

and asserted that the firm had retaliated against him. The lawsuit commenced when Mr. Charney, on a pro se basis, filed a twenty-three-page complaint and published it on websites.[89] The complaint named various individuals and referred to a "who's who" of firm clients.[90] Mr. Charney also attached a copy of firm documents to the complaint, including the law firm's partnership agreement.[91] Thereafter, the firm placed Mr. Charney on paid leave and filed a counter suit, alleging a number of claims, including breach of the firm's confidentiality policy and breach of fiduciary duty.[92] The firm pointed to the widely disseminated complaint filed by Charney and alleged that he stole documents from a partner's office and passed the documents to the *Wall Street Journal*.[93] The firm fired Charney after settlement talks failed.[94]

In the course of litigation, the firm first succeeded in obtaining a dismissal of Charney's original complaint. Although the court determined that "Charney ... stated facts arguably sufficient to support his claims, his complaint also contained extraneous and prejudicial allegations that should [have been] excluded from an amended complaint."[95] Charney subsequently hired counsel, who filed an amended complaint, and he returned documents that belonged to the firm.[96]

Sullivan & Cromwell moved for a preliminary injunction, and Charney moved to dismiss claims brought by Sullivan & Cromwell.[97] At oral argument on the motions, Charney agreed to

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The Sullivan & Cromwell complaint alleged four causes of action: (1) breach of fiduciary duty based on Charney's dissemination of privileged and confidential information in violation of the N.Y. Code of Professional Responsibility, (2) breach of a confidentiality agreement that Charney signed as a firm employee, (3) conversion of the firm's confidential material, and (4) replevin. Complaint at 2, 6–8, Sullivan & Cromwell, LLP v. Charney, 2007 WL 1240437 (N.Y. Sup. Ct. Apr. 30, 2007) (No. 600333/2007).

93. Anthony Lin, *Sullivan, Ex-Associate Settle: Confidential Pact Ends Gay Bias Suit*, 238 N.Y. L.J. 1 (2007), *available at* 10/26/2007 N.Y. L.J. 1, (col. 4) (Westlaw).

94. *Charney*, 2007 WL 1240437, at *3.

95. Bruce Jackson & Debra G. Buster, Charney v. Sullivan & Cromwell*: What Lessons Lie for Your Firm?*, LAW J. NEWSLS., Nov. 2007, http://www.agg.com/media/interior/publications/charney_pub_short.pdf.

96. William Jordan, *Law Firm May Not Bring Breach of Fiduciary Duty Claim Against Associate for Disclosing Confidential Information*, 32 PROF. LIAB. REP. 10 256, 256–57 (2007).

97. Sullivan & Cromwell (S & C) moved for a preliminary injunction enjoining

a preliminary injunction. Therefore, the court's opinion focuses on Charney's motion to dismiss.

The court agreed with Charney on the issue of whether a firm may bring a breach of fiduciary duty claim against an at-will employee based on an alleged violation of New York disciplinary rules or an alleged disclosure of confidential or proprietary documents and information.[98] Because New York law does not allow clients to recover damages for violations of disciplinary rules, the court reasoned that the firm should not be able to do so.[99] The court also noted the general rule in New York that an employee does not owe a fiduciary duty to an employer.[100] The court declined to make an exception to the rule for associates who violate their ethical obligations to clients and act disloyally to their firms by saying embarrassing things and disclosing confidential information to the media.[101] Within six months of this opinion, the firm announced that it had reached a settlement with Charney.[102] Had the lawsuit not settled, it is unclear whether a higher court would have concurred with the lower court's conclusion that the firm could not recover damages for breach of fiduciary duty.

The litigation between Charney and Sullivan & Cromwell illustrates how electronic communications and website postings

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Charney from:

> (1) revealing or disclosing the confidences or secrets of S & C's clients; (2) revealing or disclosing materials in any form constituting S & C's attorney work product or proprietary non-public information of S & C; (3) directing Charney to return all documents, files, and other materials in any form referring or relating to S & C's clients, S & C attorney work product, proprietary non-public information, and the tapes referred to in paragraph two of the complaint he filed.

Charney, 2007 WL 1240437, at *1. Charney cross-moved to dismiss S & C's complaint, "arguing that S & C's claims [were] flatly contradicted by documentary evidence, [were] legally insufficient, or [had] been rendered moot by both voluntary action on his part and interim court orders." *Id.*

98. *Id.* at *5–6. Various considerations may have influenced the court, including the fact that much of the client information was not actually confidential and that Charney had returned various material to the law firm. *Id.* at *4, *5 n.5.

99. *Id.* at *5. The court noted there is little compelling reason to extend to a law firm a private cause of action for violation of a disciplinary rule when clients themselves have no such right. *Charney*, 2007 WL 1240437, at *5.

