Leaving a Law Firm: A Guide to the Ethical Obligations in Law Firm Departure

By Mary F. Andreoni, Education Counsel, ARDC

INTRODUCTION

- I'm leaving a firm, what can I tell clients that I represent and when can they be told? Before or after I give notice to the law firm?
- Can I provide a list of all current and former clients that I represented at the prior law firm to the new firm or does that violate confidentiality?
- When I gave notice to my old firm they denied me to access to client records and my list of contacts and they refused to give callers my new contact information. Is this ethical?

The ARDC *Ethics Inquiry Hotline* receives many inquiries regarding what are the ethical obligations a lawyer has when departing a law firm to join another[1]. Most lawyers change law firms at least once and likely several times over the course of a legal career. A lawyer's departure from one law firm to practice elsewhere, whether it's amicable or not, can raise a number of difficult legal and ethical issues. This arises from the fact that lawyers in a firm have two, sometimes competing, fiduciary obligations to navigate – to the clients and to the firm. Both the departing lawyer and the firm have ethical obligations to protect clients' interests and to honor clients' fundamental right to choose their counsel. At the same time, before a lawyer resigns from and leaves a law firm, the departing lawyer also owes contractual, fiduciary and/or agency duties to the law firm.

Ensuring that the best interests of clients are met while avoiding any conduct that could be considered a breach of a fiduciary duty of loyalty can become somewhat challenging. Departing lawyers and their firms need to consider not only their ethical duties under the Rules of Professional Conduct but also their legal obligations under the substantive law separate and apart from professional conduct rules.

In planning to transition between law firms, a lawyer should consult the following sources:

(1) the Illinois Rules of Professional Conduct, caselaw and ethics opinions;
(2) the law firm's partnership, shareholder or employment agreement; and
(3) "other law" such as the law governing partnerships and other business entities, agency law, property law, business torts or trade secrets.

The steps taken by both the departing lawyer and the law firm during the transition should be aimed at accomplishing an orderly, fair and efficient transition that meets the

[1] The ARDC two-hour CLE webcast, *Law Practice Transitions: The Ethical Obligations When Selling, Closing or Leaving a Law Practice* (April 2011) is currently accessible on the ARDC website at https://www.iardc.org/CLESeminars.html.

fiduciary obligations lawyers owe to clients and to each other as members of a firm.

The first step for Illinois lawyer is to read the Illinois Supreme Court opinion of *Dowd & Dowd. Ltd. v. Gleason*, 181 Ill.2d 460, 693 N.E.2d 358 (Ill. 1998) (referred to hereafter as "*Dowd* I"), *affirmed in part, reversed in part*, and the later 2004 Appellate Court opinion following remand, 352 Ill.App.3d 365, 816 N.E.2d 754 (1st Dist. 2004) ("*Dowd* II"). Both are recommended reading for any lawyer contemplating leaving a firm and taking clients with him or her. *Dowd* I and II opinions can be found in the Appendix along with a suggested checklist and forms.

The goal of this publication is to focus on the ethics rules generally implicated when lawyers move between firms and not the various legal consequences involving the law of contracts, agency, partnership, property or unfair competition that can confront a lawyer. The Rules of Professional Conduct are not designed to be a basis for civil liability but they do establish standards of conduct by which a lawyer's conduct may be viewed. *See* Ill.Rules Prof. Conduct, Scope, cmts. [15] & [20]. By setting forth the "ethical guideposts" laid out by the Illinois Supreme Court in *Dowd*, it is hoped that Illinois lawyers may have a better understanding of what their ethical duties are in leaving a law firm and how a lawyer's compliance or noncompliance with the ethical rules can impact not just the lawyer's license to practice law but also the ultimate outcome of related civil litigation. Before planning a move, lawyers with questions concerning their ethical obligations are encouraged to call the *ARDC Ethics Inquiry Hotline* at either the ARDC Chicago office: 312/565-2600 or 800/826-8625 or Springfield office: 217/52-6838 or 800/252-8048.

KEY ETHICAL OBLIGATIONS WHEN CHANGING LAW FIRMS

What are the rules when lawyers depart a law firm to practice somewhere else? There are no specific ethical rules that directly address a lawyer's departure. To a certain extent, the Rules of Professional Conduct adopted in 2010 recognize the modern trend of lawyers transitioning law firms. *See* ILRPC 1.9, cmts. [4]-[9]; 1.10; and 1.11 (recognize the modern trend of lawyers transitioning law firms and expressly acknowledge the ethical concerns facing lawyers who change law firms).

Duties to Clients

Both the departing lawyer and the law firm have ethical obligations to ensure that the clients' interests are represented competently, diligently and with loyalty during a period of transition.

Protection of the client is of first and foremost consideration for both the departing lawyer and the law firm. The key ethical duties that all parties need to bear in mind are:

- *Communication (ILRPC 1.4)* - to keep clients informed of the impeding departure of a lawyer having substantial responsibility for the clients' active matters and to make clear to those clients for whom the departing lawyer has worked and who inquire that the client has the absolute right to counsel of the client's choosing: the departing lawyer, the firm or neither;
- *Competence and Diligence (ILRPC 1.1, 1.3)* - to assure clients on whose active matters the departing lawyer worked that any change in representation will not adversely affect the client's interests and that unless the relationship is terminated by the client or the firm withdraws, the client's matter will continue to be managed by the remaining lawyer(s) at the law firm with competence and diligence to conclusion;
- *Avoiding Prejudice Upon Withdrawal (ILRPC 1.16)* - to assure clients that, upon the firm's withdrawal from representation of any client, the firm will take all reasonable steps to protect the client's interests, respecting the client's selection of counsel and not take actions that will frustrate the client's right to choose counsel by, among other things, denying access to the client's files;
- *Maintaining Confidentiality (ILRPC 1.6)* – that confidential information of clients once shared by the departing lawyer and the law firm will be maintained consistent with ILRPC 1.6;
- *Avoiding Conflicts of Interest ILRPC 1.7, 1.9 and 1.10)* – that the duties of loyalty and confidentiality owed to current and former clients will not be compromised by lawyers moving between firms;
- *Solicitation of Clients (ILRPC 7.1-7.5)* – that clients are given adequate and accurate information to assist clients in making an informed decision about choosing counsel free from the possibility of undue influence, intimidation, and overreaching; and
- *Duty of Candor (ILRPC 8.4(a) (4))* – avoiding conduct involving dishonesty, fraud, deceit or misrepresentation toward clients and between members of a law firm in connection with a planned withdrawal from the firm.

Fiduciary Duties of Loyalty as Members of a Law Firm

Lawyers owe each other a fiduciary duty of loyalty as members of a law firm to deal with each other openly, fairly and honestly.

All lawyers in a law firm owe a fiduciary duty of loyalty to the firm whether they be partners, shareholders, associates or otherwise employed in the firm "not to (1) actively exploit their positions within the [law firm] for their own personal benefits, or (2) hinder the ability of the [law firm] to conduct the business for which it was developed." *Burke v. Lakin Law Firm*, 2008 WL 64521 (S.D.Ill. Jan. 3, 2008), *quoting FoodComm Intern. V.*

Barry, 328 F.3d 300, 303 (7th Cir. 2003). Claims for breach of fiduciary duty are commonplace in litigation over withdrawal from law firms. In *Dowd* I, the Court set forth some of the "ethical guideposts" in how far departing lawyers may go in their pre-departure preparatory activities, including what efforts a departing lawyer may properly take in communicating with the firm's clients, without breaching a lawyer's fiduciary duty owed to the members of the law firm.

See Dowd & Dowd, Ltd. V. Gleason, 181 Ill.2d 460, 693 .E.2d 358 (Ill. 1998) and 352 Ill.App.3d 365, 816 N.E.2d 754 (1st Dist. 2004).

The *Dowd* saga began when two lawyers decided to leave the Dowd firm and start their own practice. The problem was in the covert manner in which the two partners prepared to leave. They had spent over four months planning their departure, secretly making arrangements with at least one major client to follow them to their new firm, using confidential firm information to secure financing for the new firm, and enticing other firm employees to leave – all before they had resigned from the firm. Dowd sued the two former partners and their new firm, alleging causes of action for breach of fiduciary duty, breach of employment contract, tortious interference with prospective economic advantage, and civil conspiracy. Their departure triggered a 14-year legal battle that ultimately resulted in a judgment for $2.5 million in damages in favor of the law firm again the two departed lawyer and their new firm for breach of fiduciary duty to Dowd and tortious interference with prospective economic advantage. *Dowd* II, 352 Ill.App.3d 365, 816 N.E.2d 754 (1st Dist. 2004).

The Court agreed that certain preliminary arrangements may be undertaken by a departing lawyer in order to protect the important value of client freedom of choice in counsel; the Court cautioned, however, that the principle of client choice "is not so overpowering that it shields all pre-termination competition by members of a firm." *Dowd* I, 181 Ill.2d at 475, 693 N.E.2d at 366 *quoting* R. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 Tex. L.Rev. 1, 27 (1988). A lawyer's conduct can be a breach of fiduciary duty when, before the lawyer departs, he "secretly attempt[s] to lure firm clients (even those that the partner has brought into the firm and personally represented) to the new association lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties." *Dowd* I, 181 Ill. 2d at 477-78 *citing Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y. 2d 112, 112-21, 629 N.Y.S.2d 1009, 1013-14, 653 N.E.2d 1179, 1183-84).

The "fence"' or dividing line, between permissible and impermissible conduct in these circumstances, the Court concluded, "cannot be drawn with mathematical precision." *Dowd* I, 181 Ill.2d at 470, 693 N.E.2d. at 364. The steps that should be taken by both departing lawyer and the firm must be consistent with the interests of clients in continued competent representation, in freely choosing counsel, and in receiving accurate and fair information from which to make an informed choice.

Disciplinary Cases

While most claims of a breach of fiduciary duty are usually civil in nature, as in the *Dowd*, they can become disciplinary matters when a lawyer decides to misappropriate fees owed to the firm, remove files from the firm without client consent, secretly remove property belonging to the firm or conduct an outside practice without the firm's knowledge. *E.g.*, *In re Turner*, M.R. 23588, 2009 PR00016 (Ill. 2012) (lawyer suspended three months for conversion of settlement funds during a dispute with his former law firm partners over money that was due to each partner after the firm's dissolution); *In re Michod*, M.R. 17317, 97CH99 (Ill. 2001) (lawyer suspended for five months for converting $112,500 in legal fees in which the lawyer and his partner had an interest and determining unilaterally how to allocate the funds between himself and his partners); *In re Cupples*, 952 S.W.2d 226, 236-37 (Mo. 1997) (in separate disciplinary proceedings involving a lawyer in connection with his departure from two different law firms, the court held that the lawyer's conduct, which included secreting client files as he prepared to withdraw from a firm, removing files without client consent, failing to inform clients of the change in representation, and other action constituted conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Missouri's counterpart to ILRPC 8.4(c)); *In re Park*, M.R. 25897, 2012PR00027 (Ill. 2013) (lawyer suspended one year for downloading over 75,000 electronic in law firm documents, including a client directory, client files, forms and templates during a 5-month span while he was still a partner there in order to start his own competing firm and later destroying documents in violation of a litigation hold order after his former law firm notified him that it would be filing a civil lawsuit); and *In re Maciasz,* M.R. 23960, 2006PR80 (Ill. 2010) (lawyer employed as a full-time attorney at successive law firms who secretly operated his own "moonlighting practice" that he did not disclose to the law firms suspended for one year).

PREPARING TO LEAVE A LAW FIRM

Notice to the Firm

A lawyer should first give reasonable notice of intent to withdraw from the firm promptly after reaching a commitment to join another firm or making the decision to leave the firm before notifying clients.

Dowd established while it is permissible for a departing lawyer to announce to clients of his or her impending departure before the law firm is told, "ideally" these communications should occur **after** the departing lawyer has notified the firm of the lawyer's plans to leave. *Dowd* I, 181 Ill.2d at 476, 693 N.E.2d at 367. ABA *Formal Ethics Op. 99-414* Ethical Obligations When a Lawyer Changes Firms (Sept. 1999) similarly takes the view that it is ethically permissible for a departing lawyer to notify current clients even before advising the firm of the lawyer's intention to resign. That view is not universally shared, however. *See, e.g., Restatement of the Law (Third) of The Law Governing Lawyers*, sec. 9(3) (2000) (lawyer leaving firm may solicit firm clients prior to leaving only after lawyer has informed the firm of the lawyer's intent); Ohio Supreme Court Ethics Op. 98-5 (1998)(departure should be discussed between firm and departing lawyer before client is informed); Pennsylvania and Philadelphia Joint Ethics Op. 2007-300 (in most cases, client notice should not precede notice to lawyer's firm); and Fla. Rule of Prof.Conduct 4-5.8 (prohibits a departing lawyer from sending notice until after a good faith effect to negotiate a joint notice).

In addition, the Court noted in *Dowd* that leaving on short notice or concealment of a decision to withdraw may be a basis for a breach of fiduciary duty claim if the firm can show that the deception caused damage to the firm. *Dowd* I, 181 Ill. 2d at 476, 693 N.E.2d at 367.

See CHECKLIST FOR LEAVING A LAW FIRM

Logistical Arrangements Prior to Departure

A lawyer may make certain, limited logistical arrangements prior to announcing his or her withdrawal to the firm but how much planning a lawyer may or may not do before departing, as the Court noted in *Dowd*, is a difficult line to draw. *Dowd* I, 181 Ill.2d at 476, 693 N.E.2d at 367. Soliciting firm clients on firm time or using the firm's resources to establish one's own competing firm are not permissible. On the other hand, the firm has a duty not to interfere with the departing lawyer's continued right to practice law. *Dowd*, II, 352 Ill.App.3d at 372, 816 N.E.2d at 761. There is no bright line but the key, however, is not to exceed what is necessary to protect the interests of clients who might choose to continue with the departing lawyer but not undermine the fiduciary duty of loyalty owed to the other members of the firm. Simply put – a lawyer may take pre-termination steps in preparation to compete but may not begin to commence competition. *Dowd* II, 352 Ill.App.3d at 374, 816 N.E.2d at 762, *citing Dowell v. Bitner*, 273 Ill.App.3d 681, 691, 652 N.E.2d 1372, 1381 (1995).

Examples of permissible planning actions taken in anticipation of announcing a lawyer's withdrawal from the law firm may include:

(1) obtaining office space and supplies such as printing new letterhead;
(2) arranging bank financing not based on nonpublic, confidential of the firm;
(3) ordering office equipment and systems;
(4) preparing lists of clients expected to leave the firm and obtain financing based on the lists using only non-confidential, non-protected, publically available information based on what the lawyer personally knows about the clients' matters; or
(5) informing clients with active matters for whose representation the lawyer is responsible or in which the lawyer plays a principal role only that the client has the right to choose who will continue to manage their business following the lawyer's departure.

Examples of impermissible planning actions taken in anticipation of announcing a lawyer's withdrawal from the law firm may include:

(1) soliciting firm clients pre-termination;
(2) soliciting firm employees pre-termination to join the departing lawyer;
(3) lying to the firm about plans to leave;
(4) abandoning the firm on short notice and taking clients and files;
(5) using firm resources such as copying files or client lists without permission or unlawfully removing firm property from the premises to solicit clients; or
(6) using nonpublic confidential information of the firm such as time and billing information, firm structure and financial statements, etc. in order to obtain financing or other things against the interests of the firm; or
(7) taking other action detrimental to the interests of the firm or of clients, aside from the impact the lawyer's departure will have on the firm.

Dowd I, 181 Ill. 2d at 470-71, 693 N.E.2d at 364; *Dowd* II, 352 Ill.App.3d at 374-75, 816 N.E.2d at 762-64; *ABA Formal Op. 99-414* at 7; *Restatement of the Law (Third) of The Law Governing Lawyers*, sec. 9, cmt. i (2000)I .

