Law Firms and Their Partners Revisited: Reflections on Three Decades of Lawyer Mobility

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Lawyers once joined their firms with the expectation that they would remain, become partners, and work themselves up the ladder of lockstep compensation. Lateral movements of lawyers among firms were rare. Ethics norms of the time assumed lawyers stayed with their firms.[1] That, of course, has changed as lawyer mobility has become a pervasive and unquestioned feature of the contemporary legal profession.[2]

We now have experienced roughly three decades of lawyer mobility. The modern era of lawyer mobility began with the rapid growth of a law firm by the name of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey. Few lawyers of the present generation have heard of this firm, but it was a game changer. Finley, Kumble broke the mold by developing almost overnight into a legal powerhouse. It did so not through the then-usual means of growth by developing lawyers within the firm but instead sought an immediate impact through attracting political and legal stars and hiring laterally.[3] At its peak, the firm could boast of having in its

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1. Illustrative of the norms of this earlier era is an ABA 1961 ethics opinion concluding that a restrictive covenant in an employment contract is improper because it is unnecessary: "A former employee of a lawyer or law firm would be bound . . . to refrain from any effort to secure the work of clients of his former employer." ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 300 (1961).

2. Lawyer mobility has been robust in recent years. Since the Great Recession, lateral hiring of partners by large firms has increased significantly. *See* GEO. L. CTR. FOR STUDY OF L. PROF'N, 2017 REPORT ON THE STATE OF THE LEGAL MARKET 12–13 (2017). On the other hand, lateral hiring was also robust during the economic downturn. *See* Vivia Chen, *The 2010 Lateral Report Buyer's Market: The Great Recession Led to an 11 Percent Spike in Lateral Partner Moves*, AM. LAW. (Feb. 1, 2010), http://www.americanlawyer.com/id=1202439218666/The-2010-Lateral-ReportBuyers-Market?slreturn=20170826102958 [https://perma.cc/J8MU-X9WN] (noting that 2,775 lawyers left or joined the largest firms in the country in the twelve months ending September 30, 2009). All of which suggests that lawyer mobility fares well in both good and bad times.

3. *See, e.g.*, John Nielsen, *An Upstart Law Firm Comes of Age*, FORTUNE (Sept. 29, 1986), http://archive.fortune.com/magazines/fortune/fortune_archive/1986/09/29/68093/index.htm [https://perma.cc/2XQJ-NK5V] ("A law firm rises from untouchable to Brahmin only by accumulating decades of respectable practice. What then to make of Finley Kumble Wagner Heine Underberg Manley Myerson & Casey? Too young to be part of the establishment, it is too big to be an upstart. Seemingly overnight it has become one of the giants of the profession. It is among the most reviled, most envied—and most emulated—law firms in America.").

rank of partners three former U.S. Senators, a former Governor of New York, a former mayor of New York City, and perhaps most impressive of all, a former Commissioner of Baseball.[4] Overnight, it became one of the largest law firms in the United States. And, apart from the famous personages it attracted, most of its growth was fueled by hiring partners from other firms. These partners moved their practices and their clients to Finley, Kumble. The firm's aggressive lateral hiring practices brought to an abrupt end a lengthy period for American law firms characterized by loyalty of partners to their firms and very rare movement of lawyers from one large law firm to another.[5]

Other firms quickly abandoned their lockstep compensation structures and embraced rapid growth through lateral hiring of lawyers who overnight could bring their books of business and revenue streams. In many cases, entire practice groups moved to new firms. Firms losing lawyers sought to offset their setbacks by gaining lawyers through lateral hiring. Abruptly, the profession had changed, and the law firm world would never be the same. So dramatic was this development that it prompted one court to describe the revolving door as "a modern-day law firm fixture."[6] Even the Chief Justice of the United States was moved to comment on the rapidity of the changes in the legal profession brought by the new development of lawyer mobility.[7]

If Finley, Kumble's rise marked the beginning of a new era of lawyer mobility, its even more sudden collapse in 1987 signaled that the law firms of this new era would be far more fragile than they had been in the past.[8] Finley, Kumble illustrates that lateral hiring may facilitate dramatically faster growth than firms had experienced in the past, but the cost of that growth is weakened firm stability. Finley, Kumble was the first of the major law firms to fail. But it was not the last. In more recent years, blue-chip firms such as Dewey & LeBoeuf; Brobeck, Phleger & Harrison; Coudert Brothers LLP; Heller Ehrman LLP; Howrey LLP; and Thelen LLP each fell from greatness

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4. E.R. Shipp, *Finley, Kumble, Major Law Firm, Facing Revamping or Dissolution*, N.Y. TIMES (Nov. 11, 1987), http://www.nytimes.com/1987/11/11/business/finley-kumble-major-law-firm-facing-revamping-or-dissolution.html [https://perma.cc/6ZXH-JGUH]; E.R. Shipp, *Myerson & Kuhn Arises from Finley, Kumble*, N.Y. TIMES (Jan. 6, 1988), http://www.nytimes.com/1988/01/06/business/myerson-kuhn-arises-from-finley-kumble.html [https://perma.cc/JZ8J-78K5].

5. For a first-person account of Finley, Kumble's rise and fall, see STEVEN KUMBLE & KEVIN LAHART, CONDUCT UNBECOMING: THE RISE AND RUIN OF FINLEY, KUMBLE (1990).

6. Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1180 (N.Y. 1995).

7. *See* William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1987) ("Institutional loyalty appears to be in decline. Partners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them.").

8. At the time of its collapse, the firm had 245 partners and approximately 2,000 associates and staff. Rita H. Jensen, *Scenes from a Breakup*, NAT'L L.J., Feb. 8, 1988, at 1, col. 1.

into the abyss of bankruptcy.[9] The collapse of such preeminent law firms would have been unimaginable prior to the era of lawyer mobility. But today, no law firm can guarantee that it will not suffer a similar fate.

At about the time of Finley, Kumble's rise and fall, I published an article in this law review anticipating future trends in lawyer mobility and offering a framework for balancing the conflicting norms (partnership and agency law, legal ethics, and constitutional law) that set the rules of the game.[10] The article was expanded slightly and published as a book in 1990.[11] Lawyers at the time were reluctant to display the book in their offices, and my editor relayed to me that the publisher was astonished that so many orders were placed with delivery to home rather than office addresses. More recently, both the law and the acceptance of lawyer mobility have changed. The slim volume has grown into a substantial loose-leaf treatise, which itself has been the subject of multiple editions.[12] Such is the rapidity of change in this area that the treatise is revised twice a year, and the current iteration of the Table of Cases includes more than six hundred reported opinions,[13] compared with eighty-two in the first version of the book.[14] The law of lawyer mobility, first articulated and discussed in the 1988 *Texas Law Review* article, has taken hold.

Now, thirty years after this first article on the law and ethics of lawyer mobility, it is appropriate to step back and assess where we have come from and where we are heading in a world of lawyer mobility. Although the existence and scope of lawyer mobility are well-documented, the

9. Andrew Clyne, *5 Years After the Collapse of Dewey & LeBoeuf: Career Advice for Associates from a Dewey Associate-Turned-Recruiter*, ABOVE THE LAW (May 12, 2017), https://abovethelaw.com/2017/05/5-years-after-the-collapse-of-dewey-leboeuf-career-advice-for-associates-from-a-dewey-associate-turned-recruiter/ [https://perma.cc/BK6H-XT7W]; Elie Mystal, *Thelen Officially Dissolves*, ABOVE THE LAW (Oct. 28, 2008), https://abovethelaw.com/2008/10/thelen-officially-dissolves/ [https://perma.cc/P496-B248]; Steven Pearlstein, *Why Howrey Law Firm Could Not Hold It Together*, WASH. POST (Mar. 19, 2011), https://www.washingtonpost.com/business/economy/why-howrey-law-firm-could-not-hold-it-together/2011/03/16/ABNTqkx_story.html?utm_term=.f1d839ce05b9 [https://perma.cc/WJZ3-R5JN]; Ellen Rosen, *The Complicated End of an Ex-Law Firm*, N.Y. TIMES (Feb. 9, 2007), http://www.nytimes.com/2007/02/09/business/09legal.html [https://perma.cc/WEY8-YTSK]; Andrew Strickler, *5 Things To Know About The Heller Ehrman Clawback Case*, LAW360 (Sept. 19, 2016), https://www.law360.com/articles/841576/5-things-to-know-about-the-heller-ehrman-clawback-case [https://perma.cc/U4D7-ELKN].