100. *Id.*

101. *Id.* at *5–6.

102. Anthony Lin, *Sullivan, Ex-Associate Settle: Confidential Pact Ends Gay Bias Suit*, 238 N.Y. L.J. 1 (2007), *available at* 10/26/2007 N.Y.L.J. 1, (col. 4) (Westlaw).

may transform an associate from a plaintiff to a defendant. Recently, Levison Axelrod, a New Jersey-based personal injury firm, sued a former associate who had created a website criticizing the firm.[103] Alleging unfair competition and breach of loyalty, Levison Axelrod sought a court order to shut down the website.[104]

Lawsuits where associates have faced allegations of breach of duty for disclosure of firm and client information have apparently not put much of a damper on the weekly leaks of information to popular websites, such as ATL, a self-described legal tabloid. Leaked information commonly relates to information on compensation, layoffs, and job satisfaction. Depending on the circumstances, it is debatable whether such information is confidential.[105] Other information related to firm business may be confidential. Consider an example of a law firm that is investigating whether a practice leader has been inflating the bills of all lawyers the leader supervises. To conduct a meaningful audit, the firm's general counsel determines that it is necessary to review bills with the associates in the practice group. Assume that an associate, without authorization, discloses to the media the fact of the internal investigation, and the disclosure hurts the firm's relationship with current and prospective clients. In such a situation, did the associate-agent breach a duty to preserve confidential information of the firm-principal? Assuming there are damages, does the firm possess an actionable claim? Should the answer turn on whether the firm took steps to impress on the associates the sensitive and confidential nature of the information before the disclosure?

Firms have taken various steps to deter the disclosure of information considered to be confidential. Common practices

103. Martha Neil, *Law Firm & Ex-Associate Litigate Badmouth Blog Battle in State & Federal Court*, A.B.A. J., Nov. 10, 2009, http://www.abajournal.com/news/article/law_firm_ex-associate_litigate_badmouth_blog_battle.

104. *Id.*

105. Comments posted on a discussion thread on ATL noted that blanket prohibitions on associates discussing workplace conditions "clearly violated federal law." Posting of David Lat to Above the Law, Congratulations to WilmerHale on a Major Pro Bono Win (Plus the WilmerHale Warning, and Thoughts on Law Firms Trying to Crack Down on Leaks.), http://abovethelaw.com/2009/10/congratulations-to-wilmerhale-on-a-major-pro-bono-winplus-the-wilmerhale-warning-and-thoughts-on-law-firms-trying-to-crack-down-on-leaks (Oct. 30, 2009, 16:14 EST). Another post indicated that a firm precluding discussion of compensation violated federal law and possibly state and local equivalents. *Id.* Query whether the laws would apply to posting information on the Internet.

include asking employees to sign confidentiality agreements and specifically reminding lawyers of the confidential nature of particular information.[106] As indicated by the recent leaks of information, however, these efforts may not be successful even when firms take precautions to prevent a document from being disclosed outside the firm.[107]

Firm leaders who are disheartened by leaks of firm information may take a different approach. When concerned about the possible leaks of information, partners may determine that the safer course of action is to not share information with associates. Firm leaders may prefer this cone of silence to risking public discussion of private firm business.[108] The unintended consequence of this approach is that it undermines the connection of associates to their firms.

A much different approach to addressing concerns about leaks is for firm partners to discuss seriously why associates would disclose information that reflects adversely on their firms. This examination may reveal that associates do not feel committed to their firms. The following section discusses this organizational dynamic and how the current economic climate provides an opportunity for firms to reshape attitudes and firm culture.

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106. *E.g.*, Posting of David Lat to Above the Law, Update: Bingham Associate Given Date Rape Drug? Internal Email Offers Rebuttal to Ex-Associate's Claims, http://abovethelaw.com/2008/05/bingham_mccutchen_date_rape_drug.php (May 8, 2008, 15:55 EST) (on file with the *St. Mary's Law Journal*) (printing a firm memorandum that outlines the firm's response to a complaint and asks recipient to maintain the confidentiality of the information). Another article indicates that law firm leaders abroad are also attempting to prevent leaks. *See* Posting of Isaac Smith to Above the Law, Letter from London: U.K. Confidential, http://abovethelaw.com/2009/03/letter_from_london_1.php (Mar. 16, 2009, 11:07 EST) (reporting that the London managing partner of DLA Piper, LLP pleaded for ideas on preserving the confidentiality of information on redundancy packages).

107. In an online interview, David Lat, the founder and managing editor of *Above the Law*, described an incident in which a firm took steps to prevent an electronic communication from being printed or distributed. One of the recipients avoided the controls by taking a photograph of a document on the computer screen, which could then be forwarded to persons outside the firm. Web chat: Why Openness & Transparency at Law Firms Matters (Oct. 15, 2009) (recording of live call-in radio show with David Lat, moderated by Edward A. Adams), http:// www.legalrebels.com/ posts/why_openness_transparency_at_law_firms_matters_live_call-in_radio_show/.