Recruitment of Staff Prior to Withdrawal

A departing lawyer should not contact and urge firm lawyers or support staff to leave until after the departing lawyer has departed. In *Dowd*, the departing lawyers were found to have breached their fiduciary duty by recruiting not only existing firm employees (associates and support staff) but also prospective firm employees that the departing lawyers knew about from firm personnel records before resigning from the law firm. *Dowd* II, 352 Ill.App.3d 365, 377, 816 N.E.2d 754, 764-765 (1st Dist. 2004). It is clear from *Dowd* that **surreptitious** recruitment of firm employees is not justified. Less clear is the extent to which a departing lawyer may contact firm employees after giving notice to the firm but prior to departure or to what extent a departing lawyer may discuss partnership or employment opportunities with lawyers or staff who approach the departing lawyer. *Kopka, Landau & Pinkus v. Hansen*, 874 N.E.2d 1065 (Ind.Ct.App. 2007) (associate acted properly when discussing plans to depart with other associates and staff and inquiring of their desire to leave; such actions were "mere preparation to compete" and no formal offers of employment were extended until after the associate left the firm). The safest course is not to solicit firm employees until the departing lawyer has left and is at the new firm.

A departing lawyer could have concerns, however, that a client's matter may be prejudiced if key employees who worked on a client's matter were not in place prior to joining another firm It has been suggested that a way to accommodate these conflicting duties would be to allow the departing lawyer to recruit firm employees prior to resignation but only to the extent reasonably necessary to avoid disruption in the representation of clients and only after the firm has been given notice of the lawyer's intent to withdraw from the firm and the firm is told the identity of the employees to be solicited. In this way, the firm would have a reasonable opportunity to persuade the employees to remain with the firm. Hillman, Robert W., *Lawyer Mobility: The Law and*

Ethics of Partner Withdrawals and Law Firm Breakups, at sec. 4.8.4 (2d. 2009 Supp.). Once a lawyer has left a firm, the departing lawyer is generally free to recruit staff of the firm but should be careful not to use information improperly taken from the firm to advance the recruitment of firm employees or induce those employees that are themselves restricted by fiduciary or contractual obligations to breach their duties to the firm.

Conflicts Screening and the Disclosure of Confidential Information

Before departing to another firm, both the departing lawyer and his/her prospective new firm must perform a thorough conflicts check to determine whether the departing lawyer has ever represented parties with interests adverse to those of the new firm's clients. The fact that the process of checking for conflicts involves a sharing of certain information about the persons and issues involved in current and former client matters raises the concern that confidential information will be disclosed without client consent. ILRPC 1.6 does not explicitly authorize a lawyer to reveal confidential information when changing firms. *See In re Doreen Ann Graham*, M.R. 20244, 04SH118 (Ill. 2005) (lawyer censured for conflict of interest when she entered her appearance as counsel for the plaintiff in a medical negligence action against the hospital she had represented in a number of medical negligence actions while at law firm she had left three months earlier); *In re Carey*, M.R. 18575, 99 SH 67 and *In re Danis*, M.R. 18575, 99 SH 68 (Ill. 2003) (former associates of a law firm were suspended for conflict of interest under Rule 1.9(a), when they represented clients against the former law firm's client in matters that were substantially related to matters to lawyers had worked on while earlier employed at the law firm).

ABA Formal Op. 09-455 Disclosure of Conflicts Information When Lawyers Move Between Law Firms (2009) provides some helpful guidance on the issue of lawyers' conflicting duties to protect client information under Rule 1.6 and to detect and resolve conflicts of interest under Rules 1.7 and 1.9 when moving between firms. Based on *ABA Formal Op. 09-455*, the ABA's 20/20 Committee recently proposed amending Model Rule 1.6 to add an express exception to Rule 1.6 to allow limited disclosure of confidential information under these circumstances.

Under proposed Model Rule 1.6, the lawyer and prospective law firm may share limited client information to the extent reasonably necessary "to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." *See* Proposed ABA Model Rule 1.6(b)(7). The amount of information disclosed would be limited to what is reasonably necessary to allow for conflicts checks (*e.g.,* client name; brief summary of the nature of the representation; and whether the matter is ongoing or concluded) and disclosure would be prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.,* the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). *See* ABA Proposed Model Rule 1.6, cmt. [7]. Also, a lawyer in talks with another firm about a possible association, merger or purchase should provide this information only once substantive discussions regarding the new relationship have occurred. *See* Proposed ABA Model Rule 1.6, cmt. [7].

NOTICE TO CLIENTS

Both the departing lawyer and the law firm have a duty to inform firm clients of any material change in the representation, including the departure of a lawyer who had substantial responsibility for the matter, and to obtain the client's informed direction as to how the client wishes its work to be handled going forward.

Clients do not "belong" to a lawyer or law firm and have the fundamental right to counsel of their own choosing. *See* ILRPC 1.16(a)(3), cmt. [4] ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.") Should a lawyer who was actively and substantially working on a client's matter leave the firm, the client has the right to choose whether to continue with the firm, transfer his/her business with the departing lawyer, neither or both. Whether notice comes from the departing lawyer, the firm or both, the client has the right to know of the change in counsel so that they can make informed decisions about the future representation as required by ILRPC 1.4. The notice should be a joint communication from both **after** the departing lawyer has give notice to the firm. *Dowd* I, 181 Ill.2d at 476, 693 N.E.2d at 367.

Even if the departing lawyer is not seeking to bring the firm's clients with him or her, clients should be informed of the departure of the lawyer who was actively and substantially working on their matters and how the clients' matters will be continued to be handled at the firm. *See Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct No. 12-14* (May 2012) (duty under ILRC 1.4 to timely inform client of associate's departure where associate's involvement is of such degree or kind that associate's departure could reasonably affect the client's decisions regarding the representation or the means of accomplishing the client's objectives).

Joint Notice From the Departing Lawyer and the Law Firm

The law firm and departing lawyer should first attempt, prior to a lawyer's departure, to negotiate a joint communication notifying clients of the change before the lawyer prepares to unilaterally notify clients. A joint notice from the law firm and the departing lawyer has been suggested as perhaps the most desirable way for affected clients to be notified of the change, present the options for future representation and minimizes concerns about what is communicated to the affected clients.

ABA Formal Op. 99-414 (1999) provides guidance on the information that should be put in the announcement or notification letter to clients. The information clients typically should receive would include:

- *Effect of Transition* – an explanation for the lawyer's withdrawal and possible future unavailability; the time frame after which the departing lawyer will no longer be available; current status of the client matter; and identity of person to contact regarding client file;
- *Right to Counsel of Choice* – the option to remain with the law firm, choose representation by the departing lawyer or choose representation by other lawyers or law firms;
- *Liability for Fees and Costs* – if the client choose to terminate the law firm, information about any responsibility the client has for fees and costs already incurred;
- *Refund of Unearned Fees and Costs* – how any fees and/or costs deposits will be handled;
- *Transfer of Client File* – how transfer of the client's file will be handled and if the client may be charged a reasonable charge for copying the file for a successor lawyer (*see Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct Nos. 94-13* and *94-14* (Jan. 1995) (guidance on which materials in a client's file a lawyer must provide copies of to the client and who bears the expense);
- *Accounting of Client Property Held Trust* – a complete and accurate of all property and funds the law firm is currently holding in trust and whether the trust property will remain in the law firm's possession a request for direction from the client*;* and
- *Time for Response* – time for client to respond to the notice and the consequence if the client does not respond to the notice, such as the client is considered to remain a client of the firm until such time as the client gives notice otherwise.

Sample Form: JOINT CLIENT LETTER FROM FIRM AND DEPARTING ATTORNEY

Unilateral Notice From the Departing Lawyer Prior to Departure: Avoiding Pre-Departure Solicitation

A departing lawyer, prior to withdrawing from the law firm, is "permitted to inform clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of it choice." *Dowd* I, 181 Ill.2d at 476, 693 N.E.2d at 367, *quoting Graubard Mollen Dannet & Horowitz v. Moskovitz* 653 N.E.2d 1179, 1183-84 (N.Y. 1995). Asking clients to take their business to the lawyer's new firm, *i.e.*, solicitation, while still employed by the firm may be construed as an improper effort to lure clients away or otherwise tortiously interfere with the firm's relationships with its clients. *Dowd* I, 181 Ill.2d at 473, 693 N.E.2d at 366 (Ill. 1998).

While joint notice by the departing lawyer and the law firm is the preferred way of information clients, unilateral notice is permitted if the law firm and departing lawyer cannot agree upon a joint communication or the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice. *Dowd I*, 181 Ill.2d at 475, 693 N.E.2d at 367 (Ill 1998); *ABA Formal Ethics Op. 99-414* at p. 5; *see also Alaska Bar Assn. Ethics Op.* 2005-2 (Sept. 8, 2005) ("Ethical Obligations When a Lawyer Changes Firms"); *Colorado Bar Assn. Ethics Op. 116 (March 17, 2007)* ("Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure From a Law Firm"); *Pa. Bar Assn. & Phila. Bar Assn. Joint Formal Op. 2007-300 (June 2007)* ("Ethical Obligations When a Lawyer Changes Firms"); *Meehan v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1989) (suggesting use of joint announcement to avoid strife in battle for clients). Such pre-withdrawal communications, however, must be limited and should go no further than necessary to protect the important value of client freedom of choice in legal representation, and should not go so far as to undermine the important value of loyalty owed by partners and associates to their existing law firm. *See Graubard Mollen Dannet & Horowitz v. Moskovitz*, 86 N.Y.2d 121, 119-120, 629 N.Y.S.2d 1009, 1013, 653 N.E.2d 1175, 1179 (1995).

What emerges from *Dowd* and *ABA Formal Op. 99-414* (1999) are several guidelines for the manner and content of the notice sent to affected clients before the lawyer has given his or her resignation notice to the firm:

1) the notice should be limited to client whose active matters the lawyer has direct responsibility for at the time of the notice;

2) the departing lawyer can inform the client:

- the lawyer is leaving;
- the timing of the departure;
- where the lawyer is going;
- the departing lawyer's ability and willingness to continue to represent the client;
- the client's option to stay with the old firm; go with the departing lawyer or chooses another lawyer/firm entirely; and
- where the client's file will be and who will be handling the client's matter until the client expresses a choice;

3) the departing lawyer should not urge the client to sever its relationship with the firm;

4) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters;

5) the departing lawyer must not disparage the lawyer's former firm or urge the client to sever its relationship with the firm; and

6) the notice should be in writing in order to minimize the risk that the firm or client will sue the departing lawyer for improper solicitation, failure to inform or some fiduciary duty the departing lawyer may have to the former law firm.

If the client requests additional information from the departing lawyer about the departing lawyer's new firm, the departing lawyer may provide additional information, such as billing rates, staffing and the resources of the new firm, as may be reasonably necessary to assist the client in making an informed decision about future representation. *ABA Formal Op. 99-414* at 6, *relying* on *D.C. Bar Legal Ethics Opinion 273 (1997)* ("Ethical Considerations of Lawyers Moving from One Practice Firm to Another").

Sample Form: UNILATERAL LETTER TO CLIENTS FROM DEPARTING ATTORNEY

Clients Entitled to Receive Notice

The departing lawyer may contact, prior to withdrawal from the firm, only those firm clients with whom the lawyer has a prior professional relationship. *Dowd* I, 181 Ill.2d at 367, 693 N.E.2d at 476. *ABA Formal Op. 99-414* defines the "clients" as those with:

- active matters; and
- for whom the departing lawyer either is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in the matter.

ABA Formal Op. 99-414 at 1.

The duty to communicate does not mean to all firm clients and not clients on whose matters the departing lawyer did not work or worked only in a subordinate role where the lawyer had little or no direct client contact. Whether the departing lawyer played a significant enough role in the client's representation to merit giving notice should be weighed from the client's perspective with any doubt being resolved in favor of informing the client. Whether the client needs to be informed of the lawyer's departure and reminded of the client's right to choose counsel depends on whether, viewed from the perspective of the client, the client's decision about who should continue the representation might depend on the continued involvement of the departing lawyer. Even if the firm or the departing lawyer believes it is unlikely that the client would choose to retain new counsel because of the lawyer's departure, the client still has the right to make that informed decision.

Summary

- The client chooses the lawyer and may chose to stay with the old firm, go with the departing lawyer or hire another lawyer.

- In order to exercise its choice, the client must be informed that lawyer handling their matter is leaving the old firm. Both the departing lawyer and the old firm have independent ethical obligations to inform the client that the lawyer is leaving the old firm.

- The clients entitled to notice are those for whom the departing lawyer is currently handling active matters or plays a principal role in the current delivery of legal services.

- The law firm should preferably be notified before the clients are notified.

- Joint notification of clients is preferable.

- Notification of clients, whether joint or not, should remain neutral in tone and be informative only, *e.g.,* it should not disparage the law firm or the departing lawyer or mislead the client in any way.

Post-Departure Solicitation of Clients

Once a lawyer leaves a firm, a lawyer is ethically permitted to make direct contact with prospective clients with whom the lawyer has had a close personal or "prior professional relationship," as allowed by ILRPC 7.3(a)(2). *See Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct No. 12-14*, 2011 WL 2308107 (May 2012) (associate who has left a law firm may contact clients of the firm with whom he had an attorney-client relationship). *ABA Formal Opinion 99-414* (1999) advises that the "prior professional relationship" exception applies only to clients with whom the lawyer personally has had enough professional contact to give the client an opportunity to evaluate the lawyer's professional qualifications. *ABA Formal Op. 99-414*, at p. 4.

Former firm clients on whose matters the lawyer worked but had little or no direct contact with the client are treated like the general public for purpose of solicitation. *ABA Op. 99-414* at p. 2. The departing lawyer, however, cannot use a firm's confidential information such as a client list and use only publically available information or information the lawyer personally knows about the clients' matters (*Dowd*, 181 Ill. 2d at 470-71, 693 N.E.2d at 364; *See ABA Formal Op. 99-414* at 7.

Also, the departing lawyer and law firm should refrain from disparaging each other in its solicitations and communications to clients. *See Pratt, P.C. v. Blunt*, 140 Ill.App.3d 512, 488 N.E.2d 1062 (5th Dist. 1986) (post-departure solicitation, only some of which was disparaging of the former firm, enjoined as tortious interference with former firm's relationship with existing clients); *Becker v. Zellner*, 292 Ill.App.3d 116, 684 N.E.2d 1378, 1381 (2d Dist. 1997) (paralegals who left law firm to work with client's new lawyer stated a claim for slander and commercial disparagement when former employer stated that they had submitted "$45,000 bill for five pages of worthless memorandum" and were "devious").

PROPERTY ISSUES: WHAT A DEPARTING LAWYER MAY TAKE

Client Files

If a client elects to follow a departing lawyer or retains another firm, under ILRPC 1.16(d) and 1.15(d) the firm must promptly forward any requested part of the client's file remaining at the firm, subject to the firm's right to assert a lien to retain the client's file in order to secure payment of the firm's fees and disbursements. *See* ILRPC 1.16, cmt. [4] and Retaining Liens section at p. 13.

The departing lawyer may not remove client files without the client's consent and even when the client requests to have the file transferred to the departing lawyer, the file should not be removed until the firm has been give notice and opportunity to copy the file. *See In re Cupples*, 952 S.W.2d 226, 236-37 (Mo. 1997) (lawyer reprimanded for violating his duties to former law firm and law firm's client by removing files without client consent); *Maryland Attorney grievance Comm'n. v. Potter*, 844 A.2d 367 (Md. 2004) (90-day suspension on departing associate who secretly removed two client files and destroyed firm's computer records for those clients even though lawyer believed he was acting in clients' best interests out of concern the law firm might act to thwart their choice).