10. *See generally* Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEXAS L. REV. 1 (1988).

11. ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING (1990).

12. ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS (2d ed. 1998, looseleaf); ROBERT W. HILLMAN & ALLISON MARTIN RHODES, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS (3d ed. 2017, looseleaf).

13. HILLMAN & RHODES, *supra* note 12, at TC:1–14.

14. HILLMAN, *supra* note 11, at 279–81.

implications and costs of this development are not. In these brief reflections, I will focus my comments on five principal lessons and consequences of more than three decades of lawyer mobility: (1) the structure of the modern law firm is inherently fragile; (2) firms are no longer capable of acting as effective gateways to the profession in providing training and mentoring for young lawyers and offering a transition from school to professional practice; (3) the nature of firm "equity," or ownership, has undergone profound changes not fully understood by many in the profession; (4) lawyer mobility has created significant externalities often disregarded by courts anxious to promote the professional development of lawyers; and (5) lawyer mobility has made it exceedingly difficult, if not impossible, for most firms to differentiate themselves through effective "branding" of their identities.

What links these lessons together is the common theme of the diminishment of the "firm." The firm is the vehicle for providing legal services. Even as the market for legal services has grown, the firms that have provided those services have weakened and are far less stable and cohesive today than they were in the past. To be sure, BigLaw is populated by law firms of ever-increasing size and seemingly boundless energy. But scratch the surface of these firms and another picture emerges. We see firms that struggle mightily to develop identities, and that are increasingly difficult to differentiate, because of the instability of their memberships resulting from lawyer mobility. And we see that even an old-line prestigious law firm that had been in existence for more than 150 years and was the first of the truly international law firms is not immune from sudden collapse, as happened to the once-prestigious Coudert Brothers firm ten years ago.[15]

Change is the theme of the law firm world. And a large part of the change has been brought about because of lawyer mobility. I noted thirty years ago that "[f]irms are increasingly but temporary resting places for their partners."[16] The context of that statement was the astonishingly rapid and unprecedented rise in lawyer mobility. Now, with the experience of the ensuing decades, I am pleased to revisit the subject and offer these broader perspectives on the diminishment of law firms as well as the lessons, consequences, and costs of thirty years of lawyer mobility.

I. Fragility of Law Firm Structure

Strong firms are the counterpoint to mobile lawyers. To the extent that a law firm is able to command the loyalty of its clients, the risk to the firm of its lawyers grabbing clients and moving to other firms is remote. Hence,

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15. *See* Jonathan D. Glater, *Law Firm That Opened Borders Is Closing Shop*, N.Y. TIMES (Aug. 30, 2005), http://www.nytimes.com/2005/08/30/business/law-firm-that-opened-borders-is-closing-up-shop.html?mcubz=0 [https://perma.cc/NB8J-2GHL].

16. Hillman, *supra* note 10, at 2.

internal tensions inevitably arise as law firms weaken the bonds that clients have with individual lawyers and "train" clients to view the firms, not individual lawyers, as their service providers.

For the most part, these efforts have been unsuccessful. Sophisticated clients often prefer to have relationships with lawyers rather than firms and are wary of firms' attempts to weaken these bonds through methods that increase costs to clients and provide few corresponding improvements to the quality of service.[17] A 2017 report of Georgetown's Center for the Study of the Legal Profession describes the erosion of the traditional law firm franchise:

> [In the past], clients would typically entrust an entire transaction, litigation, or other project to one of their outside law firms, and the selected firm would handle all aspects of the matter "from soup to nuts." While this approach was clearly advantageous for law firms, it resulted in higher fees for clients, partly because firms tended to have many of the tasks involved in the matters performed by professionals who were overly qualified for the jobs at hand. A classic example is using relatively high-priced associates to conduct routine document reviews that could adequately be performed by qualified paralegals or other support staff.[18]

Now, the report concludes, clients increasingly are inclined to break matters into their constituent parts and decide how to most efficiently address the handling of each part.[19] This may involve dividing work among multiple law firms when in the past all work would have been done by a single firm.[20]

At the dawn of the era of lawyer mobility, the decline of the law firm franchise may have seemed highly unlikely. Professors Gilson and Mnookin published a fascinating economic theory of the law firm that, among many interesting points, argued that large firms should be strong because they allow lawyers to diversify their practices and thereby manage risk.[21] They further argued that lockstep compensation should prove an effective means of allocating firm profits among the partners.[22] In such an environment, they wondered why lawyers would ever leave their firms:

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17. *See* Robert W. Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 997, 1010–11 (1998) (discussing how sophisticated clients typically "hire the lawyer rather than the firm" and prefer an environment of competition in the provision of legal services).

18. GEO. L. CTR. FOR STUDY OF L. PROF'N, *supra* note 2, at 10.

19. *Id.*

20. Alternatively, clients may handle some matters in-house or refer work to non-law firm service providers. *Id.*

21. Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 320 (1985).

22. *Id.* at 386–87.

> The new firm is presumably prepared to pay the departing lawyer his real marginal product. But why is not the old firm prepared to match the bid? . . . One would suppose that the new firm must know that the original firm has better information concerning the actual marginal product of the lawyer who is leaving. Thus, any time the new firm is successful in hiring the winner, there is an implication that a party with better information concerning the lawyer's real value would not bid that high.[23]

There are several answers to the question Gilson and Mnookin pose. The most fundamental is that the lawyer may have greater value to another firm. This may be the case for any number of reasons. The new firm, for example, may have complementary practice areas enabling it to provide more attractive packaging of services to clients. Or the new firm's offices may be more appropriately located to service the clients of the lawyer. Or fewer client conflict problems may exist at the new firm. The list could go on. The fallacy in the argument of Gilson and Mnookin is their apparent, but unstated, assumption that firms are fundamentally equal. If that truly were the case, then their conclusion would be defensible.

There are other reasons why the economic calculation they proposed may not be an effective foil to lawyer mobility. Personality conflicts and friction may cause a partner's current firm to bid less than another firm. A lawyer may also leave a firm because of disgruntlement over management policies or dissatisfaction with the firm's approach to gender, race, and sexual-orientation issues. A lawyer may feel her firm is providing inadequate resources and staffing to support her practice. Or a lawyer may have concerns over management policies as they affect the fiscal solvency of the firm. In the past, it would have been foolhardy to speak of a top-line firm failing, but as recent years have shown, even blue-chip firms may fail with a breathtaking suddenness. In such an environment, lawyers may be quick to "jump ship" at the first signs of downturns in their firms.

With a few very impressive exceptions,[24] lockstep compensation has died and been replaced by profit-division arrangements that favor control of

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23. *Id.* at 338 n.43.

24. A very small handful of highly prestigious and successful firms retain lockstep compensation systems and seem to reflect the Gilson and Mnookin law firm model. The Cravath, Swaine & Moore website, for example, states, "[W]e compensate partners in a lockstep system throughout their careers." *Philosophy*, CRAVATH, SWAINE & MOORE LLP, https://www.cravath.com/philosophy [https://perma.cc/SN2A-YYDT]. Cleary Gottlieb makes a similar claim, noting that "[a]t Cleary, we still believe this model brings out the best in our lawyers and our firm—and helps deliver the best results to our clients. Every associate and partner is compensated solely on the basis of seniority, not hours billed or business generated." *Culture*, CLEARY GOTTLIEB, https://www.clearygottlieb.com/locations/new-york/legal-landing-page/careers-interior-pages/why-cleary/culture [https://perma.cc/49Q7-AFJG]. As does Debevoise & Plimpton, which states that the firm "is one of the few firms with a lockstep compensation system for associates and partners. Lockstep economics create a culture of collaboration among all lawyers." *Working in New*

client revenues over now-antiquated notions of seniority. All of this means that the contemporary law firm may be viewed as a loose confederation of lawyers. The personnel of the firm are constantly in flux. A recent Altman Weil survey reported that lateral hiring is perceived as a quick way to buy market share in a low-growth environment. The survey added that 85% of firms reported adding lawyers who brought new business to their firms, while 47% of firms lost lawyers who took business with them.[25]