108. A different strategy involves carefully tailoring communications with an eye toward possible disclosure outside the firm, although firm leaders may deny that they "manage to the blogs."

IV. CONCLUSION—RETHINKING FIRM CULTURE AND TREATMENT OF ASSOCIATES

A survey of breach of fiduciary claims against associates reveals that associates may not fully recognize the extent to which they owe fiduciary duties to their employing firms. Beyond refraining from serious misconduct, such as fraudulent billing and insider trading, do the majority of associates recognize that they owe other duties to their employers? Regular leaks of information to blogs suggest that many associates are not reluctant to disseminate information that hurts their employer's image or reputation. These Internet comments suggest that many associates may not feel a sense of loyalty when communicating about their employers.

In response to the WilmerHale memo discussed earlier, a number of comments on ATL referred to the lack of loyalty. The following represents the general sentiment: "[Partners] don't understand why associates post anything to ATL—they stupidly think associates have as much at stake in the firm as they do, yet they give us no reason to be loyal. Their efforts to develop loyalty and increase morale are completely misguided."[109] This comment reflects the sentiments of law firm associates who complain about firm morale and partner treatment. On the other hand, firm partners may question the maturity and professionalism of associates. In criticizing the conduct of associates, one senior lawyer told me, "We created brats (associates), and we should not be surprised when they act like brats."

A comparison of opinions of associates and partners indicates a disconnect between partners and associates. Many associates do not feel committed to their firms and partners do not feel committed to associates. The lack of commitment and loyalty is a by-product of the transformation in the economics, structure, and organization of large law firms. These changes include partners moving from lock-step compensation to "eat what you kill" systems. As a result, partners are less inclined to devote time to firm-wide initiatives, such as mentoring and training of associates.[110] Another significant change relates to client efforts

109. Posting of David Lat & Elie Mystal to Above the Law, WilmerHale Warns Associates Against Talking to ATL—But Has It Worked?, http://abovethelaw.com/2009/10/wilmerhale-warns-associates-against-talking-to-atl-but-has-it-worked? (Oct. 13, 2009, 17:40 EST).

110. Marc Galanter & William Henderson, *The Elastic Tournament: A Second*

to lower their legal budgets. Sophisticated clients do not want to pay for associates to provide costly services; rather, these clients carefully manage their legal budgets and ask that routine work be handled by contract lawyers.[111] These shifts have affected training, mentoring, and development opportunities for associates.[112]

Another structural change relates to shifts in lawyer positions in firms. As discussed in Part I, many firms now include ranks of permanent and staff lawyers who are not on the partnership track.[113] While on these tracks, these lawyers have no prospect of acquiring equity status in their firms. As a result, these associates may not feel like they have a long-term stake in their firms.

In addition to thousands of lawyers who agree to work as permanent or staff associates, many associates work in law firms where the likelihood of making partner is very low.[114] Even associates on the partnership track may not aspire to acquire

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Transformation of the Big Law Firm, 60 STAN. L. REV. 1867, 1868 (2008). In an empirical study I conducted of associates in 1999, 43% of the respondents reported that they agreed with the following statement: "Because of the pressure on partners to bill and generate business, partners in my firm do not provide the mentoring and training that I need and want." Forty-two percent of the respondents disagreed with the statement. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 283 (2000). For a discussion of the demise of mentoring and training, see ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY § 1.5 (2d ed. 1998 & Supp. 2008).

111. Tamara Loomis, *Don't Look Back*, AM. L., Student Edition, Fall 2009, at 16, 18.

112. Lack of mentoring and training contributes to attrition in firms. Before the recent economic downturn, associates were voluntarily leaving law firms in droves. Studies conducted by the National Association of Law Placement (NALP) revealed that almost one-half of all associates left law firms within three years, and three-quarters left within five years. Deborah L. Rhode, *Foreword: Personal Satisfaction in Professional Practice*, 58 SYRACUSE L. REV. 217, 220 (2008) (citing NALP, UPDATE ON ASSOCIATE ATTRITION 11 (2006)). In a cross-profession study that I conducted for NALP in 2005, approximately 37% of law firm respondents were interested in changing jobs within two years. SUSAN SAAB FORTNEY, IN PURSUIT OF ATTORNEY WORK-LIFE BALANCE: BEST PRACTICES IN MANAGEMENT 28 (2005). When asked to identify the most influential factor causing respondents to change jobs, the largest percentage of firm lawyers (26.4%) reported "reduction of work hours" as the most influential factor. *Id.*

113. For an examination of empirical evidence and implications of the new "elastic" tournament model based on a core of owner-partners surrounded by a larger mantle of employed lawyers, see Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1871–1907 (2008).