Pending the client's instructions, the firm and the departing lawyer should have reasonable access to the file in order to protect the client's interests. *See Ill. State Bar Ass'n. Advisory Op. on Prof'l Conduct No. 95-02* (1995) (lawyer no longer with a law firm may have access to closed files of that firm where the lawyer was in an attorney-client relationship with the client of the file in question.) Delays in file transfer may prejudice the client's matter particularly if there is a statute of limitations period or court-imposed deadlines. Also, return original client property and unearned client funds promptly to avoid possibly hampering the client's ability to retain new counsel. The ARDC receives a number of grievances each year complaining about delays in file transfer. *See, e.g.,* ARDC *2011 Annual Report*, Chart 9 Classification of Charges, at p. 17.

If the lawyer is requesting the copies for herself, then she should bear the cost in question. If she is requesting copies on behalf of her client, then the client should be informed of the potential cost involved. For guidance on responding to a client's request for a copy of a lawyer's closed file and whether the client can be billed for the file copying expenses *see Ill. State Bar Ass'n. Advisory Op. on Prof'l Conduct Nos. 94-13* and *94-14* (January 1995).

In releasing the file to the departing lawyer, the firm should make a copy of the file, obtain direction from the client on where to send the file and formally end the relationship between the firm and the client by sending the client an end-of-the engagement letter to help minimize the risk of any misunderstandings about who is responsible for the client's matter going forward.

Sample Forms: ACKNOWLEDGMENT OF RECEIPT OF FILE and AUTHORIZATION FOR TRANSFER OF CLIENT FILE

Retaining Liens

To the extent that there is an amount owing to the firm and the firm is refusing to release the file until fees are paid, Illinois has long recognized that lawyers may assert a common law possessory lien on the client's file until the amount is paid or the client posts adequate security for payment. *Twin Sewer & Water. Inc. v. Midwest Bank & Trust Co.*, 308 Ill.App.3d 662, 667, 720 N.E.2d 636 (1st Dist. 1999), *citing Sanders v. Seelye*, 128 Ill. 631, 21 N.E. 601 (1889). The ability to assert a retaining lien is not unbounded, however, as ILRPC 1.15(d) and 1.16(d) impose certain ethical restrictions on a lawyer's assertion of the lien.

ILRPC 1.15(d) provides in relevant part:

> …Except as stated in this ILRPC or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

ILRPC 1.16(d) also provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

If retention of the file will adversely affect the client's ability to proceed with their legal matter, however, the lawyer's duties under ILRPC 1.16(d) to avoid prejudice to the client upon termination of the representation trumps the lawyer's right to assert a retaining lien. When determining whether or not to claim a retaining lien to original documents, the lawyer should take into account: 1) whether the client will suffer serious consequences without the documents; 2) the client's ability (or lack thereof) to pay; 3) the fairness of the fee agreement or the client's understanding of it; and 4) whether any prejudice to the client can be mitigated by means other than a return of the documents. *See Matter of Liquidation of Mile Square Health Plan*, 218 Ill.App.3d 674, 578 N.E.2d 1075 (1st Dist. 1991); *Upgrade Corp. v. Michigan Carton Co*., 87 Ill.App.3d 662, 410 N.E.2d 159 (1st Dist. 1980). Given the ethical limitations, a retaining lien should be asserted only as a matter of last resort and only once the lawyer has sought other reasonable means of collection of the unpaid fees.

Client Lists, CLE Materials, Practice Forms and Computer Files

When it comes to other property, *ABA Formal Ethics Op. 99-414* (1999) concludes that a departing lawyer is entitled to take copies of documents such as research memoranda, pleadings and forms, "to the extent that they were prepared by the lawyer and are considered the lawyer's property or are in the public domain." *Op. 99-414* at p. 7. A departing lawyer shall take into consideration who prepared the material and the measures taken by the law firm to retain title or otherwise to protect it from external use, *e.g.*, continuing legal education materials, practice forms, or computer files the lawyer created while at the law firm. *Id*.

The departing lawyer shall first look to the employment, operating, or shareholder agreement with the law firm. If the agreement does not restrict what a lawyer can take, the lawyer shall first inform the law firm and avoid taking property in a "surreptitious" manner to avoid accusations of misconduct and possible tort claims. Taking firm property without its knowledge and consent may result in both civil litigation as well as disciplinary action. *See In re Park*, M.R. 25897, 2012PR00027 (Ill. 2013) (lawyer suspended one year for downloading over 75,000 electronic documents, including a client directory, client files, forms and templates during a 5-month span while he was still a partner at a firm, while simultaneously making plans to establish his competing firm and later destroying firm documents in violation of a litigation hold order after his former law firm notified him that it would be filing a civil lawsuit which later resulted in the lawyer being ordered to pay nearly $60,000 in sanctions to his former firm); *In re Nelson*, M.R. 19657, 02 CH 12 (Ill. 2004) (lawyer suspended 90 days for taking and copying confidential personnel records without employers' consent). A departing lawyer cannot take a firm's proprietary business information including client lists or information about salaries, bonuses, and other business information. *See Restatement of the Law (Third) of The Law Governing Lawyers*, sec. 9, cmt. i (2000) (lawyer planning a departure must not "misuse firm resources (such as copying file or client lists without permission or unlawfully removing firm property from its premises"); *see In re Teplitz*, 97 CH 94, M.R. 16148 (Ill. 1999) (lawyer improperly took a client list when he left his client's employment and then disseminated other confidential information about the client's operations to the media). Departing lawyers are permitted to prepare lists of clients expected to leave the firm and obtain financing based on the lists but can do so using only publically available information and what the lawyer personally knows about the clients' matters in advising clients of the lawyer's new association. *Dowd* I, 181 Ill. 2d at 470-71, 693 N.E.2d at 364); *ABA Formal Op. 99-414* at 7.

To the extent that a departing lawyer retains copies of client documents relating to the representation of former clients, the departing lawyer must take reasonable measures to ensure that any confidential client information contained in those documents is protected from disclosure pursuant to the lawyer's duties under ILRPCs 1.6 and 1.9. As for the departing lawyer disclosing to the lawyer's new firm a current or former client list to prevent conflicts at a new firm, the information must be limited to that which is reasonably necessary to check for conflicts. *See* Screening for Conflicts section at p. 15.

Summary

- A departing lawyer should first look to the employment, operating or shareholder agreement. If the agreement does not restrict what a lawyer can take, the lawyer should first inform the law firm can avoid taking property in a "surreptitious" manner.

- A departing lawyer can take those things that the lawyer developed in the course of his/her own practice while at the firm.

- A departing lawyer cannot take a firm's proprietary business information such as client lists or information about salaries, bonuses or other business information.

- Unless disclosure would prejudice a client's interests, a departing lawyer may disclose to the lawyer's prospective new firm a limited amount of information concerning the clients previously served by the lawyer but only to the extent reasonably necessary to check for conflicts at the new firm.

POST DEPARTURE ISSUES

A law firm cannot impede a departing lawyer's ability to practice law or service the clients that wish to go with the departing lawyer.

Restrictive Covenants

ILRPC 5.6 provides that a lawyer shall not participate in offering or making an employment agreement that restricts the rights of a lawyer to practice after the termination of the employment relationship except an agreement concerning benefits upon retirement. In *Dowd*, the Court held that a covenant not to compete between the Dowd firm and two departing attorneys which prohibited the departing lawyers, for a period of to year after termination, to ":not directly or indirectly, solicit or endeavor to entice away any clients" of the law firm, was unenforceable under Rule 5.6. *Dowd*, 181 Ill. 2d at 480, 693 N.E.2d at 369. The Court said that ILRPC 5.6 "is designed to afford clients greater freedom in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility." *Dowd*, 181 Ill. 2d at 481, 693 N.E.2d at 369-370; *see also* ILRPC 5.6, cmt. [1].

ILRPC 5.6 provides:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Similarly, placing any financial disincentives and penalties upon on a departing lawyer for competing, not within a *bono fide* retirement plan, is a violation of the rule. *Dowd*, 352 Ill.App.3d 365, 386, 816 N.E.2d 754 (1st Dist. 2004); *Stevens v. Rooks Pitts & Poust*, 289 Ill.App.3d 991, 996, 682 N.E.2d 1125 (1st Dist. 1997) (holding "courts have overwhelmingly refused to enforce provisions in partnership agreements which restrict the practice of law through financial disincentives to the withdrawing attorney"); Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct No. 97-09 (May 1998) ("It is unethical and a violation of Rule 5.6(a) for a lawyer to make such an agreement or for a law firm, lawyer, or group of lawyers, whether in a partnership, corporation or proprietorship, to make such an agreement").

Restrictive covenants "concerning benefits upon retirement" are allowed under Rule 5.6 and have been held enforceable. *See Hoff v. Mayer, Brown and Platt*, 331 Ill.App.3d 732, 772 N.E.2d 263 (1st Dist. 2002) (retirement provision that precluded payment unless the retiring lawyer "substantially ceases the active practice of law on a permanent basis" is enforceable); *cf. Cummins v. Bickel & Brewer*, No. 00 C 3703, 2002 WL 187492 (N.D.Ill. Feb. 6, 2002) (court held unenforceable a retirement provision for the forfeiture of retirement benefits "in the event [the retiring lawyer] undertakes the representation of a Partnership Client within three (3) years after his effective date of withdrawal from the Partnership.")

Requests for Departing Lawyer's Contact Information

Additionally, a law firm should not withhold information from clients that inquiry about the whereabouts of the departing lawyer or mislead clients. *See Pa. Bar Assn. & Phila. Bar Assn. Joint Formal Op. 2007-300* (June 2007) Ethical Obligations When a Lawyer Changes Firms. If a client asks for the contact information about a lawyer who has left the firm, the law firm should give the client whatever information the firm has regarding that lawyer's whereabouts.

Conclusion

There are two key principles that all lawyers involved in a transition must bear in mind – the clients' fundamental right to choice of counsel and the fiduciary duty of loyalty that lawyers owe each other as members of a law firm. As difficult as changes in law firm affiliation can be, all lawyers involved must keep in mind that the interests of the clients are paramount. Both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued representation and avoid conflicts. At the same time, the actions taken need to also respect the fiduciary duties lawyers and law firms have to each other while members of the same firm. Neither the lawyer nor the firm may impede or prevent the other's fulfillment of any ethical obligations or duties owed to a client, the court or each other. These ethical obligations can best be satisfied when the departing lawyer and the law firm agree to suspend any feelings of animosity or retribution they may have toward each other and instead agree to engage in coordinated cooperation and candid discussions for the sake of the interests of clients.

Appendix

Bibliography

Leaving a Law Firm Publications
Robert W. Hillman, *Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups* § 1.1 (2d ed. 1998)

Michael L. Shakman, Geraldine Soat Brown, and Barry A. Miller, Primer on Acting Rationally When Lawyers Relocate, *CBA Record (*February/March 2000)

Douglas R. Richmond, Yours, Mine & Ours: Law Firm Property Disputes, *NIU Journal* Vol. 30 (2010)

ABA Formal Opinions
ABA Formal Op. 99-414 (Sept. 1999) Ethical Obligations When a Lawyer Changes Firms

State Ethics Opinions *(*Links to the ethics opinions websites for the issuing state bar ethics committees are available on the ABA Center for Professional Responsibility website: www.abanet.org/cpr/links.html#states)

- *Alaska Bar Assn. Ethics Op. 2005-2 (Sept. 8, 2005) E*thical Obligations When a Lawyer Changes Firms
- *Colorado Bar Assn. Ethics Op. 116 (March 17, 2007)* Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure From a Law Firm
- *Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct No. 12-14* (May 2012)
- *Pa. Bar Assn. & Phila. Bar Assn. Joint Formal Op. 2007-300 (June 2007)* Ethical Obligations When a Lawyer Changes Firms
- *D.C. Bar Legal Ethics Opinion 273 (1997)* Ethical Considerations of Lawyers Moving from One Practice Firm to Another

Fla. Rules of Prof'l Conduct R. 4-5.8(c)(1) (www.floridabar.org)

Conflicts Screening
ABA Formal Op. 09-455 (2009) Disclosure of Conflicts Information When Lawyers Move Between Law Firms

Client Files
Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct Nos. 94-13 and 94-14 (January 1995) (guidance on which materials in a client's file a lawyer must provide copies of to the client and who bears the expense) (www.isba.org)

Rule 5.6 and Restrictive Covenants
Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct No. 97-09 (May 1998)

Sample Forms

CHECKLIST FOR LEAVING A LAW FIRM

☐ Review your firm's partnership, shareholder or employment agreement concerning provisions made in advance for departing lawyers.

☐ Read and review the *Dowd & Dowd* case. This case will guide you in what pre-departure actions you may take in anticipation in setting up or going to a competing law firm.

☐ Review your caseload and determine:

- ☐ when you will notify the firm of your intended departure;
- ☐ when clients will be notified of your departure;
- ☐ who will be notified of you departure, *i.e.*, current client matters or all clients matters, including former clients, for which you had primary responsibility;
- ☐ what will be contained in the notification letter to clients; and
- ☐ who will send it.

☐ Compile a list of client matters for which you were the originating and/or responsible attorney and include:

- ☐ addresses, phone numbers, and other contact information related to each file;
- ☐ all active client matters, the current status of each matter and any important upcoming deadlines and dates;
- ☐ all active client matters pending before a tribunal;
- ☐ all clients that you believe should be notified of your departure and which of those clients you would like to take with you and/or those you intend to leave behind with the old firm;

☐ any funds deposited into the firm's trust account that have not been earned or expended;

☐ any outstanding accounts receivable, unbilled disbursements; and

☐ any work in progress, and any case management issues.

☐ Discuss with the firm the best procedure to notify clients regarding your departure. You and the firm should try to jointly notify clients by letter. If not possible, clients may be notified separately by the firm and you. The notification should advise the client of the change in the representation and should not be in the form of a solicitation for the client's business.

☐ Notification letter to clients affected your departure, prepared and sent either jointly or individually, should be professional in nature and tone and include the following elements:

☐ Inform the client that you are leaving the firm and when.

☐ Indicate where you are going.

☐ If it is an option, notify the client that they may stay with the firm.

☐ If it is an option, notify the client that they may go with you.

☐ Include a form authorizing the transfer of the client's file and trust funds if the client's choice is to go with you, or authorizing the client's matter to remain with the firm. Include a return envelope for the authorization.

☐ If the client will not have any of the above options because you are not continuing the same area of practice, the new firm you are going to may have a conflict, or the firm from which you have left does not have a lawyer that handles that area of practice, it should be clearly explained to the client as well as offering an alternative option.

☐ Notify the client that they may elect to choose any other lawyer or law firm.

☐ Clarify any critical information regarding the client's matter.

☐ Explain what will happen to client funds deposited in the firm's trust account or balances that are due.

☐ Inform the client where their file is currently located and how they may retrieve it, if they so desire, or how the file may be transferred.

☐ Notify the client about the lawyer who is currently handling their matter in the interim.

☐ Prepare and file any necessary motions seeking permission to withdraw or for substitution of counsel in any proceedings pending before a tribunal as well as advising all other counsel of any change in the representation.

☐ Agree on how the firm staff will handle calls from clients or potential clients after you have left the firm. The old firm must not mislead clients or withhold information.

☐ Notify the ARDC of your change of address or change your address on the ARDC's website.

☐ Arrange for your name to be removed from all firm's bank accounts, including trust accounts, if applicable.

☐ If you and the firm from which you are departing are not able to resolve differences concerning your departure, consider hiring an independent mediator or arbitrator to assist with a resolution.

JOINT CLIENT LETTER FROM FIRM AND DEPARTING ATTORNEY

DISCLAIMER: Lawyers using these forms should do so very carefully to ensure that the language finally used fits the particular situation for which they are designed. It is not the intent of these forms to suggest or establish practice standards.

Re: [client/matter name]

On [date], [departing lawyer] [is leaving/left] our firm to [join the law firm of [name]]/[commence practice as a sole practitioner].