A firm's losses may be offset quickly by the same firm's hiring new lawyers from other firms. Firms are in a state of constant change, and for this reason it is unsurprising that clients often focus their loyalties on individual lawyers, or even practice groups, ahead of the firms in which they practice. In other words, lawyer mobility has destabilized, permanently, the American law firm. When the revenue streams lost to other firms are not offset by new revenue streams generated through lateral hiring, downsizing the firm is inevitable in the hope that firm collapse may be avoided. The pressures are all the more intense as firms come to recognize overcapacity in the legal profession aggravated by decreased demand for legal services.[26]

II. Narrowing the Gateway to the Profession

Large law firms once provided a well-functioning gateway to the legal profession. They bridged the gap between theory (law school) and professional practice by providing coherent training and mentoring programs for young associates.[27] Often, new lawyers spent the first two or three years in their firms rotating through various departments and practice groups.[28] Much time was spent on nonproductive but educational tasks such as attending depositions and meetings with clients. Only as third- or fourth-year associates were they required to commit to a practice specialty, a decision

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York, DEBEVOISE & PLIMPTON, http://www.debevoise.com/news/working-in-new-york [https://perma.cc/F2XC-9E6H]. A handful of other elite firms may maintain lockstep compensation systems, but they are in a distinct minority.

25. ERIC A. SEEGER & THOMAS S. CLAY, ALTMAN WEIL, INC., 2016 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY iii (2016).

26. A 2017 Altman Weil survey revealed that nearly 61% of firms believe overcapacity is diluting firm profitability, and 88% said that they have chronically underperforming lawyers. ERIC A. SEEGER & THOMAS S. CLAY, ALTMAN WEIL, INC., 2017 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY 38, 41 (2017).

27. *See generally* Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299 (2002).

28. An American Bar Association publication suggested that rotation programs are useful in: (1) giving broad on-the-job training; (2) providing associates with expertise that they can later draw upon; (3) enabling firms to assess the capabilities of new attorneys; and (4) fostering understanding between practice areas so that, for example, nonlitigators understand the pressures of trial work, etc. *See* Gregory D. Huffaker, Jr., *Departmental Rotation of New Lawyers*, *in* YOUR NEW LAWYER: THE LEGAL EMPLOYER'S COMPLETE GUIDE TO RECRUITMENT, DEVELOPMENT AND MANAGEMENT 143, 143–49 (Michael K. Magness & Carolyn M. Wehmann eds., 2d ed. 1992).

grounded on significant work experience in the area and, therefore, likely to be the correct one both for the lawyer and the firm.

A. The Demise of Subsidized Training

The rather leisurely but highly effective professional-development model for associates of the past is no longer. Rotation and extensive training programs were premised on the assumption that a large percentage of associates would remain with their firms. Over time, the firms would recoup the costs of early professional development. Moreover, the costs to be recouped often were passed on to clients, who accepted charges, without significant questioning, for unproductive time associates spent on their matters.

In the more competitive environment of today, clients are no longer willing to subsidize associate training,[29] and firms are unwilling to commit resources to training young lawyers unlikely to remain with their firms. These reasons help explain why the number of junior associates at large law firms is decreasing.[30] Moreover, rising salaries for top associates further pressure firms to get a return on their "investment" in associates sooner rather than later.[31] Firms, in short, have ceased providing a type of postgraduate training to serve as a useful bridge between law school and professional practice.

Providing entry-level lawyers with diverse practice experiences and sufficient time to make long-term career decisions are some of the casualties of these developments. The rotation period is a luxury no firm can afford (and no clients are willing to subsidize). Consider, for example, Cravath, Swaine & Moore, an elite firm that maintains lockstep compensation and boasts of the quality of training it provides associates. The Cravath website states with enthusiasm the firm's rotation program, which provides "our associates with

29. *See, e.g.*, Melissa Maleske, *The Trouble With Young Associates*, LAW360 (Mar. 1, 2017), https://www.law360.com/articles/897098/the-trouble-with-young-associates [https://perma.cc/6BJD-J6C5] ("Most corporate clients, however, are insulated from any effect of the raises [in associate starting salaries] because they simply don't pay for first- and second-year associates. They have either adopted blanket policies, negotiated nonhourly billing arrangements or acquired the control to veto rate hikes, and their unwillingness to pay for the services of the inexperienced base of the law firm pyramid has been a main driver behind such moves."). This development is not limited to firms in the United States. Anna Ward & Alex Berry, *In a First, Major UK Client Says No to Paying for Junior Lawyers*, AM. LAW. (Mar. 21, 2017), http://www.americanlawyer.com/id=1202781722437/In-a-First-Major-UK-Client-Says-No-to-Paying-for-Junior-Lawyers [https://perma.cc/5M7N-GBBC].

30. *See* GEO. L. CTR. FOR STUDY OF L. PROF'N, *supra* note 2, at 12.

31. Even in the early 1980s there was a perception that rising associate salaries were limiting firms' investment in training. *See, e.g.*, David Ranii, *In-House Training Pays Off; Quicker Competency?*, NAT'L L.J., Jan. 3, 1983, at 1 (quoting the director of professional development at a large firm: "There was a day when you could train young lawyers by letting them sit in on meetings, what the New York firms call second chairing. But that was when associates were making a lot less.").

a broad but intense training experience they are not likely to find anywhere else."[32] But a closer reading reveals that the so-called rotation program simply involves working for different partners "within their department of choice."[33] The benefit of the traditional but now-defunct rotation program was that lawyers could sample different practice areas (not just different partners) before making long-term career choices concerning their specialties. But that is an expensive training luxury that firms simply no longer support.

This is a sad development and a serious loss in the professional development of young lawyers. Second-year law students exploring job opportunities are asked to state their specialties, with the result that a student's decision to commit to a career as a litigator may be based on nothing more than a positive experience in a first-year civil procedure course (perhaps not even taught by a lawyer). Young associates must earn their keep from the first day. To make matters worse, mentoring is haphazard and often does not exist.[34] Asking inexperienced lawyers to make long-term career decisions with neither information nor guidance through mentoring is a manifestation of weakened law firms brought about, at least in part, by lawyer mobility.

B. The Emergence of Contract Lawyers

The competition for entry-level positions in law firms is intense. In the past, firms on a growth trajectory would regularly hire associate "classes" with clear tracks to partnership. But clear tracks have diminished, and in recent years the rise of "contract lawyers" has made the quest for entry-level positions all the more difficult. In contrast with an associate, a contract lawyer has only a temporary affiliation with a firm. A recent report reveals that most firms are reducing their hiring of associates in favor of more expansive use of contract lawyers to meet staffing needs without incurring the long-term costs attendant to the hiring and development of associates.[35] The report adds that there is little reason to believe firms will be "ratcheting up their associate hiring goals anytime soon."[36]

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32. *The Rotation System*, CRAVATH, SWAINE & MOORE LLP, https://www.cravath .com/rotationsystem/ [https://perma.cc/7FU3-7CQR].

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34. On the value of associate mentoring, see Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 721–22 (1998) ("Most of those in the legal profession understand that mentors . . . play an important role in teaching novice lawyers how to practice law *well*. What is not widely understood is that, as important as mentoring is in teaching young attorneys to practice law well, it is far more important in teaching them to practice law *ethically*.").

35. GEO. L. CTR. FOR STUDY OF L. PROF'N, *supra* note 2, at 14.

36. *Id.* at 15.

The contract lawyer position is not a path to partnership even though contract lawyers produce legal work of a high quality. Altman Weil reports that the stigma that contract-lawyer work is of lower quality is nearly gone and that the use of contract lawyers is the most effective lawyer-staffing technique firms are pursuing.[37] Seventy percent of firms surveyed regard the shift to contract lawyers as a permanent rather than temporary trend.[38] Moreover, almost 60% of large firms surveyed plan to shift work to contract lawyers and paraprofessionals in the future.[39] Nearly 80% of large firms (more than 250 lawyers) now use contract lawyers.[40] The development is a natural consequence of lawyer mobility because it enables a firm to quickly adjust staffing levels to reflect its *current* needs based on the *present* population of senior lawyers in the firm.