114. Nate Raymond, *In Further Sign of Tough Economy, Law Firms Promote Fewer Senior Partners to Partnership*, 242 N.Y. L.J. 1 (2009), *available at* 11/30/2009 N.Y.L.J. 1, (col. 3) (Westlaw) (quoting a law firm consultant who explained that firms "may be trying to avoid dividing their dwindling net income among even more partners").

equity status. They may perceive work in a large law firm as a way to pay student loans and obtain experience before moving to other employment, commonly a general counsel position.[115] Because these lawyers do not want to climb ranks to partnership, they may not feel much of a sense of loyalty to their firms.[116]

The economic downturn has aggravated these problems.[117] Clients are cutting amounts expended for legal services. Firms' profit margins have been squeezed by both sagging demand and record-high expenses, leading to mass layoffs, salary freezes, salary cuts, deferred start dates for first-year associates, and canceled or downsized summer programs.[118] The manner in which some firms have handled these issues has also damaged morale and undermined loyalty. For example, a firm may publicly state that it terminated associates because of poor performance reviews, rather than because of the lack of work. Such comments not only hurt the terminated employees but serve as a blow to remaining associates.[119] Associates are also very troubled to learn that their colleagues are being terminated because of economic downturn, but partners are continuing to make millions.

Firm managers who bemoan the lack of loyalty should look in the mirror and consider what actions they take to build team

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115. In the study I conducted for NALP, the largest percentage of respondents who wanted to change jobs indicated that they were most interested in a corporate counsel position. SUSAN SAAB FORTNEY, IN PURSUIT OF ATTORNEY WORK-LIFE BALANCE: BEST PRACTICES IN MANAGEMENT 28 (2005); Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 185 (2005).

116. *See* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 266–67 (2000) (discussing empirical data on the effect of billable hour pressure on the partnership aspirations of associates). "Among the survey respondents, only 8% identified 'full partner participation' as the professional goal they were most interested in attaining." *Id.* at 266.

117. For a discussion of how the economic recession has affected legal markets and law practice, see Rachel J. Littman, *Finding the Silver Lining: The Recession and the Legal Employment Market*, N.Y. ST. B.J., Sept. 2009, at 16.

118. Tamara Loomis, *Don't Look Back*, AM. L., Student Edition, Fall 2009, at 16.

119. *See* Posting of David Lat to Above the Law, Congratulations to WilmerHale on a Major Pro Bono Win (Plus the WilmerHale Warning, and Thoughts on Law Firms Trying to Crack Down on Leaks.), http://abovethelaw.com/2009/10/congratulations-to-wilmerhale-on-a-major-pro-bono-winplus-the-wilmerhale-warning-and-thoughts-on-law-firms-trying-to-crack-down-on-leaks (Oct. 30, 2009, 16:14 EST) (reporting that sources indicated that associates felt like they, and their friends, had been treated unfairly when a firm referred to poor performance reviews rather than economic conditions).

culture within their organizations.[120] Firms should attempt to foster a sense of inclusion by treating associates as assets whose opinions are valued.[121] Loyalty is a two-way street. As posed by David Lat, founder of ATL, "When it comes to relationships between associates and their law firms, who broke the social compact first?"[122] If partners want associates to be loyal, the partners should treat associates as the future of the firm, not temporary inhabitants.

120. For thoughtful steps firms can take to retain associates, see Ben W. Heineman Jr. & David B. Wilkins, *The Lost Generation? Demoralized and Dispirited, Big-Firm Associates Are Deflecting in Droves: Here is How Law Firms—and Their Clients—Can Change That*, CORP. COUNS., Mar. 1, 2008, at 104, *available at* http://www.law.com/jsp/article.jsp?id=120421 2425546&hbxlogin=1.

121. *See id.* (referring to the partners' failure to communicate issues related to finances, business strategy, and partnership prospects). In addition to communicating with associates, firm leaders may seek associate feedback on their work and partners. *See* Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 367 (1995) (discussing associate reviews of partners). For guidance on conducting a 360 review, see Daren Asner, *The Upward Review: Partners Find Out What Associates Really Think of Them*, 187 N.J. L.J. 824 (2007), *available at* 3/5/2007 N.J.L.J. 28 (Westlaw).

122. Posting of David Lat to Above the Law, Congratulations to WilmerHale on a Major Pro Bono Win (Plus the WilmerHale Warning, and Thoughts on Law Firms Trying to Crack Down on Leaks.), http://abovethelaw.com/2009/10/congratulations-towilmer hale-on-a-major-pro-bono-winplus-the-wilmerhale-warning-and-thoughts-on-law-firms-try ing-to-crack-down-on-leaks (Oct. 30, 2009, 16:14 EST).