Inasmuch as [departing lawyer] was your designated lawyer on the above matter, we are required by the Illinois Rules of Professional Conduct to inform you that you have the right to choose to have [departing lawyer] continue in [his/her] new capacity to represent you in this matter, **or** you may have our firm continue to represent you, in which case the file will be handled by [firm lawyer], **or** you can choose to retain an entirely new lawyer.

If you wish to have [departing lawyer] **or** a new lawyer continue to represent you, arrangements to secure your outstanding account with us will have to be made before the file can be released to [departing lawyer] **or** new lawyer.

[If applicable: You may be liable for fees and costs for services already provided by the firm.]

[If applicable: Any retained/unspent fees or costs currently held by the firm will be promptly returned or transferred to [departing lawyer] or [new lawyer] as you designate.

Please advise [departing lawyer] and us, as quickly as possible, of your decision so that continuity in your representation is assured. You may do so by indicating your choice below and returning a signed and dated copy in the enclosed stamped envelope. Please retain the additional copy of this designation letter for your records.

Yours truly,

[for the firm]

Instructions

- ❑ I wish my file to stay with [name of former firm]
- ❑ I wish my file and trust account balance to be transferred to [name of departing lawyer]
- ❑ I will retain new counsel and have them contact [name of former firm].

Adapted from Florida Bar Ethics Department, Law Office Management Assistance Department (LOMAS). Reprinted with permission.

UNILATERAL LETTER TO CLIENTS FROM DEPARTING ATTORNEY

DISCLAIMER: Lawyers using these forms should do so very carefully to ensure that the language finally used fits the particular situation for which they are designed. It is not the intent of these forms to suggest or establish practice standards.

Dear [client]:

Effective [date], I became a [partner/shareholder/member] of [name + address of new law firm], having withdrawn from [name of law firm]. My decision represents an opportunity to broaden my experiences, and should not be construed as adversely reflecting in any way on my former firm.

I want to be sure that there is no disadvantage to you, as the client, from my move. The decision as to how the matters I have worked on for you are handled, and who handles them in the future, will be completely yours. Whatever you decide will be determinative.

Sincerely,
[name of departing attorney]

Please, at you earliest opportunity:

(1) Check the appropriate statement reflecting your wishes.
(2) Retain one of the two copies of your directive contained herein for your records.
(3) Return one copy in the herein provided prepaid addressed envelope. To best protect your interest and promote continuity of representation, pleas respond quickly.

[ ] I wish to continue being represented by [departing attorney]. Please transfer to [him/her], at the above stated address all records, files and property in the possession of [name of former firm] as quickly as possible.

[ ] I wish to continue being represented by [name of former firm]. Please have a firm representative contact me to discuss continuity of representation.

[ ] I wish to now be presented by ____________________________
Name and Address of other Lawyer __________________________

Irrespective of your choice, you remain responsible for any fees and costs already incurred. Any fees or costs may be deducted from any trust fund balance held by the firm. Should photocopying of documents be required you will be charged ______ cents per copy.

_____________________________ ________________________ ___/___/____
Printed Name Signature Date

Adapted from Florida Bar Ethics Department, Law Office Management Assistance Department (LOMAS). Reprinted with permission.

ACKNOWLEDGMENT OF RECEIPT OF FILE

I hereby acknowledge that I have received a copy of my file from the law office of ____[name].

[I understand that [Affected Lawyer] has [died, was disbarred, is disabled or is missing.] [I have been notified that I should retain substitute counsel immediately to handle any ongoing legal matters in which I am involved.]

____

[Name]

____

[Date]

AUTHORIZATION FOR TRANSFER OF CLIENT FILE

I hereby authorize the law office of ______________________________ to deliver a copy of my file to my new attorney at the following address:

____

____

____

____

____
Client Name

____
Date

181 Ill.2d 460, 230 Ill.Dec. 229, 693 N.E.2d 358 (1998)

DOWD & DOWD, LTD., Appellee and Cross-Appellant,
v.
Nancy J. GLEASON et al., Appellants and Cross-Appellees.

No. 82347.
Supreme Court of Illinois.
March 19, 1998.

Appellate court judgment affirmed in part and reversed in part; circuit court judgment affirmed in part and reversed in part; cause remanded. (284 Ill.App.3d 915, 220 Ill.Dec. 37, 672 N.E.2d 854)

Frank K. Heap, Bell, Boyd and Lloyd, Chicago, Jeffrey M. Marks, Chicago, for Nancy J. Gleason.

Douglas G. Shreffler, Chicago, for Douglas G. Shreffler.

Scott J. Szala, Winston & Strawn, Chicago, for Dowd and Dowd, Ltd.

Dennis A. Rendleman, Illinois State Bar Association, Springfield, for Amicus Curiae, Illinois State Bar Association.

Justice MILLER delivered the opinion of the court:

The plaintiff, Dowd & Dowd, Ltd., a law firm, brought this action against two of its former members, Nancy J. Gleason and Douglas G. Shreffler, and the law firm that they formed, Gleason, McGuire & Shreffler, following their departure from Dowd & Dowd. The plaintiff sought imposition of a constructive trust on the new firm's fee income, an accounting, and compensatory and punitive damages for breach of fiduciary duty, breach of contract, and other theories of recovery. Gleason and Shreffler filed a counterclaim, seeking amounts due under a stock repurchase agreement and sanctions. The parties submitted cross-motions for summary judgment. The trial judge denied the defendants' request for sanctions and denied the defendants' motion for summary judgment on the part of the plaintiff's second-amended complaint that sought recovery for breach of fiduciary duty; with regard to that count, the trial judge certified a question of law. The trial judge otherwise ruled in favor of the defendants on the issues then contested. The plaintiff appealed, and the appellate court affirmed in part and reversed in part. 284 Ill.App.3d 915, 220 Ill.Dec. 37, 672 N.E.2d 854. We allowed the defendants' petition for leave to appeal (166 Ill.2d R. 315(a)), and the plaintiff additionally raises here several issues decided adversely to it by the appellate court (155 Ill.2d R. 318(a)).

Because of the procedural posture of this case, the summary of relevant facts must be derived from the pleadings, depositions, and affidavits on file. These facts are fully summarized in the appellate court opinion and will receive only brief restatement here.

The law firm of Dowd & Dowd was organized as a professional corporation. Ownership of the firm consisted of 72 shares, which were divided in the following manner: Michael Dowd, 35 shares; Nancy Gleason, 10 shares; Kenneth Gurber 10 shares; Robert Yelton III, 10 shares; and Douglas Shreffler, 7 shares. Dowd, however, had obtained from each of the other owners a proxy giving him the right to vote one of that person's shares, and therefore Dowd effectively controlled a total of 39 shares, while the four other owners together controlled a total of 33 shares.

The firm's principal client prior to the split up was Northbrook Excess and Surplus Insurance Company, a subsidiary of the Allstate Insurance Company. Billings to that client were more than $6 million in 1990, representing about 58% of Dowd & Dowd's total revenue for that year. The work for Allstate mainly involved environmental coverage.

By November or December 1990, the members who were planning to leave the Dowd firm had obtained office space, furniture, telephones, and other equipment preparatory to their departure. They had also presented their business plan to Harris Bank, which had approved a line of credit for the new firm, to be known as Gleason, McGuire & Shreffler.

On December 31, Gleason and Shreffler resigned from Dowd & Dowd, delivering the news to Dowd in person at his home. Later that day they went to Allstate's offices, and there they talked to two executives, Lynn Crim and George Riley; Crim was vice-president of Allstate's claims department, and Riley was director of the company's environmental claims department. Crim and Riley had authority to choose counsel to represent Allstate, and at the meeting on December 31 Gleason and Shreffler obtained from them responsibility for handling Allstate's cases that were currently with Dowd & Dowd. In the weeks that followed, the new firm of Gleason, McGuire & Shreffler hired a number of persons previously employed at Dowd & Dowd, including associate lawyers and office personnel.

The plaintiff sought recovery from the defendants on a variety of theories, and the defendants filed a counterclaim. The plaintiff's second-amended complaint comprised seven counts. Count I was against Gleason and Shreffler individually for breach of fiduciary duty. Count II was against Gleason and Shreffler for breach of contract-the employment agreements signed by Gleason and Shreffler. Count II alleged several distinct breaches by the defendants, including their failure to provide 90 days' notice of their departure, as required by the agreement, their subsequent solicitation of Dowd & Dowd clients, prohibited by the noncompetition provision in the agreement, and their subsequent solicitation of Dowd & Dowd personnel, also prohibited by the agreement. Count III was against Gleason, Shreffler, and their new firm, Gleason, McGuire & Shreffler, and alleged tortious interference with contractual relations, based on their subsequently obtaining Allstate as a client. Counts IV and V, which are not at issue in this appeal, sought recovery from Gleason, Shreffler, and their new firm on theories of tortious interference with contractual relations for hiring Dowd personnel and obtaining Dowd clients. Count VI, brought against Gleason, Shreffler, and their new firm, alleged civil conspiracy. Count VII, not at issue in this appeal, sought recovery from Gleason, Shreffler, and their new firm on a theory of willful and wanton misconduct. The defendants answered the second-amended complaint, alleged a number of affirmative defenses, and filed a five-count counterclaim.

The parties later filed cross-motions for summary judgment. The parties submitted extensive evidence in support of their respective motions, including affidavits, transcripts of depositions, and other documents. The plaintiffs attempted to show that the defendants, prior to their departure from the Dowd firm, had engaged in extensive preparations for establishing their new firm. We have already noted some of the steps taken by the defendants. The plaintiff also submitted evidence to show that the defendants, while still employed by the Dowd firm, had obtained a federal employer identification number and had discussed their new venture with members of the Dowd & Dowd staff.

After protracted proceedings, the trial judge entered an order that granted the following relief: summary judgment in favor of the firm Gleason, McGuire & Shreffler on counts III (interference with prospective advantage), VI (civil conspiracy), and VII (willful and wanton conduct) of the plaintiff's second-amended complaint; summary judgment in favor of Gleason and Shreffler on counts II (breach of contract) and III (tortious interference with prospective economic advantage) of the second-amended complaint; and denial of defendants' motion for sanctions. The judge denied Gleason and Shreffler's motion for summary judgment on count I (breach of fiduciary duty) and certified a question of law, pursuant to Supreme Court Rule 308(a) (155 Ill.2d R. 308(a)), regarding that count. The judge also entered judgment in favor of Gleason for $100,000 and in favor of Shreffler for $70,000 on the part of the defendants' counterclaim seeking compensation for a breach of a share repurchase agreement in their employment contracts.

The appellate court accepted the question of law certified by the trial court. Separately, the plaintiff appealed the portions of the judgment adverse to it, and the defendant appealed the denial of sanctions. As to the certified question, the appellate court concluded that the plaintiff had stated a cause of action for breach of fiduciary duty, based on evidence of the defendants' pretermination activities. With respect to the other issues that the parties raise before this court, the appellate court upheld the dismissal of count VI, which seeks recovery against the new firm on a conspiracy theory; reinstated count III, seeking recovery on a theory of tortious interference with prospective economic advantage; reinstated the portion of the count II seeking recovery on a breach of contract theory for the defendants' failure to provide written notice of their departure from the Dowd firm; affirmed the trial court's grant of summary judgment to the defendants on the portion of count II seeking recovery on a breach of contract theory for soliciting clients after termination of their employment; and denied the defendant's requests for sanctions. We allowed the defendants' petition for leave to appeal. 166 Ill.2d R. 315(a). Pursuant to Rule 318, the plaintiff also raises several issues decided against it by the appellate court. 155 Ill.2d R. 318. We granted leave to the Illinois State Bar Association to submit a brief as amicus curiae in support of the defendants. 155 Ill.2d R. 345. For the reasons set out below, we now affirm in part and reverse in part the judgments of the appellate and circuit courts, and we remand the cause to the circuit court of Cook County for further proceedings.

I

The trial judge certified the following question of law, pursuant to Supreme Court Rule 308 (155 Ill.2d R. 308)

"Whether the plaintiff law firm, a professional corporation, has a cause of action for breach of fiduciary duties against its former Officers or Directors who:

a. Departed the plaintiff firm without notice to the other Officers or Directors;

b. Had accomplished substantial planning of their departure before leaving; and planned to solicit business or clients of Dowd and Dowd;

c. Had made substantial arrangements, in terms of new office space, telephones, equipment, obtaining a federal employer identification number, etc., without knowledge of the Officers or Directors;

d. Where more than one Officer or Director, and other support staff, left simultaneously, from the Plaintiff firm;

e. But, where there is no evidence that legal clients or legal business were solicited or sought before the departure. On the other hand, where there is no evidence that the defendants, departing Officers and Directors[,] solicited clients or sought the firm's legal business before departing, should the claim of plaintiff, a professional corporation[,] be dismissed (the Court certifies subparagraph e above over Plaintiff's objection as to the question of the existence of solicitation)."

Count I of the second-amended complaint forms the basis for the certified question, which asks us to assume the existence of certain facts. Although the matter is framed as a question of law, we believe that any answer here would be advisory and provisional, for the ultimate disposition of count I will depend on the resolution of a host of factual predicates. For proof that factual issues remain, we need look no further than the trial judge's ruling on the defendants' motion for summary judgment on this count: in denying the motion, the trial judge stated that issues of material fact remained, which precluded entry of summary judgment. The judge observed that at some point departing partners are duty-bound to disclose their plans to leave a firm; the judge noted a number of factual questions, such as the number of predeparture meetings by the departing members, the number of persons leaving the firm, and the taking of firm documents, as bearing on this issue.

Moreover, the circumstances mentioned in the certified question do not represent the full range of allegations underlying the count, even though the certified question was seemingly designed to incorporate the various allegations of this part of the complaint. Although the question assumes the answers to certain allegations, it omits others. For example, the question notes that more than one person left the firm, without specifying how many did so. Elsewhere, the question states that "substantial planning" occurred prior to the defendants' departure from the firm, but left unspecified are the types of things that the defendants did in preparing for their new venture. The parties sharply dispute many of these matters, and it is apparent that a number of unresolved variables are at work in this case, making resolution of the certified question meaningless at this point in the proceedings. Thus, given the provisional nature of the inquiry, the importance of the issue involved, and the absence of a fully developed factual record, we do not believe that it is necessary or advisable for us to attempt to provide an answer to the question framed by the trial judge.

Still, it is appropriate here to set out, in a general way, some of the relevant ethical guideposts. In the proceedings below, Judge Gillis observed that it is difficult to locate the "fence," or dividing line, between permissible and impermissible conduct in these circumstances. We agree with the trial judge's assessment that these boundaries cannot be drawn with mathematical precision. The New York Court of Appeals aptly summed up the state of the law in this area when it observed, "It is unquestionably difficult to draw hard lines defining lawyers' fiduciary duty to partners and their fiduciary duty to clients." Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 119, 629 N.Y.S.2d 1009, 1013, 653 N.E.2d 1179, 1183 (1995).

Lawyers who are preparing to leave a law firm face a dilemma, caught between the fiduciary obligations they owe the other members of their firm, on one hand, and the duty of being able to adequately represent clients who choose to follow them to their new place of employment, on the other hand. As a practical matter, then, cases have recognized that some preliminary preparations by lawyers who are leaving a firm must be allowed, and that it is appropriate for lawyers in these circumstances to make arrangements, prior to their departure, to obtain new office space, equipment, and other materials necessary for the practice of law. Bray v. Squires, 702 S.W.2d 266, 270 (Tex.Ct.App.1985); see also Restatement (Second) of Agency § 393, Comment e (1958) (recognizing that agent may make certain preparations for own venture prior to termination of agency). Discussing a similar question, the Supreme Court of Massachusetts stated, in Meehan v. Shaughnessy, 404 Mass. 419, 435, 535 N.E.2d 1255, 1264 (1989):

"Here, the judge found that Meehan and Boyle made certain logistical arrangements for the establishment of MBC [i.e., the new firm]. These arrangements included executing a lease for MBC's office, preparing lists of clients expected to leave Parker Coulter for MBC, and obtaining financing on the basis of these lists. We believe these logistical arrangements to establish a physical plant for the new firm were permissible * * *, especially in light of the attorneys' obligation to represent adequately any clients who might continue to retain them on their departure from Parker Coulter."