The movement toward contract lawyers is very similar to the practices of many law schools in placing increased teaching responsibilities on adjuncts and lecturers rather than permanent, tenured members of faculties.[41] Both trends reflect severe cost-cutting priorities and radically alter traditional relationships between institutions and participants who contribute necessary intellectual capital. Staffing that assumes the fungibility and temporary status of such contributors may be an effective approach to cutting costs in the uncertain environment brought about by lawyer mobility, but it is not the preferred method of developing, over the long term, robust institutions with unique identities and consistently high performance.

III. Diminishment of Equity

Law firms of the past were smaller and more egalitarian than contemporary law firms. Partnership as an associational form suited these firms well as partnerships by their nature are populated by lawyers who are equals within, and truly co-owners of, their firms. But growth meant larger firms, and larger firms meant more hierarchical structures. The traditional law firm model for growth became pyramidal, with an ever-expanding,

37. ERIC A. SEEGER & THOMAS S. CLAY, ALTMAN WEIL, INC., 2017 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY iii (2017).

38. *Id.* at 1.

39. *Id.* at 25.

40. *Id.* at 33.

41. The American Bar Association is considering relaxing its requirement that full-time tenured faculty teach more than half the total credit hours offered by a law school. Such a change could be seen as a cost-cutting measure for law schools. Nick Roll, *Debating the Value of Full-Time Professors*, INSIDER HIGHER ED. (July 14, 2017), https://www.insidehighered.com/news/2017/07/14/american-bar-association-receives-pushback-tenure-proposal [https://perma.cc/Q2GY-7QCE]. Not surprisingly, the American Association of University Professors (AAUP) opposes this change. AAUP, COMMENTS ON PROPOSED REVISIONS TO STANDARD 403(A) (July 10, 2017), https://www.aaup.org/sites/default/files/AAUP-ABA-Comments-on-Proposed-Revisions-to-Standard-403_July%2010.%202017.pdf [https://perma.cc/RB9D-FZVL].

leveraged base and well-defined career paths to partnership. For this purpose, partnership continued to mean ownership, as it should, although the line between owner and employee began to blur in larger firms.[42] That at least some degree of co-ownership is the *sine qua non* of a partnership is reflected both in the Uniform Partnership Act, which defines a partnership as an "association of two or more persons to carry on as co-owners a business for profit,"[43] and in the Revised Uniform Partnership Act, which includes a similar definition of a partnership.[44]

But as law firms grew in size, the egalitarian premise underlying partnership was stressed severely. May it truly be said that partners are coequal owners when they number in the hundreds or even the thousands? Centralized management became a necessary norm, and even true equity partners had relatively little say in the day-to-day direction of their law firms. If there was any doubt about the changing nature of partnership, the uncertainty was removed as firms faced with an economic downturn responded with "layoffs" of large numbers of partners. The inherent contradiction in laying off an owner of a firm was a rather nuanced point of more interest to this academic than to the managers of large law firms.[45]

The pyramidal model keyed to both growth and leverage may have worked well in an environment in which lawyer mobility was anemic, lawyers stayed at their firms, and compensation increased with seniority (i.e., compensation was lockstep). But as lateral movement options expanded and the era of lawyer mobility was launched, new and more restricted gateways to partnership developed. Some firms increased in size even as the relative percentage of true "partners" declined.

The ubiquitous nonequity partner is a modern phenomenon appropriate for an environment in which true "partnership" is illusory for increasing percentages of firm members. Although some firms seek to evade the oxymoronic character of "nonequity partner" by describing this new status of lawyers within their firms with alternative terms such as "salaried partner" and "income partner," the effect transcends the label. By creating a large group of mature nonequity lawyers within the firm, the true equity partners

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42. The equality norm of partnership law is in sharp contrast with the more hierarchical underpinnings of the relationship between employer and employee. On this point, see Robert W. Hillman, *Law, Culture, and the Lore of Partnership: Of Entrepreneurs, Accountability, and the Evolving Status of Partners*, 40 WAKE FOREST L. REV. 793, 796 (2005).

43. UNIF. P'SHIP ACT § 6 (UNIF. LAW COMM'N 1914).

44. REV. UNIF. P'SHIP ACT § 101(6) (UNIF. LAW COMM'N 1997).

45. *See* Hillman, *Law, Culture and the Lore of Partnership*, *supra* note 42, at 812–17 (discussing various means for removing partners, including layoffs). On downsizing generally, see HILLMAN & RHODES, *supra* note 12, ch. 5.

are able to keep their own group small while enjoying many of the benefits of leverage and avoiding diluting the economic ownership of their firm.[46]

To those outside law firms and in particular to clients, nonequity and equity partners may be indistinguishable, and that is often the idea. But within firms there is a clear difference in that the former have the status of employees rather than equity stakeholders. When firms need to downsize in response to changes brought by partner departures, layoffs of nonequity partners may be implemented quickly and without legal complications. Conversely, nonequity partners may move among firms with fewer hindrances than equity partners. They do not have capital accounts that need to be repaid and generally are not subject to lengthy notice periods in their employment agreements (as equity partners frequently are in their partnership agreements). Often, nonequity partners are integral parts of practice groups, and when a group moves to another firm largely as a unit, the ease of movement for the nonequity partner segment of the unit facilitates lawyer mobility.

Nonequity partners and contract lawyers are two sides of the same coin. Firms may quickly "staff up" or "staff down" by retaining or discharging these professionals with no greater difficulty than a commercial firm encounters in adjusting the size of its workforce in a recession. Lawyer mobility encourages this option because firms vulnerable to sudden changes in client revenues require flexibility to adjust staffing, and to do so quickly. To be sure, contract-lawyer status by its nature is temporary. The same cannot necessarily be said of nonequity-partner status, and firms may be more reluctant to remove nonequity partners than contract lawyers. But neither status may be said to be associated with employment security, and when necessary, firms may quickly remove both contract lawyers and nonequity partners.

More broadly, both the rise of nonequity partners and the rise of contract lawyers limit the number of lawyers who may hope to achieve equity ownership of their firms. The goal of true "partnership" becomes ever more elusive for an increasing number of lawyers. The data bear this out. Over the last decade, the number of midlevel and senior associates has declined slightly, the number of nonequity partners has risen, and the number of junior associates has dropped significantly.[47] As noted, the use of contract lawyers has reduced the need for firms to dangle the partnership carrot as a means of attracting young lawyers. Along a similar line, for more experienced lawyers,

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46. *See generally* Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-Equity Partners*, 58 U. KAN. L. REV. 507 (2010).

47. REPORT ON THE STATE OF THE LEGAL MARKET, *supra* note 2, at 11–12. The effect is to stress the traditional leverage benefits of the pyramid structure by reducing the number of lowly compensated (relatively speaking) attorneys at the junior level while increasing the number of highly compensated partners. *Id.* at 12.

nonequity-partner status may be a transitional step on the way to becoming an equity partner, but it often is not. By eliminating the "up or out" feature of past law-firm structures, nonequity partners have rendered the achievement of firm ownership illusory for an increasing number of lawyers in the contemporary large law firm.

IV. Externalities

The last several decades have been kind to entrepreneurs who seek to shield themselves from liability. Traditionally, partners have stood behind their businesses in the most meaningful way possible by having potentially unlimited liability for tort and contract claims.[48] Incorporating as a means of limiting liability has long been an option, but is not without its own drawbacks, particularly on the tax front.[49] But beginning in the 1990s, the small business landscape was changed forever with the development of new associational liability shields, principally through LLCs and LLPs, curtailing or eliminating altogether significant personal liability for claims arising from law firm business operations. To a large extent, lawyers also have benefitted from the extension of limited liability protections, and in most states the limited liability partnership and/or the limited liability company are popular associational forms for law firms.[50]

A largely unnoted aspect of lawyer mobility is the externalities generated when mobile lawyers remove income streams from their firms to the possible detriment of third parties, most notably staff employees and creditors. In the once-benign world of partnership law as applied to law firms, all fees generated on open cases—so-called unfinished business—were the property of the firm.[51] If the firm failed, fees derived from the completion of unfinished business would be remitted to the firm for the benefit of its creditors.[52] This has become known as the "*Jewel* doctrine," named after a

48. UNIF. P'SHIP ACT §§ 13–15 (UNIF. LAW COMM'N 1914) (defining partners' liability, jointly and severally, for the debts and obligations of the partnership); REV. UNIF. P'SHIP ACT §§ 305–06 (UNIF. LAW COMM'N 1997) (same).