For the reasons mentioned, we do not believe that lawyers are necessarily bound by the same fiduciary constraints that apply to nonlawyer officers and directors who are seeking to leave positions in commercial entities. *See* Veco Corp. v. Babcock, 243 Ill.App.3d 153, 160-61, 183 Ill.Dec. 406, 611 N.E.2d 1054 (1993); Preferred Meal Systems, Inc. v. Guse, 199 Ill.App.3d 710, 724-25, 145 Ill.Dec. 736, 557 N.E.2d 506 (1990).

One of the major questions underlying the present action is whether the defendants solicited the Allstate business for their new firm before they left Dowd & Dowd. The question certified by the trial judge assumes that no pretermination solicitation occurred; the final order entered by the judge, which contains the certified question and rulings on the other counts, includes a finding that there is "no credible or admissible evidence that defendants solicited the Allstate account prior to December 31, 1990," the date of their departure from the Dowd firm. The plaintiff contends that the evidence demonstrates that the defendants engaged in pretermination solicitation, while the defendants argue that there is no competent evidence of pretermination solicitation. Strictly speaking, the judge's finding is not before us. As noted previously, the certified question arises from count I, on which the trial judge denied the defendants' motion for summary judgment. The denial of a motion for summary judgment is not a final judgment (Pagano v. Occidental Chemical Corp., 257 Ill.App.3d 905, 909, 196 Ill.Dec. 24, 629 N.E.2d 569 (1994)), for it does not terminate the litigation on that part of the complaint (*see* In re Marriage of Verdung, 126 Ill.2d 542, 553, 129 Ill.Dec. 53, 535 N.E.2d 818 (1989)), and therefore an order denying summary judgment is not by itself appealable. The issue before us concerning count I is framed by the certified question, which, as we have noted, assumes that no solicitation occurred. Still, we may go beyond the limits of a certified question in the interests of judicial economy (Bright v. Dicke, 166 Ill.2d 204, 208, 209 Ill.Dec. 735, 652 N.E.2d 275 (1995); Schrock v. Shoemaker, 159 Ill.2d 533, 537, 203 Ill.Dec. 787, 640 N.E.2d

937 (1994)), and we believe that such action is appropriate here.

We recognize, as the defendants point out, that Lynn Crim and George Riley of Allstate testified in their depositions that they did not know about the defendants' plans to form a new firm until December 31, 1990, when the defendants resigned from Dowd & Dowd. The plaintiff refers to other evidence, however, to support its theory that Allstate was obtained as a client prior to the defendants' departure. The plaintiff cites the testimony of Leslie Henkels, who was defendant Gleason's chief paralegal at Dowd & Dowd. Henkels testified in her deposition that before December 31, 1990, she learned from Gleason, Shreffler, or one of Gleason's sisters, Judith, that Allstate would be a client of the new firm. A statement to Henkels by either of the individual defendants, Gleason or Shreffler, would be an admission, and therefore Henkels' testimony regarding that would be admissible. Henkels further testified that on December 31, 1990, Gleason faxed her a letter over George Riley's signature transferring Allstate files from Dowd & Dowd to the new firm; according to Henkels, Gleason instructed her to copy the letter and to place it on the desks of non-departing lawyers at Dowd & Dowd. Henkels further testified that Gleason called back later that day and, on what Gleason characterized as advice of counsel, told Henkels to collect the copies of the letter she had previously distributed and to destroy them. Henkels had a third telephone conversation with Gleason on December 31; on that occasion, Gleason told Henkels that they were on their way to Michael Dowd's house to tell him of their resignation from the firm. The plaintiff argues that Henkels' deposition undercuts the defendants' contention that on December 31, 1990, the defendants informed Michael Dowd of their departure before they talked to the Allstate executives.

The plaintiff also cites a credit memorandum prepared by David J. Varnerin, of Harris Bank. The memorandum states, "Allstate has been urging the Gleasons to break away from Dowd & Dowd and start their own firm"; "Allstate stands ready to give them as much business as they can handle"; "Discussions have been held with their principal client-Allstate. The firm has been assured that their invoices will be paid promptly within 30 days." These statements lend support to the plaintiff's contention that the defendants had obtained Allstate as a client prior to their departure from Dowd & Dowd.

Opposing this interpretation, the defendants point to an affidavit submitted by Varnerin in the proceedings below. In the affidavit, Varnerin states that no one associated with the new firm told him that Allstate or any other Dowd client had been contacted regarding the plan to leave the Dowd firm. Varnerin also asserts that his statement concerning Allstate's readiness to give them business was simply his conclusion. Regarding the statement in the credit memorandum, "Discussions have been held with their principal client-Allstate. The firm has been assured that their invoices will be paid promptly within 30 days," Varnerin insists in his affidavit that he was referring only to discussions that Dowd & Dowd had with Allstate, and that the word "firm" in the second sentence- "The firm has been assured * * *" refers to Dowd & Dowd. We would observe, however, that the remainder of the paragraph in the credit memorandum conflicts with the explanation later given in Varnerin's affidavit. In the credit memorandum, the paragraph goes on to state, "And, since the firm will have the prior firm's office administrator, we can reasonably assume that bills will be generated and sent in a very prompt manner." Dowd & Dowd obviously was the "prior firm." Although the affidavit submitted by Varnerin was not directly contradicted by anything filed by the plaintiff, the affidavit and credit memorandum seem in certain respects to be irreconcilable.

In rejecting the request of the defendants for sanctions, which was based on the defendants' argument that the action was not well grounded in fact, the appellate court explained, "[P]laintiff was not obligated to believe Riley and Crim and, in fact, elicited credible testimony from other witnesses refuting Riley's and Crim's claims." 284 Ill.App.3d at 935, 220 Ill.Dec. 37, 672 N.E.2d 854. This statement is also apt here, and we believe that questions of fact remain concerning the defendants' possible pretermination solicitation of Allstate.

Cases have recognized that pretermination solicitation of clients by members of an existing firm for the benefit of a new firm rises to a breach of fiduciary duty. Vowell & Meelheim, P. C. v. Beddow, Erben & Bowen, P.A., 679 So.2d 637, 639 (Ala.1996); In re Silverberg, 81 A.D.2d 640, 641, 438 N.Y.S.2d 143, 144 (1981). As one commentator has explained:

"Although the ethical principles relating to the attorney-client relationship constrain a fairness inquiry concerning postwithdrawal competition by a former agent, pretermination competition by firm members is another matter. The principle of client choice is not, or at least should not be, so overpowering that it shields all pretermination competition by members of a firm." R. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving, 67 Tex. L.Rev. 1, 27 (1988).

The case law supports the trial judge's view, expressed in the proceedings below, that while lawyers who are planning to leave a firm may take preliminary logistical steps of obtaining office space and supplies, they may not solicit clients for their new venture. In Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 119-20, 629 N.Y. S.2d 1009, 1013, 653 N. E.2d 1179, 1183 (1995), the New York Court of Appeals observed:

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

Thus, proof of pretermination solicitation of clients by the defendants may establish a breach of their fiduciary duties.

Although much of the focus in the briefs is on the question of pretermination solicitation, the plaintiff points to other acts as also supporting its argument that the defendants breached their fiduciary duty. We note in passing some of the other allegations in the complaint, which might or might not be true. For example, the plaintiff alleges that the departing members improperly decided to pay off the existing firm's line of credit, in an effort to reduce their own potential liabilities and to improve their positions as borrowers for their new firm. The plaintiff believes that this decision by the departing members was a breach of the fiduciary duty they owed to the existing firm. In addition, the plaintiff alleges that the departing members usurped a corporate opportunity by hiring for the new firm persons who had been interviewed for positions at the Dowd firm. If established, this allegation could also support a claim for breach of fiduciary duty.

The record on appeal thus discloses a number of factual variables which present a range of possible conduct by the defendants but remain unresolved. Relevant here are the following comments by the court in Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179 (1995):

"Given the procedural posture of the case before us, plainly this is not an occasion for drawing the hard lines. Factual variations can be crucial in determining whether an attorney's duties have been breached, and we cannot speculate as to what conclusions will follow from the facts yet to be found in the case before us. We can, however, set out certain broad parameters * * *.

At one end of the spectrum, where an attorney is dissatisfied with the existing association, taking steps to locate alternative space and affiliations would not violate a partner's fiduciary duties. That this may be a delicate venture, requiring confidentiality, is simple common sense and well illustrated by the eruption caused by defendants' announced resignation in the present case. As a matter of ethics, departing partners have been permitted to inform clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice [citations]. Ideally, such approaches would take place only after notice to the firm of the partner's plans to leave [citations].

At the other end of the spectrum, secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties [citations]." Graubard, 86 N.Y.2d at 120-21, 629 N.Y.S.2d at 1013-14, 653 N.E.2d at 1183-84.

This is a fact-intensive inquiry, and on remand the finder of fact will have to resolve a number of factual disputes before determining whether the defendants breached their fiduciary duty. Because of the provisional nature of the inquiry and the many unresolved factual questions that remain, mentioned above, we do not attempt on this occasion to offer an answer to the question certified by the trial judge.

II

We now turn to the other issues raised in this appeal. Count II of the plaintiff's second- amended complaint sought recovery from the defendants for breach of contract on several distinct grounds. The contracts involved were the employment agreements signed by Gleason and Shreffler as employees of the Dowd firm. Relevant here are the allegations in count II that the defendants breached their employment contracts by failing to give the Dowd firm 90 days' notice prior to their departures, by later attempting to solicit clients of the Dowd firm, and by later attempting to solicit other employees of the Dowd firm. According to count II, the employment agreements required the defendants to provide 90 days' notice of their intended departure from the firm and barred the defendants from subsequently representing Dowd & Dowd clients. The trial court granted summary judgment for the defendants on all three theories of recovery. On appeal, the plaintiff challenged the rulings with respect to the 90 day notice provision and the noncompetition covenant; the plaintiff did not challenge the ruling with respect to the solicitation of Dowd & Dowd employees. The appellate court held in favor of the plaintiff on the 90 day notice provision and in favor of the defendants on the noncompetition covenant. The parties challenge the appellate court's determinations, and we will consider these questions in turn.

A

The defendants argue that the appellate court erred in ruling in favor of the plaintiff on the portion of count II of the second-amended complaint that alleged that the defendants breached their employment agreements by failing to give advance notice of their intended departures from the Dowd firm. We agree with the defendants that they did not violate the employment agreements, given the timing of their departures.

Paragraph 4 of the employment agreements signed by Gleason and Shreffler states:

"4. Term of Employment. The term of the Employee's employment hereunder shall be from the date hereof until the end of the Corporation's current fiscal year and from year to year thereafter, subject to termination at any time upon 90 days['] prior written notice either by the Corporation (acting by unanimous vote of the Board of Directors, excluding the Employee if he is a

Board member) to the Employee or by the Employee to the Corporation."

The Dowd firm's fiscal year ended on December 31. The trial judge found that the defendants did not violate the notice provisions in their employment contracts; the judge construed the provision to mean that no notice at all was required during the last quarter of the year, an interpretation not advanced by the defendants. The appellate court took a different view, concluding that 90 days' written notice was always required, even at the end of the year.

The defendants argue that the terms of the contract must be enforced as they appear, and that the appellate court's interpretation departs from the text of the provision and renders a portion of it surplusage. The defendants maintain that notice is not required on the last day of the year, for the employment term expires then by its own terms. In response, the plaintiff maintains that the appellate court's requirement of 90 days' notice correctly fulfills the parties' intent by ensuring greater continuity in representing and serving clients when attorneys decide that they wish to leave.

The terms of an agreement, if not ambiguous, should generally be enforced as they appear (P.A. Bergner & Co. v. Lloyds Jewelers, Inc., 112 Ill.2d 196, 203, 97 Ill.Dec. 415, 492 N.E.2d 1288 (1986)), and those terms will control the rights of the parties (Midland Management Co. v. Helgason, 158 Ill.2d 98, 103, 196 Ill.Dec. 671, 630 N.E.2d 836 (1994)). Moreover, any ambiguity in the terms of a contract must be resolved against the drafter of the disputed provision. Duldulao v. St. Mary of Nazareth Hospital Center, 115 Ill.2d 482, 493, 106 Ill.Dec. 8, 505 N.E.2d 314 (1987).

We agree with the defendants that the terms of the agreement are not ambiguous. As the defendants observe, the agreement affords an employee two alternative ways of terminating his or her employment: first, by not renewing that employment when it expires by its own terms each December 31, the close of the firm's fiscal year, or, second, by providing 90 days' written notice of termination. When Gleason and Shreffler informed Michael Dowd on December 31, 1990, that they would no longer be members of the firm, they fulfilled their obligations under the language of paragraph 4 of the employment contract. To require 90 days' notice in all instances, as the plaintiff argues and the appellate court held, makes meaningless the contract phrase "from year to year thereafter," regarding the period of employment. Courts will generally avoid interpretations that render contract terms surplusage (Hufford v. Balk, 113 Ill.2d 168, 172, 100 Ill.Dec. 564, 497 N.E.2d 742 (1986)), and accordingly we reject the plaintiff's interpretation.

B

The plaintiff, seeking cross relief, contends that the appellate court erred in refusing to enforce the noncompetition covenants contained in Gleason's and Shreffler's employment agreements. As we have noted, these covenants formed one of the bases for the plaintiff's breach of contract claim, in count II, against Gleason and Shreffler.

The noncompetition clause at issue states:

"10. Nonsolicitation. During the term of this Agreement and for a period of two (2) years following the termination of this Agreement, the Employee will not directly or indirectly, solicit or endeavor to entice away any clients of the Corporation without the prior written consent of the Corporation. For the purpose of this subsection, the term 'solicit' shall mean to call or contact or to lend assistance in any way to any person or entity in calling or contacting a client of the Corporation in a manner detrimental to the business of the [C]orporation * * *."

The appellate court believed that the provisions violated Rule 5.6 of the Rules of Professional Conduct and that Rule 5.6 therefore precluded their enforcement. 284 Ill.App.3d at 932-33, 220 Ill.Dec. 37, 672 N.E.2d 854; see also Stevens v. Rooks Pitts & Poust, 289 Ill.App.3d 991, 225 Ill.Dec. 48, 682 N.E.2d 1125 (1997) (following decision of appellate court in this case and applying rule to preexisting contract). Rule 5.6, which took effect August 1, 1990, after the employment agreements in question were signed, provides:

"A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement * * *." 134 Ill.2d R. 5.6(a).

The plaintiff contends that Rule 5.6 should not be applied to invalidate contract clauses entered into prior to the effective date of the rule, noting that Gleason signed her employment agreement in 1988 and that Shreffler signed his in 1989. The plaintiff maintains that the language of the rule indicates that it is not to be given retroactive effect and, moreover, that retroactive operation would result in an unconstitutional impairment of contracts.

We believe that Rule 5.6 may have retroactive effect and therefore bars the present enforcement of noncompetition covenants entered into prior to the effective date of the rule. Contrary to the plaintiff's argument, the prohibition of the rule is not expressed in the future tense and is not limited by its terms to contract provisions formed after its effective date. We recognize, of course, that Rule 2-108 of the Code of Professional Responsibility, the predecessor to Rule 5.6, did not contain a similar prohibition. Still, "the law cannot enforce a contract which it prohibits" (Sibley v. Health & Hospitals' Governing Comm'n, 22 Ill.App.3d 632, 637, 317 N.E.2d 642 (1974)), and we believe that enforcement of the provisions at issue would violate the important considerations of public policy that underlie the prohibition found in Rule 5.6. The rule is designed both to afford clients greater freedom in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility. 2 G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 5.6:201, at 824 (Supp.1997). Consistent with that rationale, we conclude that the noncompetition covenants in the employment agreements conflict with Rule 5.6 and may not be enforced.

The plaintiff also contends that application of Rule 5.6 to the contract provisions at issue here would result in an unconstitutional impairment of contracts, in violation of the Illinois Constitution (Ill. Const. 1970, art. I, § 16 ("No * * * law impairing the obligation of contracts * * * shall be passed")). As a general principle, however, judicial decisions are not subject to the prohibition against impairment of contracts. Phelps v. Elgin, Joliet & Eastern Ry. Co., 28 Ill.2d 275, 280, 191 N.E.2d 241 (1963); Prall v. Burckhartt, 299 Ill. 19, 42, 132 N.E. 280 (1921). Thus, if the promulgation of Rule 5.6 is understood to be a judicial decision and not an act of legislation, then the plaintiff cannot be heard to argue that application of the rule to the contract provisions at issue here results in an unconstitutional impairment of contracts. Assuming, without deciding, that judicial action like the promulgation of a court rule may fall within the interdiction of the contracts clause, as the plaintiff suggests, we still do not believe that such an objection will lie here. In resolving this question, we will apply federal case law interpreting the corresponding provision of the United States Constitution. U.S. Const., art. I, § 10. Under this line of authority, the first step in determining whether the contract clause has been violated is to ask whether the change in law substantially impairs a contractual relationship. General Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328, 337 (1992); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736 (1978). "The severity of the impairment measures the height of the hurdle the state legislation must clear." Allied Structural Steel, 438 U.S. at 245, 98 S.Ct. at 2723, 57 L.Ed.2d at 736-37. We do not believe that the change in law at issue here operated as a substantial impairment of the parties' contract. The noncompetition provision represented a small part of the contract, and it came into play only when an employee left the Dowd firm. Accordingly, we do not believe that the mandated elimination of that provision represented an invalid impairment of contract.

Moreover, courts will not enforce contract terms that violate public policy. American Federation of State, County & Municipal Employees v. Department of Central Management Services, 173 Ill.2d 299, 317-18, 219 Ill.Dec. 501, 671 N.E.2d 668 (1996); Beneficial Development Corp. v. City of Highland Park, 161 Ill.2d 321, 330-31, 204 Ill.Dec. 211, 641 N.E.2d 435 (1994). As we have noted, the foundation for Rule 5.6 rests on considerations of public policy, and it would be inimical to public policy to give effect to the offending provisions.

III

The defendants next argue that the appellate court erred in reinstating count III of the plaintiff's second amended complaint, which sought recovery on a theory of tortious interference with prospective economic advantage. Count III alleged that the defendants, prior to their departure from Dowd & Dowd, improperly solicited Allstate as a client and took various steps to establish a new firm that would be capable of representing Allstate once the departure was completed. The trial judge had granted the defendants summary judgment on this count.

A motion for summary judgment may be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 1996). In ruling on a motion for summary judgment, the trial court must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party. Kolakowski v. Voris, 83 Ill.2d 388, 398, 47 Ill.Dec. 392, 415 N.E.2d 397 (1980). Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Purtill v. Hess, 111 Ill.2d 229, 240, 95 Ill.Dec. 305, 489 N.E.2d 867 (1986). Our review of an order granting summary judgment is de novo. Crum & Forster Managers Corp. v. Resolution Trust Corp., 156 Ill.2d 384, 390, 189 Ill.Dec. 756, 620 N.E.2d 1073 (1993)

In Fellhauer v. City of Geneva, 142 Ill.2d 495, 511, 154 Ill.Dec. 649, 568 N.E.2d 870 (1991), this court described the elements of a cause of action for tortious interference with prospective economic advantage: "It is generally recognized by the Illinois courts * * * that to prevail on a claim for tortious interference with a prospective economic advantage, a plaintiff must prove: (1) his reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference. [Citations.]" As the appellate court below found, although a lawyer-client relationship is terminable at the will of the client (In re Estate of Callahan, 144 Ill.2d 32, 37-38, 161 Ill.Dec. 339, 578 N.E.2d 985 (1991)), the gravamen of the charge is interference with an existing relationship, and the absence of an enforceable contract does not bar recovery (Anderson v. Anchor Organization for Health Maintenance, 274 Ill.App.3d 1001, 1013, 211 Ill.Dec. 213, 654 N.E.2d 675 (1995)).

The defendants contend that allowing the plaintiff to go forward with a cause of action under count III is incompatible with the substantial body of case law recognizing that a client may discharge an attorney at any time, with or without cause. Balla v. Gambro, Inc., 145 Ill.2d 492, 503, 164 Ill.Dec. 892, 584

N.E.2d 104 (1991); In re Estate of Callahan, 144 Ill.2d 32, 37-38, 161 Ill.Dec. 339, 578 N.E.2d 985 (1991); Rhoades v. Norfolk & Western Ry Co., 78 Ill.2d 217, 227-28, 35 Ill.Dec. 680, 399 N.E.2d 969 (1979). We do not agree.

"Third party inducement of breaches of contract or unjustifiable interference by third parties in business relationships between attorneys and clients have been held actionable in numerous cases." Herman v. Prudence Mutual Casualty Co., 41 Ill.2d 468, 472-73, 244 N.E.2d 809 (1969). The focus here is not on the conduct of the client in terminating the relationship, but on the conduct of the party inducing the breach or interfering with the expectancy. Unlike the actions involved in the cases recognizing the client's right of discharge, the plaintiff's claim here is directed not at the client, but at the party allegedly responsible for causing the termination of the relationship. Moreover, to prevail on the claim, a plaintiff must show not merely that the defendant has succeeded in ending the relationship or interfering with the expectancy, but "purposeful interference" -that the defendant has committed some impropriety in doing so. Restatement (Second) of Torts § 766B, Comment a (1979) ("In order for the actor to be held liable, this Section requires that his interference be improper"); Mittelman v. Witous, 135 Ill.2d 220, 251, 142 Ill.Dec. 232, 552 N.E.2d 973 (1989); La Rocco v. Bakwin, 108 Ill.App.3d 723, 730, 64 Ill.Dec. 286, 439 N.E.2d 537 (1982).

In the present case, the plaintiff alleges in count III of the second-amended complaint that the defendants committed the tort through their various predeparture activities. If the defendants engaged in the actions alleged by the plaintiff-and on review of an order granting summary judgment, we must assume that they did-then we believe that a cause of action for tortious interference with prospective economic advantage could lie. We believe that there are material issues of fact that preclude entry of summary judgment in favor of the defendants on this count. As we have noted, in discussing the scope and nature of the defendants' fiduciary duties, numerous factual questions exist regarding the defendants' conduct prior to their departure from the Dowd firm, including the possible solicitation of Allstate as a client, and the steps taken by the defendants in establishing their new firm.

IV

In its second and final contention as cross-appellant, the plaintiff argues that the appellate court erred in dismissing the conspiracy count, count VI, brought in the plaintiff's second-amended complaint against the new firm, Gleason, McGuire & Shreffler, formed by the departing members. The appellate court believed that the conspiracy count was duplicative of other counts of the complaint.

Illinois recognizes civil conspiracy as a distinct cause of action. Adcock v. Brakegate, Ltd, 164 Ill.2d 54, 62, 206 Ill.Dec. 636, 645 N.E.2d 888 (1994).

Although the allegations in the conspiracy count against the firm of Gleason, McGuire & Shreffler mirror allegations made elsewhere in the complaint, the elements of the cause of action are distinct, and are not subsumed under another theory of recovery pleaded by the plaintiff. In addition, Gleason, McGuire & Shreffler is a named defendant in the civil conspiracy count, and not elsewhere. We agree with the plaintiff that dismissal of the conspiracy count as duplicative of other theories of recovery alleged in the complaint is, at this point in the proceedings, premature. A plaintiff may plead and prove multiple causes of action, though it may obtain only one recovery for an injury. Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 159 Ill.2d 137, 172, 201 Ill.Dec. 71, 636 N.E.2d 503 (1994); Dial v. City of O'Fallon, 81 Ill.2d 548, 558, 44 Ill.Dec. 248, 411 N.E.2d 217 (1980). Here, the conspiracy count simply represents an alternative theory of liability.

V

The defendants raise one further issue on appeal, contending that the appellate court improperly denied their motions for sanctions against the plaintiff and its counsel. The defendants sought sanctions on two separate grounds, arguing that the plaintiff's circuit court pleadings and the plaintiff's appellate court brief violated rules of this court. The appellate court denied relief on both grounds, and the defendants renew here their requests for sanctions.

Supreme Court Rule 137 addresses the signing of pleadings, motions, and other papers in the circuit courts. The rule provides, in pertinent part:

"The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." 155 Ill.2d R. 137.

Rule 137 also authorizes a court to impose sanctions on lawyers and parties who violate its terms.

Because Rule 137 is penal in nature, it will be strictly construed. Reyes v. Compass Health Care Plans, 252 Ill.App.3d 1072, 1078, 192 Ill.Dec. 286, 625 N.E.2d 246 (1993); see Yassin v. Certified Grocers of Illinois, Inc., 133 Ill.2d 458, 467, 141 Ill.Dec. 791, 551 N.E.2d 1319 (1990) (discussing predecessor provision, section 2-611 of the Code of Civil Procedure (Ill.Rev.Stat.1987, ch. 110, par. 2-611)). The decision whether to impose sanctions under Rule 137 is committed to the sound discretion of the circuit judge, and that decision will not be overturned unless it represents an abuse of discretion. Spiegel v. Hollywood Towers Condominium Ass'n, 283 Ill.App.3d 992, 1001, 219 Ill.Dec. 436, 671

N.E.2d 350 (1996); Bennett & Kahnweiler, Inc. v. American National Bank & Trust Co., 256 Ill.App.3d 1002, 1007, 194 Ill.Dec. 929, 628 N.E.2d 426 (1993).

The judge here denied the defendants' request for sanctions under Rule 137, and we cannot say that his determination was an abuse of discretion. The defendants first argue that the plaintiff initiated the present action without having made reasonable inquiry. In support of this contention, the defendants point to Michael Dowd's statement in his deposition that the present action was brought even though no investigation had been conducted into the question whether the defendants solicited the Allstate account before leaving the Dowd firm. As we have already noted, however, evidence exists supporting the plaintiff's claim that pretermination solicitation occurred, and therefore we do not believe that sanctions would be appropriate under this theory.

The defendants next argue that the suit was not well grounded in fact because Allstate's Riley and Crim both repeatedly denied, in their deposition testimony, that any solicitation of the client occurred before December 31, 1990, when Gleason and Shreffler left the Dowd firm. Again, as we have noted, other evidence exists that supports the plaintiff's contention; as the appellate court observed, the plaintiff "was not obligated to believe Riley and Crim." 284 Ill.App.3d at 935, 220 Ill.Dec. 37, 672 N.E.2d 854.

The defendants also argue that existing law did not support the plaintiff's breach of contract claims against Gleason and Shreffler for their alleged violations of noncompetition provisions in their employment agreements. As we concluded earlier in this opinion, the noncompetition provisions are unenforceable. We do not agree with the defendants, however, that the theory of recovery was so clearly lacking in merit that sanctions would be warranted under Rule 137.

Finally, the defendants contend that suit was brought for an improper purpose, citing Michael Dowd's comment in his deposition that he initiated the action to obstruct Gleason and Shreffler in their efforts to take away the Dowd firm's major client. We do not agree with the defendants that Dowd's remark betrays a sanctionable purpose for the litigation. The plaintiff may ultimately prevail on several theories of recovery against the defendants, and we cannot say that the action lacks a proper purpose.

Separately, the defendants argue that sanctions should be imposed for the brief filed by the plaintiff as appellant in the appellate court; the defendants contend that the statement of facts appearing in the plaintiff's brief was improperly argumentative. Supreme Court Rule 341(e)(6) requires an appellant to provide an accurate and fair statement of facts (155 Ill.2d R. 341(e)(6)); Rule 375(a) permits a court to impose sanctions on a party for violations of our appellate practice rules (155 Ill.2d R. 375(a)).

The defendants have attached to their brief before this court a copy of the disputed portions of the plaintiff's appellate court brief. We have examined the challenged brief, and we agree with the appellate court's assessment that the contents of the brief do not warrant the imposition of sanctions under Rule 375(a). 284 Ill.App.3d at 922-23, 220 Ill.Dec. 37, 672 N.E.2d 854.

For the reasons stated, the judgment of the appellate court is affirmed in part and reversed in part and the cause is remanded to the circuit court of Cook County for further proceedings not inconsistent with this opinion.

Appellate court judgment affirmed in part and reversed in part; circuit court judgment affirmed in part and reversed in part; cause remanded.

BILANDIC and HEIPLE, JJ., took no part in the consideration or decision of this case.

First Division
September 13, 2004

No. 1-01-1002

DOWD and DOWD, LTD.,		
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County
v.	)	
	)	No. 98 L 5429
NANCY J. GLEASON, DOUGLAS G. SHREFFLER,	)	
	)	
and GLEASON, McGUIRE AND SHREFFLER,	)	Honorable
	)	Loretta Douglas,
	)	Judge Presiding.
Defendants-Appellants.		

JUSTICE O'MALLEY delivered the opinion of the court:

Plaintiff, Dowd & Dowd, Ltd. (Dowd), filed suit against Nancy J. Gleason and Douglas G. Shreffler (defendants), after they resigned as shareholders (partners) of Dowd and opened a new law firm, Gleason, McGuire and Shreffler (GMS). While working at Dowd, Nancy Gleason managed the Allstate Insurance Company (Allstate) account. When the new firm was formed, Allstate moved its business to the new law firm. Dowd filed suit against defendants, alleging breach of fiduciary duty, breach of employment contract, tortious interference with prospective economic advantage and civil conspiracy.

The case was heard in a bench trial. In February 2001, the court entered a judgment in favor of Dowd and denied defendants' mistrial motion. In March 2001, the court found that there was no reason to delay enforcement or appeal. Defendants now appeal.

The following issues are presented for review by defendants: (1) whether the decision below misinterpreted the law as to attorneys and client retention;

(2) whether the decision below improperly used a finding of credibility to supercede failure of proof;

(3) whether the court erred in denying defendants' motion for a mistrial after receiving and considering inadmissible "bad acts" testimony and accusing defendants of fraud and professional misconduct, and delaying issuing its decision for 18 months; and

(4) whether the trial court's determination of damages was in error.

BACKGROUND[(1)]

Dowd & Dowd is a law firm. In 1975 or 1976, Northbrook Excess and Surplus Insurance Company, a subsidiary of Allstate, retained Dowd for advice on insurance coverage of claims that were being made against Allstate's policyholders for injuries arising from exposure to asbestos products. Nancy Gleason, one of the defendants here, joined Dowd in 1977 as an attorney and for the next 13 years became the primary person handling the Allstate account. Lynn Crim was the head of Allstate's claims department and supervisor to George Riley, a manager in the claims department. Between 1987 and December 1990, Crim spoke with Nancy Gleason on a daily basis and spoke with Mike Dowd, the senior partner, "[r]arely."

On August 7, 1990, Dowd paralegal Leslie Henkels met with Judy Gleason (an attorney at Dowd and wife of Douglas Shreffler), Nancy Gleason (an attorney and niece of principal partner Mike Dowd), and Maureen Henegan (a Dowd secretary). During that meeting, Judy Gleason indicated that Patrick Dowd (son of Mike Dowd[(2)]) was being promoted to partnership status and that she and the others were leaving the firm. On or about September 25, there was a partners meeting and Patrick's appointment was announced. Following the appointment of Patrick Dowd to partner, Nancy Gleason, Douglas Shreffler and Judith Gleason began investigating the possibility of establishing a new, separate law firm. They decided to take preliminary steps to form that firm and by December 1990, GMS had located office space, ordered furniture and equipment and initiated a banking relationship with the Harris Bank.