49. 26 U.S.C. § 11 (laying out corporate tax rates).

50. *See generally* Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW 1387 (2003) (providing data on associational choices of law firms); Allison M. Rhodes, Robert W. Hillman & Peter Tran, *Law Firms' Entity Choices Reflect Appeal of Newer Business Forms*, BUS. ENTITIES, July/Aug. 2014, at 16 (updating the 2003 data).

51. *See, e.g.*, UNIF. P'SHIP ACT § 30 (UNIF. LAW COMM'N 1914) (partnership is not terminated upon dissolution but continues until a winding up of its business is completed); REV. UNIF. P'SHIP ACT § 802 (UNIF. LAW COMM'N 1997) (same). *See generally* HILLMAN & RHODES, *supra* note 12, § 4.3.

52. *See, e.g.*, Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 189 (Cal. Ct. App. 1983) (holding that contingent fees from the completion of the case pending at the time the firm dissolved were unfinished-business income of the dissolved firm); HILLMAN & RHODES, *supra* note 12, §§ 4.3–.4; Douglas R. Richmond, *Migratory Law Partners and the Glue of Unfinished Business*,

relatively obscure California case applying the unfinished-business doctrine of partnership law to law firms.[53] To circumvent this result, partners of failing firms began reaching "*Jewel* waivers" providing that departing lawyers could take their cases to their new firms and retain any fees generated from the completion of work in progress.[54]

What is wrong with this picture? As between partners in a law firm, there is no reason not to respect arms-length bargaining culminating in a *Jewel* waiver. But such contracts should not create externalities harmful to third parties. For good reason, creditors decry the loss of income derived from the completion of a firm's unfinished business. This point was made succinctly and clearly by a federal district court judge in a ruling ultimately overturned on other grounds: "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."[55]

Creditors have enjoyed some success as a handful of decisions have applied bankruptcy law's fraudulent-transfer doctrine to allow clawbacks of some or all fees addressed in such agreements.[56] Clawbacks have a tentative toehold in the world of law firms, although it is by no means certain that all courts will be prepared to apply the fraudulent-transfer doctrine to protect the interests of creditors harmed by lawyer mobility.

The vulnerability of creditors is evident in a series of recent decisions refusing to treat hourly-fee cases as the unfinished business of law firms. These decisions mean that lawyers who control hourly-fee cases are free to move the income streams generated by such cases to other law firms, free of claims by the creditors of failed law firms. The most important of the decisions is a 2014 decision of the New York Court of Appeals. The decision endorses lawyer mobility and concludes that hourly-fee matters are not the unfinished business of a dissolved law firm and may freely be moved to new firms.[57] The opinion not only failed to recognize key provisions of the Uniform Partnership Act (in effect in New York) that point to a contrary

39 N. KY. L. REV. 359 (2012); Thomas E. Rutledge & Tara A. McGuire, *Conflicting Views as to the Unfinished Business Doctrine*, BUS. L. TODAY, Feb. 2015, at 1.

53. Jewel v. Boxer, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984).

54. *See* HILLMAN & RHODES, *supra* note 12, § 4.6.3.1.

55. Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 480 B.R. 145, 157 (S.D.N.Y. 2012), *rev'd in part*, Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 574 F.App'x. 15 (2d Cir. 2014).

56. *See, e.g.*, *In re* Brobeck, Phleger & Harrison LLP, 408 B.R. 318, 336–40 (Bankr. N.D. Cal. 2009) (holding that such an agreement is effective but is subject to attack on the fraudulent-conveyance grounds if made at the time a dissolved partnership is insolvent).

57. *In re* Thelen LLP, 20 N.E.3d 264, 273–74 (N.Y. 2014). The New York Court of Appeals was responding to the Second Circuit's certification of unresolved questions concerning the scope of the unfinished-business doctrine under New York law. *See In re* Thelen LLP, 736 F.3d 213, 224–25 (2d Cir. 2013). *See generally* Rutledge & McGuire, *supra* note 52.

conclusion but also had nothing to say about the costs of its decision to be borne by creditors and employees of bankrupt firms.[58] At least in New York, the interests of mobile lawyers are of paramount importance.

Along a similar line, in *Heller Ehrman LLP v. Davis Wright Tremaine LLP*,[59] decided under the Revised Uniform Partnership Act, a federal district court concluded hourly matters are not unfinished business of a bankrupt law firm. *Heller* reasoned that third-party firms should not be discouraged from hiring former partners of insolvent firms or taking on their clients. Missing from the policy analysis, however, is a substantive consideration of the interests of third parties other than clients. Although the court did note in passing that the "plight of Heller's former staff and creditors is, as in all bankruptcies, deplorable,"[60] it made absolutely no attempt to accommodate the interests of these parties in its decision.

Cases like *Thelen* and *Heller* elevate lawyer mobility to the level of public policy that courts should encourage. *Thelen* was explicit on the point, noting that "[u]ltimately, what the trustees ask us to endorse [are] conflicts with New York's strong public policy encouraging client choice and, concomitantly, attorney mobility."[61] Unquestionably, the freedom of clients to choose their lawyers has long been a policy advanced by law. But the link between client choice and lawyer mobility is attenuated, and the elevation of lawyer mobility to the level of a worthy public policy objective in its own right is dubious, particularly when the same concerns are not expressed over the professional mobility of physicians and other professionals.[62] The

58. Although the court was addressing the consequences of firm dissolution, it failed to even cite Uniform Partnership Act (UPA) Section 29 (defining dissolution) and Section 30 (providing that a partnership does not terminate on dissolution but continues until the winding up of its business is complete). UNIF. P'SHIP ACT §§ 29, 30 (UNIF. LAW COMM'N 1914).

59. 527 B.R. 24 (N.D. Cal. 2014). On appeal, the Ninth Circuit has certified the question to the California Supreme Court. *See* Heller Ehrman LLP v. Davis Wright Tremaine LLP, 830 F.3d 964, 966 (9th Cir. 2016) ("We ask the California Supreme Court to resolve a question of state law: whether a dissolved law firm has a property interest in legal matters that are in progress but not completed at the time the law firm is dissolved, where the dissolved law firm had been retained to handle the matters on an hourly basis."). The California Supreme Court has granted the request to decide the question, but it framed the issue in a more appropriate fashion: "[W]hat interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis?" Heller Erhmann LLP v. Davis Wright Tremaine LLP, No. S236208, 2016 Cal. LEXIS 7131, at *1 (Cal. Aug. 31, 2016).

60. Heller Ehrman, 527 B.R. at 32.

61. *In re* Thelen, 20 N.E.3d at 273.

62. For example, with a very limited exception relating to retirement, lawyers may not enter restrictive covenants that limit their right to practice and, by extension, take clients when they change firms. MODEL RULES OF PROF'L CONDUCT r. 5.6 (AM. BAR ASS'N 2016). Courts have extended this ban on restrictive covenants to include contractual provisions that impose economic disincentives on compensation. *See, e.g.*, Cohen v. Lord, Day & Lord, 550 N.E.2d 410 (N.Y. 1989). *See generally* HILLMAN & RHODES, *supra* note 12, § 2.2. In contrast, restrictive covenants are more widely used in the medical profession, which recently amended its rules to reflect the need to

analysis becomes all the more troublesome when offered without meaningful consideration (if there is consideration at all) of the costs and externalities associated with lawyer mobility, particularly those that affect employees and creditors of failed firms.

V. Firm Branding and the Rise of Group Movement

Branding enables a firm to differentiate itself from other firms.[63] A firm is an aggregation of lawyers, however, and a prerequisite to branding a firm's identity is stability in the firm's membership, especially at the level of its senior lawyers. In the professional-services context, branding and lawyer identity are inseparable. A firm may promote through marketing efforts its mergers-and-acquisitions (M&A) practice, for example, but the key component of the practice is the identity of the lawyers, not the view from the top-floor large conference room. And if key lawyers or even practice groups leave for other firms, the post-departure firm is not the same even after it replaces the losses with new lawyers and practice groups hired from

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balance the interests of physicians, patients, and healthcare firms. *See* AM. MED. ASS'N, CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION 190 (2017) (revising Opinion E-9.02 governing restrictive covenants in light of increased mobility of physicians to prohibit only those restrictive covenants that unreasonably restrict the right to practice (time or geographic area) and do not make "reasonable" accommodations for patients' choice of physician). The commentary accompanying the revision noted, "While covenants not-to-compete may seem counterproductive in the medical realm, such agreements can help protect a practice's relationships with its patients, as well as protect monetary and other investments health care organizations and practices make in physician training and mentoring." AMA ASS'N, REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS 3-A-14, at 3 (2014), https://www.ama-assn.org/sites/default/files/media-browser/public/about-ama/councils/Council%20Reports/council-on-ethics-and-judicial-affairs/ceja-3a14.pdf [https://perma.cc/BQY2-LZWU].

63. A number of firms specialize in assisting professional-services firms with branding. *See, e.g.*, *Branding and Marketing for Professional Services*, HINGE, https://hingemarketing.com/programs-services/branding [https://perma.cc/AXU8-GG3E] (describing the firm as the leader in professional services branding):

> At the heart of our Branding Program is Hinge's proprietary Growth Algorithm™. This groundbreaking knowledge engine combines research about you and your clients with proprietary industry data from our ongoing study of over 15,000 firms and buyers of professional services. The results allow us to benchmark your firm against high growth firms and identify opportunities to position your firm in the marketplace.

Branding is frequently discussed in professional publications for lawyers. *See, e.g.*, John Hellerman, *Minding Your Firm Brand: A Roundtable Discussion on Brand Identity*, LAW PRACTICE, Nov./Dec. 2015, at 50–55, http://www.mazdigital.com/webreader/34871?page=52 [https://perma.cc/DW33-YVF7]:

> Few topics have as much sustained relevance to law firm management as branding. For decades now law firms have been developing branding strategies—some very successful, and others, like Howrey's, now serving as cautionary tales in Law360. In contrast to other management topics that come and go, branding is one of a handful of issues that we can be certain firms will continue to grapple with decades into the future. Indeed, the only issue as durable as branding may be the death of the billable hour, which gets announced and chewed over on an annual basis.

other firms. All of which raises questions concerning what exactly firms with unstable memberships are "branding."

Firms continue to invest in their brands, with mixed results. But branding is not limited to firms and may extend to lawyers and, increasingly, practice groups within firms.[64] The success of these efforts is evident as sophisticated clients recognize areas of strength within firms and divide their work among numerous firms.[65] As one commentator rather colorfully put it, "Hiring 'the lawyer, not the firm' is not a toxic notion; it is sanity."[66] All of this may give rise to an intrafirm competitive environment in which the firm, individual lawyers, and distinct groups within the firm seek positive identities (i.e., their brand) with the objective of securing both new clients and the loyalty of existing clients. Branding is alive and well, but firms are no longer the exclusive (or even meaningful) beneficiaries of branding and related marketing activities.

Attempting to play to their strengths in branding, some firms may highlight particularly strong areas of their practices. The idea is that clients that come to a firm because of its strong healthcare practice, for example, may be persuaded to use the firm's services in areas in which its reputation is not as strong (e.g., tax, labor relations, and real estate work). Over time, or so the argument goes, the weaker areas will become stronger as the influx of clients facilitates the development of these weaker practice areas.

This branding strategy, however, may prove problematic. By promoting strong practice groups, firms strengthen the mobility prospects of those groups (which may chafe under the financial and professional burdens of supporting weaker groups in their firms) and sow the seeds of their departure. Hence the conundrum for law firms: How do firms burnish their brands by marketing their most successful practice groups without thereby facilitating and highlighting the groups' successes and promoting their future departures for greener pastures?

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64. *See, e.g.*, Daniel J. DiLucchio, *"We Hire the Lawyer, Not the Law Firm"—Really?*, REP. TO L. MGMT., Apr. 2009, at 11, http://www.altmanweil.com//dir_docs/resource/cd0c93d9-b842-4ab2-9d9c-387ecb16d4e3_document.pdf [https://perma.cc/5882-WSMV] ("If we conclude that general counsel hire lawyers and the law firm, each firm must concern itself with multiple brands—the firm's overall brand, as well as that of its practice groups and individual lawyers.").

65. *See* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902 (1990) ("Long-term relationships give way to retention of counsel in connection with discrete specialized transactions; clients select their own specialists; and the rule becomes to hire lawyers, not firms.").

66. Mark Herrmann, *Inside Straight: 'The . . . Toxic Notion That You Hire The Lawyer, Not The Firm'*, ABOVE THE LAW (Jan. 28, 2013), http://abovethelaw.com/2013/01/inside-straight-the-toxic-notion-that-you-hire-the-lawyer-not-the-firm/ [https://perma.cc/Y7XK-8VJZ] (responding to another commentator who criticized clients for encouraging the "star" system and being willing to chase stars from one firm to another). *See* Bruce MacEwen, *Letter from London*, ADAM SMITH ESQ. (Jan. 16, 2013), http://adamsmithesq.com/2013/01/letter-from-london/2/ [https://perma.cc/N6VE-9YED].

Despite efforts of firms to build their brands and establish unique identities, the movement of groups, including entire practice groups, has become an important component of lawyer mobility.[67] Group movements are regularly reported by the legal press.[68] In the early years of lawyer mobility,

67. *See, e.g.*, MP McQueen, *The Big Law Lateral Hiring Frenzy Continues*, AM. LAW. (Feb. 1, 2016), http://www.americanlawyer.com/id=1202747504110/The-Big-Law-Lateral-Hiring-Frenzy-Continues [https://perma.cc/6VDR-C8LW] (discussing how "lateral lift-outs" of groups of lawyers are becoming common).