On December 31, 1990, Nancy Gleason and Shreffler resigned from Dowd and with Philip McGuire and Judith Gleason, started the GMS law firm. On December 31, 1990, Nancy Gleason and Shreffler went to Mike Dowd's home "in the late morning" to inform him of their resignations as officers and directors of Dowd. Crim of Allstate gave Gleason the charge of moving Allstate's cases that were currently with Dowd to the new firm. Crim testified that he learned of Gleason's new firm on December 31, 1990, "first thing in the morning."

PROCEDURAL HISTORY

Dowd brought this action against Gleason, Shreffler and GMS, seeking imposition of a constructive trust on the new firm's fee income, an accounting, compensatory and punitive damages for breach of fiduciary duty, breach of contract, and other theories of recovery. Gleason and Shreffler filed a counterclaim, seeking amounts due under a stock repurchase agreement and sanctions. The parties submitted cross-motions for summary judgment. The trial judge denied the defendants' motion for sanctions and denied their motion for summary judgment as to Dowd's breach of a fiduciary duty count, which it certified as a question of law. The trial judge otherwise ruled in favor of the defendants on the issues.

Dowd appealed, and the appellate court affirmed in part and reversed in part. Dowd & Dowd v. Gleason, 284 Ill. App. 3d 915, 672 N.E.2d 854 (1996). The appellate court held that: the trial court had authority to consider defendants' motions for summary judgment; the trial court failed to make proper findings of fact; the trial court's error in weighing the credibility of witnesses in ruling on motion for summary judgment was harmless error; complaint stated a cause of action for breach of fiduciary duty; the trial court properly dismissed the civil conspiracy claim as duplicative; the trial court properly dismissed allegations of wilful and wanton conduct as duplicative; there existed a sufficient business expectancy to support its claim for tortious interference with prospective economic advantage; defendants were not required to give 90 days' notice prior to resignation; employment contract provision prohibiting the solicitation of firm clients was void; defendants' right to have the firm buy their partnership shares upon termination was not subject to offset; and the trial court properly denied defendants' motion for sanctions.

The defendants were granted leave to appeal by the Illinois Supreme Court. The supreme court held that: there remained unresolved factual issues on the breach of fiduciary duty count; factual questions remained as to the tortious interference with prospective economic advantage count; defendants did not breach their employment contract; noncompetition covenants in the employment agreements were unenforceable as violations of Rule 5.6 of the Rules of Professional Conduct (134 Ill. 2d R. 5.6); the civil conspiracy claim was improperly dismissed as duplicative and Dowd may plead and attempt to prove the separate elements of civil conspiracy; and no sanctions would be imposed upon Dowd for violations of the pleadings rules.

A bench trial was had on the matters remaining. After the close of evidence, Dowd moved to reopen its case to submit more evidence. Over defendants' objection, the court granted the motion and heard additional evidence alleging illegal tax document alterations and bank fraud. Defendants moved for a mistrial in November 2000.

On February 26, 2001, the trial court entered a judgment order, finding in favor of Dowd on the following counts: count I, breach of fiduciary duty; and count III, tortious interference with prospective economic advantage. The trial court found that Dowd failed in its burden of proof as to count VII, wilful and wanton conduct. Further, the trial court stated "[a]s the Supreme Court held that [the] Conspiracy count simply represented an alternative theory of liability[(3)], the Court enters no judgment nor awards any damages on this Count VI."

The trial court's amended order, dated March 12, 2001, noted that the wilful and wanton conduct count was "mooted by the Appellate Court's ruling." There was consequently no ruling on that count and the court allowed Rule 304(a) (134 Ill. 2d R. 304(a)) language to be included in its order. On March 13, 2001, defendants filed a notice of appeal. On April 10, 2001, Dowd filed a notice of cross-appeal requesting that this court reverse certain portions of the amended order dated March 12, 2001, by entering judgment in favor of plaintiff on the civil conspiracy count or granting a new trial on that count.

ANALYSIS

I. STATUS OF CLIENTS

Defendants' initial contention is that the trial court's reasoning in the breach of fiduciary duty section of its order essentially reduces the status of clients to chattel and the decision deprives clients of their choice of counsel by prohibiting the mobility of lawyers. A full reading of the court's written order shows that defendants' assertion is an overstatement of the court's findings and an exaggeration of the impact of those findings.

In its written order, the trial court discussed the broad guidelines regarding the standards and obligations used to determine whether a departing partner's actions prior to leaving a firm constitute a breach of fiduciary duty. In citing an article from the Michigan Bar Journal (A. Goetz, Break Away Lawyers, 77 Mich. B.J. 1078 (1998)), the trial court noted that when attorneys leave a law firm to establish their own firm, it is appropriate to consider the clients as property of the firm and not property of the individual members of the firm. The trial court went on to explain that, accordingly, the lawyers may not solicit the firm's clients on company time nor may they use the firm's resources to establish their own, competing firm, particularly until proper notice has been given. While defendants were free to set up a new law firm, the question became whether any of the steps taken in connection with such action breached the fiduciary duty that the defendants owed to Dowd. On the other hand, the current firm has a duty not to interfere with the departing attorneys' continued right to practice law. The trial court noted that it is not improper for the lawyer to notify the client of his impending departure provided that he makes it clear that legal representation is the client's choice. In our view, the court's discussion encourages departing attorneys to give clients an informed choice as to who will manage their business in light of changes in employment or business structure. The court's order also reminds current firms to allow attorneys to move freely without hindrance from them.

In fact, the supreme court noted in its review of this matter that the case law supports the view that while lawyers who are planning to leave a firm may take preliminary, logical steps of obtaining office space and supplies, they may not solicit clients for their new venture. Dowd, 181 Ill. 2d at 475, citing Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 119-20, 653 N.E.2d 1179, 1183, 629 N.Y.S.2d 1009, 1013 (1995). The Graubard court noted:

"'[A]s a matter of principle, preresignation surreptitious "solicitation" of firm clients for a partner's personal gain *** is actionable. Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation, and thoroughly undermines another important value-the loyalty owed partners (including law partners), which distinguishes partnerships (including law partnerships) from bazaars.'" Dowd, 181 Ill. 2d at 475, quoting Graubard, 86 N.Y.2d at 119-20, 653 N.E.2d at 1183, 629 N.Y.S.2d at 1013.

Defendants here rely on Corti v. Fleisher, 93 Ill. App. 3d 517, 471 N.E.2d 764 (1981), an inapposite case, for the proposition that clients may not be reduced to chattel. The appellate court in Corti held that the employment agreement there, which provided for the transfer of client files from defendants to plaintiff without permission from clients, was void and contrary to public policy in that it deprived clients of the right to be represented by counsel of their own choice. Corti, 93 Ill. App. 3d at 522. The Corti case is inapposite because that case dealt with a written agreement to transfer clients' files without permission from clients. In the instant case, there is no such agreement, oral or written. Here, we are dealing with the alleged improper solicitation of Dowd's largest client and the duty defendants owed to their former firm.

We are by no means asserting that clients of a law firm are the property of the firm in terms of "chattel," but we are reaffirming the tenet that preresignation solicitation of firm clients for a partner's personal gain is a breach of the partner's fiduciary duty to the firm.

II. BREACH OF FIDUCIARY DUTY

The supreme court opinion in this case's procedural history noted that "[t]his is a fact-intensive inquiry, and on remand the finder of fact will have to resolve a number of factual disputes before determining whether the defendants breached their fiduciary duty." Dowd, 181 Ill. 2d at 477.

On remand, the trial court made several findings of fact as to defendants' breach of fiduciary duty to Dowd. Some of those findings included: failing to disclose certain facts that threatened the economic existence of Dowd, such as obtaining a $400,000 line of credit and $100,000 checking account from Harris Bank using Dowd's confidential information; paying down more than $186,000 of Dowd's line of credit to American National Bank without authorization, in order to present a better financial statement for themselves when obtaining a line of credit for GMS; soliciting Allstate's business prior to resigning from Dowd; arranging for a mass exodus of firm employees prior to December 31, 1990; downloading Allstate case service lists and mailing labels for substitution of counsel; and using of confidential information.

Our standard of review is whether the trial court's findings of breach of fiduciary duty are against the manifest weight of the evidence. See Howard v. Zack Co., 264 Ill. App. 3d 1012, 1024, 637 N.E.3d 1183 (1994) (factual determinations will not be overturned unless they are against the manifest weight of the evidence). "Manifest weight" means a level of proof that leads to a result that is "clearly evident, clear, plain and indisputable." Laroia v. Reuben, 137 Ill. App. 3d 942, 946, 485 N.E.2d 496 (1985). A judge's findings of fact are "not against the manifest weight of the evidence merely because the record might support a contrary decision." Graham v. Mimms, 111 Ill. App. 3d 751, 767, 444 N.E.2d 549 (1982). Because defendants vehemently contest the finding as to pretermination solicitation, we will address that issue first.

A. Pretermination Solicitation

One of the major questions in this case was whether defendants solicited Allstate as a client for their new firm before they left Dowd, thereby breaching their fiduciary duty to the firm. Defendants assert that Dowd's proof of solicitation was based on allegations of obtaining office space, credit, and equipment and using Dowd resources, all of which the Illinois Supreme Court has already deemed proper.

The trial court in the instant case observed that in Illinois, the breach of fiduciary duty among law partners has often been examined in connection with business partners. For instance, in Dowell v. Bitner, 273 Ill. App. 3d 681, 691, 652 N.E.2d 1372 (1995), the appellate court there noted that "employees may plan, form and outfit a competing corporation while still working for the employer, but they may not commence competition." (Emphasis is omitted.) Further, former employees may compete with their former corporate employer and solicit former customers as long as there was no business activity prior to termination of employment. Dowell, 273 Ill. App. 3d at 691. Although the Illinois Supreme Court pointed out that lawyers are not bound by the same fiduciary duties as those of nonlawyer corporate officers and directors (Dowd, 181 Ill. 2d at 471), the principles are similar. In its review of this case, the supreme court found the following comments from Graubard, a New York Court of Appeals case, relevant: secretly attempting to lure firm clients to the new association, lying to partners about plans to leave, and abandoning the firm on short notice and taking clients and files would not be consistent with a partner's fiduciary duties. Dowd, 181 Ill. 2d at

476, quoting Graubard, 86 N.Y.2d at 120-21, 653 N.E.2d at 1183-84, 629 N.Y.S.2d at 1013-14.

One item of evidence that supports a finding of breach of fiduciary duty based on pretermination solicitation in this case is Leslie Henkels' testimony. Henkels, a former legal assistant/paralegal at Dowd, testified that she was told in mid-December 1990 by Nancy Gleason that GMS had secured the Allstate business for the new firm. The trial court found her testimony to be credible. Ultimately, it is for the trial judge to determine the credibility of the witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidentiary record. Williams v. Cahill, 258 Ill. App. 3d 822, 825, 629 N.E.2d 1175 (1994).

The trial court also relied on the testimony of Leslie Henkels regarding the events of December 31, 1990. Henkels testified that on December 31, 1990, shortly before noon, Nancy Gleason called her and told her that she was faxing a letter to her to be put on the desks of the partners at Dowd. Henkels recalled that the letter was on Allstate letterhead and signed by George Riley. Nancy Gleason called back shortly thereafter and told Henkels to retrieve the faxes and destroy them, on the advice of "their counsel." Nancy then called a third time indicating that she was on her way to Mike Dowd's house to resign. The time between the first call and the third call was approximately 30 to 45 minutes. When shown Nancy Gleason's resignation letter at trial, Henkels stated that the letter was not the document she received via fax from Nancy and had not seen it before.

In contrast, Nancy Gleason testified that she told Henkels that she was sending a fax, but testified that it was not a fax from Allstate. She stated that it was her letter of resignation. Nancy testified that after speaking with Mike Dowd on December 31, 1990, she proceeded to the Allstate offices. Nancy Gleason recalled telling Crim and Riley that a new firm was being formed and certain associates would be extended offers.

The trial court expressly believed Henkels version of the December 31 events, including the content of the letter, and we will not disturb such a finding of credibility. See Williams, 258 Ill. App. 3d at 825.

Timothy Nolan, an attorney that began working for GMS in July or August 1991, testified that Virginia Vermillion, an associate at Dowd prior to December 31, who joined GMS in January 1991, told him that Nancy Gleason had George Riley's commitment long before defendants left Dowd and that "they had a lock on the business long before they left." Nolan further testified that Vermillion told him that they were able to transfer the files so easily because, "[w]e knew which files were coming. We knew which attorneys were coming. We knew who was coming."

At trial, Virginia Vermillion denied telling Timothy Nolan that she knew about the new firm before January 1, 1991, or that defendants solicited the Allstate business prior to December 31. She also testified that she did not tell William Kreese, a candidate for an associate position at Dowd, that he was actually interviewing for the new law firm.

Another item of evidence that supports the finding of pretermination solicitation is the November 1990 credit memorandum created by David J. Varnerin, a relationship manager in the private banking group at Harris Bank. The November 28, 1990, memorandum that Varnerin prepared for his supervisors indicated that "[d]iscussions have been held with their principal clientAllstate. The firm has been assured that their invoices will be paid promptly within 30 days. And, since the firm will have the prior firm's office administrator, we can reasonably assume that bills will be generated and sent in a very prompt manner." Also in the memorandum, business reference D. Paterson Gloor told Varnerin that "Nancy Gleason's group has a real lock on the Allstate business and he believes this client relationship will last for years." The reasonable inference from Varnerin's memorandum is that defendants made contact with and solicited Allstate's business prior to resigning from Dowd. Circumstantial evidence will suffice whenever an inference may reasonably be drawn therefrom. Grewe v. West Washington County Unit District No. 10, 303 Ill. App. 3d 299, 303, 707 N.E.2d 739 (1999).

We note that the supreme court stated in its prior opinion in this case that departing lawyers are permitted to prepare lists of clients expected to leave the firm and obtain financing based on the lists. Dowd, 181 Ill. 2d at 470-71. That expectation is distinctly different from what happened in this case, where the evidence leads to the reasonable inference that the partners actually solicited the Allstate business, secured a commitment from Allstate for future business and obtained financing based on that commitment, not a mere expectation.

In contrast, Lynn Crim and George Riley both testified that they had not been solicited by defendant to move their business to the new firm prior to Nancy Gleason's resignation. As stated earlier, it is for the trial judge to determine the credibility of the witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidentiary record. Williams, 258 Ill. App. 3d at 825. Thus, we affirm the court's finding that Dowd met its burden of showing that defendants breached their fiduciary duty to Dowd by soliciting Allstate prior to the termination of their employment contracts.

B. Manner of Leaving Dowd

Although we have found that the trial court did not abuse its discretion in holding that defendants breached their fiduciary duty by committing pretermination solicitation, the evidence in the instant case also supports a finding that defendants breached their fiduciary duty in the manner in which they left Dowd.

The court held that "voting and accepting large bonuses for themselves and their friends and family without disclosure that they would be leaving and again stripping D&D of cash reserves" was a breach of defendants' fiduciary duty to Dowd. This was evidenced by Nancy Gleason's testimony that she received a $62,500 bonus in October 1990 based on August 1990 discussions with the other shareholders/partners to issue bonuses and a $100,000 bonus on or about December 21, 1990, despite her plans to leave Dowd on December 31, 1990. The evidence also demonstrated that defendants' discussions of forming the new firm also began in August 1990. Therefore, the court's decision to include bonuses in its award to Dowd is not an abuse of discretion. Even though we may have held differently in light of the testimony that bonuses were based, in part, on past performance and service to the firm, a reviewing court will not overturn a circuit court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the trier of fact. In re Application of the County Treasurer, 131 Ill. 2d 541, 549, 546 N.E.2d 506 (1989).