68. For a small sampling of such reports, see Brian Baxter, *Covington Adds 15 More Chadbourne Lawyers in 3 Cities*, AM. LAW. (June 10, 2017), http://www.americanlawyer.com/id=1202789382892 [https://perma.cc/NDY6-J9V9] (reporting on the move of a project finance group to Covington); Lizzy McLellan, *Cozen O'Connor Snags More Buchanan Defectors, Building Employment Group*, LEGAL INTELLIGENCER (May 8, 2017), http://www.thelegalintelligencer.com/id=1202785516507/Cozen-OConnor-Snags-More-Buchanan-Defectors-Building-Employment-Group?slreturn=20170715170039 [https://perma.cc/VKH5-B6CB] (reporting on a lateral move of seventeen labor and employment group lawyers from Buchanan to Cozen O'Connor); Lizzy McLellan, *Cozen O'Connor Grabs Construction Group From Pepper Hamilton*, LEGAL INTELLIGENCER (Apr. 25, 2017), http://www.thelegalintelligencer.com/id=1202784538142/Cozen-OConnor-Grabs-Construction-Group-From-Pepper-Hamilton [https://perma.cc/3DPR-7QEX] (reporting on the movement of construction law practices, including a four-lawyer group from Pepper Hamilton to Cozen O'Connor); Brian Baxter, *The Door Spins at Jenner & Block, Plus More Lateral Moves*, AM. LAW. (Apr. 20, 2017), http://www.americanlawyer.com/id=1202755404576/The-Door-Spins-at-Jenner—Block-Plus-More-Lateral-Moves [https://perma.cc/Y93J-CBFA] (reporting on the lateral movement of an eight-partner government contracts team from Jenner & Block, a group of nine lawyers from Carlton Fields Jorden Burt, and a four-lawyer corporate team from LeClairRyan); Brenda Sapino Jeffreys, *Norton Rose Lures 8 in NY for Public Finance Practice*, N.Y. L.J., June 2016, at 4 (discussing the departure of eight public finance lawyers from Sidley Austin to join Norton Rose Fulbright); Susan Beck, *Polsinelli Guts IP Boutique Novak Druce With Mass Hire*, AM. LAW. (Mar. 1, 2016), http://www.americanlawyer.com/id=1202751088041/Polsinelli-Guts-IP-Boutique-Novak-Druce-With-Mass-Hire [https://perma.cc/3ZES-7WLD] (reporting on the lateral move of forty-four intellectual property lawyers from Novak Druce to Polsinelli); Katelyn Polantz, *Covington Picks Up Heart of McKenna's Government Contracts Group*, LEGAL TIMES (May 1, 2015), http://www.nationallawjournal.com/legaltimes/id=1202725169744/Covington-Picks-Up-Heart-of-McKennas-Government-Contracts-Group?slreturn=20170715171237 [https://perma.cc/L5KA-ZMTE] (reporting on a move of nineteen-lawyer government contracts practice group to Covington); Brian Baxter, *Arent Fox Adds Real Estate Team, Plus More Lateral Moves*, AM. LAW. (Apr. 28, 2015), http://www.americanlawyer.com/id=1202724873517/Arent-Fox-Adds-Real-Estate-Team-Plus-More-Lateral-Moves [https://perma.cc/WH2F-K7UM] (reporting on a number of lateral moves, including real estate team from McKenna Long & Aldridge and eleven-lawyer team from Kelley Drye); Brian Baxter, *Winston Poaches 11-Partner Team From Pillsbury*, AM. LAW. (Mar. 11, 2015), http://www.americanlawyer.com/id=1202720296398/Winston-Poaches-11Partner-Team-From-Pillsbury [https://perma.cc/HME3-C4CM] (reporting on a move of eleven corporate, finance, and private equity partners from Pillsbury to Winston & Strawn); David Gialanella, *Epstein Becker Nabs 15-Lawyer Group, Opens in Princeton*, N.J. L.J. (Feb. 23, 2015), http://www.law.com/njlawjournal/almID/1202718666351/epstein-becker-nabs-15lawyer-group-opens-in-princeton/?back=law [https://perma.cc/8KSR-GU73] (reporting on the lateral move of fifteen-lawyer health care group); Brian Baxter, *Latham Raids O'Melveny for Six Partners, Plus More Lateral Moves*, AM. LAW. (Nov. 11, 2014), http://www.americanlawyer.com/id=1202676160161/Latham-Raids-OMelveny-for-Six-Partners-Plus-More-Lateral-Moves [https://perma.cc/7CC2-5EJ2] (reporting on Latham's lateral hire of a six-partner sports, media, and entertainment team from O'Melveny); Julie Triedman & Brian Baxter, *Bingham Loses Bulk of London, Frankfurt Offices to Akin*, AM. LAW. (Sept. 17, 2014), http://www.americanlawyer.com/id=1202670307995/Bingham-Loses-Bulk-of-

movement was an individual rather than group exercise, but today lawyers often move in numbers. Although some firms avoid hiring groups because of the perceived increased risks when compared with individual lateral hires,[69] data indicate that group hires are often more successful over the long term.[70]

Group movement signals a more mature age of lawyer mobility and likely will have significant long-term implications for law firms. Already, many firms have become little more than loose affiliations of practice groups, which in some respects and situations operate as firms within firms. Even as firms and the effectiveness of their branding efforts weaken, attempts to highlight firm strengths may redound more to the benefit of the practice groups being promoted than to the firms themselves. Practice groups should prove cohesive and enduring, particularly if the environment of lawyer mobility continues to support group movement among firms. Law firms may continue to serve an important role in providing organizational and support services to groups operating within their ambit, but a growing number of firms will bear little resemblance to the stable, economically robust institutions that existed prior to the dawn of lawyer mobility.

VI. An Observation on MDPs and What Might Have Been

Neither lawyer mobility nor the decline of law firms was inevitable. In fact, in the early years of lawyer mobility a movement emerged within the accounting and law professions pointing to the development of strong firms that may very well have resisted the effects of mobile professionals. These Multidisciplinary Practice Firms (MDPs) were to be mega-firms, each of which would provide a wide range of services, including legal, accounting, and financial services. Proponents of the idea argued that such firms were

London-Frankfurt-Offices-to-Akin [https://perma.cc/98AS-YCSL] (reporting on a lateral move from Bingham to Akin of twenty-two partners and an unspecified number of associates largely specializing in financial restructuring).

69. Hiring a large group of lawyers may have an immediate financial impact (positive or negative) on the firm, create challenges in the integration of the new lawyers into the firm, and may raise significant client conflicts of interest because of new clients brought to the firm.

70. A study of partners (equity and nonequity) laterally hired in 2011 by large law firms and still practicing in 2016 reveals that the hiring of individuals or pairs accounted for over three-quarters of partners hired. Measured by attrition rates over the five-year period, however, the individuals or pairs proved to be less successful hires than the group hires. The largest groups had the lowest attrition rates. The study concluded that the more cautious law firm managers should be more open to hiring groups of lawyers. *See* Hugh A. Simons, *Global Lateral Hiring by the Numbers: A Look Behind the High 5-Year Attrition Rate*, AM. LAW. (Feb. 3, 2017), https://www.law.com/americanlawyer/almID/1202778406931/ [https://perma.cc/R8NQ-PRR6] (comparing attrition rates of lateral hires of single partners versus groups of partners). Groups of three or four laterally hired have an attrition rate that is thirteen percentage points below the average; groups of five or more have an attrition rate five percentage points below the average. *Id.*

necessary in an increasingly competitive global environment for professional services.[71] Such firms likely would be very large and limited in number.[72]

Although many in the legal profession were concerned over how MDPs would function consistent with traditional legal-ethics norms (especially client confidentiality and the prohibition on fee sharing with nonlawyers),[73] there was considerable support for MDPs and even a feeling that their emergence was inevitable.[74] Until, that is, it wasn't. Continued resistance from some in the legal profession,[75] combined with financial scandals

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71. *See* Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 281–88 (2000) ("The historical restrictions imposed on [multidisciplinary practice] by the profession not only should be, but will be, eliminated by a vibrant free market."); John S. Dzienkowski & Robert J. Peroni, *Shaping the Future of Law: ABA's Multidisciplinary Practice Proposals Will Stymie the Growth of MDPs*, LEGAL TIMES, Aug. 1999, at 27 ("To flourish in this interconnected, electronic world, large and small corporate clients need multidisciplinary professional services.").

72. Large accounting firms were vigorous advocates for MDPs. In fact, the efforts of accounting firms to expand their range of service to include legal advice was one of the underlying reasons for the MDP movement. The debate over MDPs was intense, and the prospects for their emergence was described as "the most important issue to face the legal profession this century – the expansion of professional-service entities, principally accounting firms, into the practice of law." COMM'N ON MULTIDISCIPLINARY PRACTICE TO THE ABA HOUSE OF DELEGATES, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS (1999), https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/multicomreport0199.html [https://perma.cc/979A-NM63].

73. *See* Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1097 (2000) (finding that "the Big 5 accounting firms have mounted a frontal assault on the legal profession that threatens to destroy the foundation of professional independence, loyalty and confidentiality that the lawyers of America have always promised the public").

74. *See, e.g.*, Erica Blaschke Zolner, *Jack of All Trades: Integrated Multidisciplinary Practice, or Formal Referral System? Emerging Global Trends in the Legal and Accounting Professions and the Need for Accommodation of the MDP*, 22 NW. J. INT'L L. & BUS. 235, 260 (2002) ("Like all other forms of change to legal practice, the MDP will eventually be embraced and no longer feared by the American legal system."); Cheryl Niro, *Another Look at the Future*, 88 ILL. B.J. 190 (2000) ("We simply must anticipate increasing nonlawyer competition and unauthorized practice of law—whether we approve the authorization of multidisciplinary practice or not.").

75. The ABA created the Commission on Multidisciplinary Practice to take a closer look at MDPs, and in two proposals, the Commission recommended amending the Model Rules of Professional Conduct to permit MDPs. *See* COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES—RECOMMENDATION, A.B.A. (Aug. 1999), https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecommendation.html [https://perma.cc/KD8M-SW9B]; COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES—RECOMMENDATION, A.B.A. (July 2000), https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html [https://perma.cc/ZP5A-AHUS]. To review the full study and accompanying reports by the Commission, see *Commission on Multidisciplinary Practice*, ABA, https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html [https://perma.cc/F5QX-ETMT]. However, the ABA Center for Professional Responsibility rejected the proposals and adopted Recommendation 10F instead. *See id.* Prepared by the Illinois, New Jersey, and New York State Bar Associations, Recommendation 10F recommended closing the MDP debate and discharging the Commission on Multidisciplinary

implicating and ultimately destroying one of the largest accounting firms,[76] ultimately crushed the MDP movement.[77] As the former Chair of the Commission on Multidisciplinary Practice noted, "It will be a long while before multidisciplinary practice turns up again, if ever."[78]

But consider what might have been the impact on lawyer mobility if MDPs had been allowed to develop. MDPs likely would have been outsized firms for which firm identity, goodwill, and branding would have been critical. Assuming, as is probable, there would have been a relatively small number of MDPs attractive to corporate and institutional clients, the mega-firms should have been able to resist ongoing raiding of each other's professional talent. Moreover, the broad mix of professional and legal services may have made it less desirable, and more difficult, for sophisticated clients to divide their work among firms as they do today. For example, a client in need of mergers and acquisitions services may very well have preferred that the full range of legal, financial, and accounting services be sourced in a single firm.

This, of course, was the very idea behind MDPs, and a world in which they flourished would not be a welcoming environment for lawyer mobility.[79] As noted above, strong firms are the counterpoint to mobile lawyers. If MDPs did restrict lawyer mobility, then investment in the training and mentoring of young lawyers and the articulation of long-term career paths in the firms, perhaps reinforced by some form of lockstep compensation keyed to seniority, have alleviated some of the consequences of lawyer mobility discussed above. Moreover, to the extent that large MDPs were financially

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Practice. *See MDP Recommendation*, ABA, https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html [https://perma.cc/K4ZX-NS6F]. Recommendation 10F stated that the "ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession." COMM'N ON MULTIDISCIPLINARY PRACTICE, MDP RECOMMENDATION, A.B.A. (July 2000), https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html [https://perma.cc/CB8Y-V5FM].

76. *See* Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J.L. REFORM 95, 98 (2003) (noting that many Arthur Anderson attorneys provided consulting services to clients at the time of the scandal).

77. *See* Alexis Gilbert, *Is MDP DOA? Experts Ponder Effect of Andersen Guilty Verdict*, LEGAL INTELLIGENCER, June 2002, at 6 (quoting Jerome Shestack, former ABA president: "The Enron situation has driven the last nail in the coffin of MDP.").

78. Geanne Rosenberg, *Big Four Auditors' Legal Services Hit by Sarbanes-Oxley*, N.Y. L.J. (Jan. 5, 2004), http://www.law.com/newyorklawjournal/almID/900005398686/ [https://perma.cc/56AP-5TCD].

79. Although MDPs may have curtailed movement of lawyers among the large firms, they would not have affected lawyers whose clients are not corporations and institutions drawn to the MDPs. Most lawyers represent individuals, not corporations and institutions, and the impact of MDPs on the practices of these professionals would have been minimal. The emergence of MDPs would have restricted the mobility options of lawyers providing services to large, sophisticated clients, but lawyer mobility would continue to have thrived for the balance of the profession.

stable, or at least more stable than large law firms in the present environment, externalities associated with failing firms could have been reduced.[80] On the other hand, it is quite possible that MDPs would continue the trends of today in restricting equity participation in firms and expanding the class of lawyers who are "employees" rather than "owners" of the firms for which they work.

The abrupt termination of the MDP movement means we will never know how the practice would look if dominated by a handful of these mega-firms. But it would surely look very different from the world we now have, where large numbers of top-flight law firms struggle to withstand the ongoing challenges of lawyer mobility.

Concluding Notes

Firms exist today with varying degrees of cohesiveness. They range from a select handful of Wall Street firms continuing to employ lockstep compensation and enjoying exceptional stability in membership to a much larger number of firms with weak firm structures and constant turnover in lawyers. Although many firms fall between these extremes, the trend is clear. Lawyer mobility is robust and pervasive. More firms are becoming weaker, less cohesive, and even unstable. And lawyer mobility bears the responsibility for much of this change.

For most firms, lawyer mobility has moved beyond being a problem for which a management solution should be sought. The world of law firms has changed dramatically over the last thirty years. The initial outrage of firms over grabbing and leaving activities of their partners, the subject of my earlier article, has been replaced with an acceptance, often grudging, of the inevitability of lawyer mobility. Indeed, firms victimized by partner departures have learned how to gain from lawyer mobility as they move quickly to offset their losses through their own lateral hires of partners from other firms. And so the cycle continues.

Most firms have no choice on lateral hiring. If for no other reason than the need to replace lawyers lost to other firms, firms must ride the carousel of lawyer mobility. And they must do so even though the prospects for long-term success from the practice are dubious. Today's lateral hires are next year's departing lawyers. One recent report concludes half of lateral-partner hires are failures in that 47% of laterals do not stay more than five full years.[81]

80. A note of caution on this observation is in order. Given the failures of large law and accounting firms, there is no reason to assume that MDPs could never fail. Indeed, Arthur Andersen, one of the largest accounting firms, failed because of the actions of a handful of its members, not for reasons of accountant mobility or any underlying financial weakness in the firm. But the diversity of MDP services combined with stability of their membership likely would have reduced the prospects of failure and associated hardships on third parties who would have done business with the firms.

81. *See* Simons, *Global Lateral Hiring by the Numbers*, *supra* note 70.

Rational firms may well decide that the long-term benefits of lateral hiring are illusory, but whether they have any options is doubtful.

Even if such a "reform" would be desirable, it is doubtful that anything short of a radical change in applicable law will stem the tide of lawyer mobility. It is tempting to argue that the legal profession's rather extreme position on client choice, giving clients the ability to change their lawyers and firms at any time, has facilitated lawyer mobility.[82] If that were so, then restricting the ability of clients to choose their lawyers, and allowing firms to establish in partnership agreements contractual disincentives to competition, would limit lateral movement of lawyers among firms. But a few states, most notably California, do allow modest contractual disincentives to competition, and there is no evidence that lateral movement occurs any less frequently in these states than in others.[83]

Lawyer mobility transcends particular rules of law and legal ethics, and the tweaking of written standards for lawyer behavior is unlikely to have a meaningful effect on the activity. To the contrary, lawyer mobility is a new norm that both reflects and supports increased competition in the market for legal services. This change in the environment is not limited to law and may be seen in all sectors of commercial and professional activities. The newer generation of lawyers understands this and is more comfortable with the world of lawyer mobility than more senior lawyers with rich but sometimes unreliable memories of happy days when firms were stable and commanded the long-term loyalties of their members.

Although many law firms and lawyers have been casualties of lawyer mobility, there are beneficiaries as well. Rainmaking lawyers no longer must wait patiently under systems of lockstep compensation before receiving a share of their firms' income commensurate with their contributions. And sophisticated corporate and institutional clients almost certainly benefit from increased competition that arises from the mobility of lawyers. These are no small benefits. But against these benefits should be weighed the costs, which include less effective training of lawyers, arguably fewer attractive career paths for lawyers, and harm to third parties who do business with firms

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82. On client choice as an absolute value that enhances competition among lawyers, see HILLMAN & RHODES, *supra* note 12, § 2.2.

83. *See* Howard v. Babcock, 863 P.2d 150, 159 (Cal. 1993) (allowing a partnership agreement to impose a penalty upon a lawyer who leaves and takes clients):

> Unless the penalty were unreasonable, it is more likely that the agreement would operate in the nature of a tax on taking the former firm's clients—a tax that is not unreasonable, considering the financial burden the partners' competitive departure may impose on the former firm. The sum to be forfeited by the withdrawing partners may be seen as comparable with a liquidated damages clause, an accepted fixture in other commercial contexts.

For a discussion of *Howard* and other courts that have accepted this reasoning, see HILLMAN & RHODES, *supra* note 12, § 2.2.4.

unable to meet their liabilities because of lawyer departures. These costs represent the dark side of lawyer mobility and should be considered together with the benefits when assessing the changes that firms and lawyers who populate them have experienced over the last three decades.