The trial court here also held that defendants breached their fiduciary duty by arranging for the mass exodus of firm employees before December 31, 1990. See Veco Corp. v. Babcock, 243 Ill. App. 3d 153, 163-64, 611 N.E.2d 1054 (1993) (held that actions constituted breach of fiduciary duty where defendants secretly solicited Veco employees for new company and orchestrated a mass exodus following defendants' resignation). This was evidenced by the matching of Dowd associates who eventually joined GMS and the furniture invoice providing the names of the persons using the new furniture created prior to defendants' resignations. The evidence regarding the premade furniture labels leads to the reasonable inference that defendants went so far as to solicit many Dowd attorneys who worked on the Allstate files to leave Dowd prior to their resignation. Additionally, paralegal Leslie Henkels testified that on the evening of December 31, she received a call from Judy Gleason asking her to join the firm--though it was "basically a formality since I had already been asked to join the firm months before." The circuit court's determination is not against the manifest weight of the evidence.

The trial court here heard ample amounts of testimony as to defendants' actions prior to their resignation and based on that testimony and its credibility assessments, the court determined that the manner in which defendants left Dowd was improper and a breach of their fiduciary duty. We will not disturb those determinations. A reviewing court may not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion. Howard, 264 Ill. App. 3d at 1024.

Defendants here also contend that the trial court's finding that defendants were competing with Dowd "in their own minds" before resignation has no support in the record. Defendants are referring to the portion of the trial court's written order that stated:

"***The evidence shows that in their own minds, the firm of GMS was in business prior to the date of resignation as shown from the employer identification number application (11-1-90) (Pl.'s Ex. 2) and the Professional Liability Insurance Policy Declarations effective 12/1/90, which listed 14 D & D employees for GMS (Pl.'s Ex. 108 a.k.a. Def.'s Ex. 90), as well as the revenue projections to Harris Bank." (Emphasis added.)

The December 1, 1990, start date for GMS's professional liability insurance, compared to defendants' December 31, 1990, actual resignation date, supports the trial court's finding. Even if this finding was not supported by the record, as a reviewing court, we can sustain the decision of a lower court on any grounds that are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct. Leonardi v. Loyola University of Chicago, 168 Ill. 2d 83, 97, 658 N.E.2d 450 (1995). Here, we have already affirmed the trial court's finding that defendants breached their fiduciary duty to Dowd by soliciting Allstate's business prior to their resignation and the trial court's breach of fiduciary duty decision may stand on that finding alone.

C. Use of Confidential Information

Defendants also assert that the court's finding as to the use of confidential information is "flatly contradicted" by the record and the court never identifies what was considered "confidential information." The trial court, however, specifically states that it was a breach of fiduciary duty when "Nancy Gleason and Douglas Shreffler breached the agreement not to use confidential information, time and billing information and information from the financial statements of D&D for their own personal gain." In its order, the trial court cites the testimony of Maureen Gleason as evidence of defendants' use of confidential information. In Illinois, the law is well established that the trial judge, sitting without a jury, has the obligation of weighing the evidence and making findings of fact. Chicago Investment Corp. v. Dolins, 107 Ill. 2d 120, 124, 481 N.E.2d 712 (1985). An appellate court will defer to the findings of the trial court unless they are against the manifest weight of the evidence. Dolins, 107 Ill. 2d at 124.

Maureen Gleason testified, as an adverse witness, that in late October 1990 she and her husband prepared a projected profit and loss statement[(4)] for the new firm, with a start date of November 1990. It was prepared for submission to three banks, including Harris Bank. Maureen said that the unspecified associates listed therein were based on a projection of the number of associates GMS needed "to handle the business that [they] hoped to get," but no specific associates were in mind. She stated that the estimated 2,250 billable hours per associate was based on the average expectancy at law firms. She explained that the experience level and billable hours expectancy descriptions of the unspecified associates was based on who they "hope[d] to bring with [them] if [they] left." Though she had access to confidential information like this, Maureen denied using Dowd's confidential information to obtain GMS' projected figures. Maureen testified that the figures were based upon numerous publications that indicated what was the accepted amount of billable hours for associates.

The trial court believed that confidential information was in fact used to defendants' benefit in creating this projection. However, the Illinois Supreme Court stated in its prior opinion in this case that departing lawyers are permitted to prepare lists of clients expected to leave the firm and obtain financing based on the lists. Dowd, 181 Ill. 2d at 471. Therefore, the trial court's finding is in error. Nonetheless, the finding of breach of fiduciary duty is supported on other grounds and does not change the outcome of this case.

The court also found that it was an improper use of confidential information for defendants to make payments to Dowd's line of credit with American National Bank to secure its own line of credit without authorization to do so. Defendants assert that David Varnerin, Dowd's witness, obviated such a claim and thus, the court's decision is unfounded. Varnerin testified that in considering the application for a line of credit with Harris Bank, he did not inquire as to whether Dowd's line of credit obligation had been paid off and affirmed that the decision to approve defendants' line of credit was independent of that obligation. However, Kenneth Gurber, a nondeparting partner at Dowd, testified that under normal circumstances, he would have been consulted about the American National Bank payoff, but was not, and Maureen Gleason did not have the authority to write a check for $187,000 without approval from the board of directors. Because credibility and conflicts in testimony are for the fact finder to determine (Gordon v. Dolin, 105 Ill. App. 3d 319, 326, 434 N.E.2d 3411 (1982)), we leave the credibility assessment at the discretion of the trial court. The court was in the best position to determine whether it believed that Varnerin used the payoff information in his evaluation. Regardless of whether the court considered the payoff, the evidence demonstrates that defendants used confidential information and covert action to pay off this line of credit. As guarantors of Dowd's line of credit, paying the sum off would make them more attractive to Harris Bank officials in the position to extend a line of credit to them for the new firm.

There was also ample evidence of defendants' use of Dowd confidential records in preparation for taking Allstate with them to the new firm. Leslie Henkels testified that between August 1990 and December 31, 1990, she was directed by either Judy Gleason, Maureen Gleason or Maureen Heneghan to update the service lists in order to move the Allstate business to GMS. On December 28, 1990, Henkels made sure that the service lists were up to date and the mailings lists were with them so that they could notify counsel of substitution of attorney. On December 31, 1990, between 2 p.m. and 3 p.m., Henkels took the service list binders to GMS's offices, at the instruction of Doug Shreffler.

Mary Judson, a former Dowd legal secretary, testified that on December 28, 1990, prior to defendants' resignations, she was instructed by Leslie Henkels and

Maureen Henegan to update and download the Allstate service lists and mailing labels to disks. She was told that the project had to be completed that day.

In contrast, Maureen Henegan (Nancy Gleason's secretary at Dowd and GMS) testified that she did not instruct anyone at Dowd to update service lists so that they may taken to the new firm. In light of the conflicting testimony, we will not disturb the fact finder's decision as to the credibility of these witnesses. Kalata v. Anheuser-Busch Co., 144 Ill. 2d 425, 433, 581 N.E.2d656 (1991). Moreover, the court's finding of use of confidential information is well supported by the record.

III. TORTIOUS INTERFERENCE

In focusing on the conduct of the defendants, the trial court here determined that Dowd proved defendants' actions constituted tortious interference with a prospective economic advantage. We agree, as shown below in our discussion of each element. Defendants, however, assert that the trial court's personal assertions of business expectations prejudiced their case and, further, that the trial court had no evidence that Dowd had a valid business expectation that they would be the recipient of Allstate's business after Nancy Gleason's departure.

To establish a cause of action for the tort of intentional interference with a prospective economic advantage, Illinois law requires that the following four elements must be proven: (1) the existence of a valid business relationship or expectancy; (2) the defendants' knowledge of plaintiff's relationship or expectancy; (3) purposeful interference by the defendants that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship or termination of the relationship; and (4) damages to plaintiff resulting from such interference. Fellhauer v. City of Geneva, 142 Ill. 2d 495, 511, 568 N.E.2d 870 (1991).

A. Existence of a Valid Business Relationship or Expectancy

Defendants contend that Dowd did not offer any evidence that it had an expectancy to keep Allstate's business after the departure of Gleason and reminds this court that the relationship between an attorney and his client is terminable at will. See Grund v. Donegan, 298 Ill. App. 3d 1034, 1038, 700 N.E.2d 157 (1998). While this is true, until terminated, the relationship created by an at-will contract will presumptively continue in effect so long as the parties are satisfied, and, therefore, such a relationship is sufficient to support an action for tortious interference. Grund, 298 Ill. App. 3d at 1038.

The fact that the relationship between an attorney and her client is terminable at will does not of itself defeat an action for tortious interference because the action is not dependent upon an enforceable contract but, rather, upon an existing relationship. La Rocco v. Bakwin, 108 Ill. App. 3d 723, 731, 439 N.E.2d 537

(1982). Until terminated, the relationship created by a contract terminable at will is subsisting and will presumptively continue in effect so long as the parties are satisfied. Anderson v. Anchor Organization for Health Maintenance, 274 Ill. App. 3d 1001, 1013, 654 N.E.2d 675 (1995). Such a relationship is sufficient to support an action for tortious interference. See Kemper v. Worcester, 106 Ill. App. 3d 121, 125, 435 N.E.2d 827 (1982).

The focus here is not on the conduct of the client in terminating the relationship, but on the conduct of the party inducing the breach or interfering with the expectancy. Dowd, 181 Ill. 2d at 484. Moreover, to prevail on the claim, a plaintiff must show not merely that the defendant has succeeded in ending the relationship or interfering with the expectancy, but "'purposeful interference,'" meaning the defendant has committed some impropriety in doing so. Dowd, 181 Ill. 2d at 485, quoting Restatement (Second) of Torts § 766B, Comment a (1979) ("'In order for the actor to be held liable, this Section requires that his interference be improper'").

Defendants assert that the trial court had no evidence that Dowd had a valid business expectation that it would be the recipient of Allstate's business after Nancy Gleason's departure. They complain that following Dowd's objection during trial, George Riley from Allstate was not allowed to testify that the 200 files handled by Nancy Gleason at Dowd would have gone with her had she been fired by Dowd. We first note that a trial court's ruling on an objection to evidence will not be reversed absent an abuse of discretion. Progress Printing Corp. v. Jane Byrne Political Committee, 235 Ill. App. 3d 292, 304, 601 N.E.2d 1055 (1992).

The question posed to Riley during trial was: "If Mike Dowd had fired Nancy Gleason in 1990, would you have left the files that she was working on for you with Mike Dowd?" Following an objection, the court stated that the answer would call for speculation. Defense counsel argued that it spoke to the "missing gap" in Dowd's reasonable expectation issue. The court then allowed counsel to ask a series of questions of Riley as an offer of proof. Riley was asked what effect Nancy Gleason's termination would have had on the handling of Allstate's files. Riley responded, "Disaster," because "Nancy was an integral part of this operation." Riley was also asked if he would have allowed the 200 Allstate files to remain at Dowd absent Nancy Gleason, to which he answered, "No."

Riley's answers, in defendants' view, would support the conclusion that Dowd did not have a legitimate expectancy of continued business in the event that Gleason left Dowd. We find it important that there was no evidence that Dowd had any indication from Riley prior to December 31, 1990, that its continued business relationship was dependent upon Nancy Gleason's continued employment with Dowd. Even if Dowd had that understanding, Dowd was unaware of Nancy Gleason's intention to leave the firm. There was also no indication that Allstate was in any way dissatisfied with the services received from Dowd. More importantly, as we have already affirmed the finding that defendants succeeded in ending the relationship, their "purposeful interference" was committed in an unseemly manner. In our view, the trial court's order does not offend the well-established rule that a client may discharge an attorney at any time, for any reason, or for no reason. See Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104 (1991).

B. Knowledge of Plaintiff's Relationship or Expectancy

Dowd enjoyed a 15-year business relationship with Allstate. As partners and shareholders, defendants were undeniably aware of this relationship and its lucrative benefit to Dowd.

C. Purposeful Interference

Support for the trial court's purposeful-interference finding is found within the breach of fiduciary duty discussion of this opinion. Defendant's actions, or "impropriety" as the trial court put it, established a purposeful interference with Dowd's prospective economic advantage. The reasonable inference from the evidence discussed earlier and the court's credibility findings demonstrate that defendants covertly solicited the Allstate account prior to terminating their employment with Dowd. The covert steps taken by Nancy Gleason, Shreffler and GMS, individually and collectively, seemingly caused Dowd's largest client to make a commitment to cease doing business with Dowd. Defendants' actions, in the trial court's view, prevented Dowd from enjoying a continuing relationship with Allstate and, more importantly, precluded Allstate from having a free and unfettered choice regarding keeping its business with Dowd. Cases have recognized that pretermination solicitation of clients by members of an existing firm for the benefit of a new firm rises to a breach of a fiduciary duty. Dowd, 181 Ill. 2d at 474, citing Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A., 679 So. 2d 637, 639 (Ala. 1996) and In re Silverberg, 81 A.D.2d 640, 641, 438 N.Y.S.2d 143, 144 (1981).

There was no evidence introduced, for example, that Dowd was given any time to attempt to salvage its long-standing business relationship. If given the opportunity, Allstate may have remained with Dowd if offered more attractive fee arrangements (no fees for research, no second chairs at trial, and lower hourly rates are usually accorded government bodies). The latter, in the long run, might have proven more appealing to this insurer than simply having only Gleason in charge of their files. However, due to the secretiveness and abruptness of defendants' ultimate departure, the securing of the Allstate business was a feat accomplished at least by January 1, if not months earlier as the trial court believed. This alone represents some interference with Dowd's legitimate business expectation vis-a- vis Allstate and more importantly, casts doubt on how free and unfettered Allstate's decision to leave Dowd really was, absent a viable and familiar alternative (continuing to do business with Dowd at more advantageous terms). It also renders the pronouncements of Riley and Crim, as the trial court said, closer to speculation than fact, as they insist.

Defendants contend that the trial court ignored the testimony of the Allstate representatives, Crim and Riley, that they were not aware of the new firm prior to December 31 and unjustifiably credited the conflicting testimony of former Dowd paralegal Leslie Henkels that she was told that defendants had secured Allstate's commitment prior to December 31. Defendants also disagreed with the court's reliance on GMS associate Timothy Nolan's testimony that Virginia Vermillion told him that Allstate's commitment was secured before defendants' resignations. However, these contentions are based on credibility assessments. Absent a showing of an abuse of its discretion, we will not reverse a trial court's determination on the issue. See Williams, 258 Ill. App. 3d at 825.

Moreover, we hold that the trial court's purposeful- interference finding is supported by the evidence and the reasonable inferences therefrom. See Grewe, 303 Ill. App. 3d at 303.

D. Damages

1. Compensatory Damages

Defendants also assert that because Riley from Allstate testified that Allstate would have followed Gleason in any event there can be no damages. A plaintiff must prove damages to a reasonable degree of certainty, and evidence cannot be remote, speculative, or uncertain. In re Estate of Halas, 209 Ill. App. 3d 333, 349, 568 N.E.2d 170 (1991); First National Bank v. Dusold, 180 Ill. App. 3d 714, 718, 536 N.E.2d 100 (1989). The trial court specifically held that "Plaintiff has proved damages with a reasonable degree of certainty." Even when the appellate court would have been better satisfied with different findings, we generally will not interfere with a trial court award supported by the evidence. Pioneer Trust & Savings Bank v. Zonta, 96 Ill. App. 3d 339, 345, 421 N.E.2d 239 (1981).

Here, the compensatory damages award against Nancy Gleason, Douglas Shreffler and GMS for count III (tortious interference with prospective economic advantage) in the amount of $2,464,889.46, was based on the evidence presented by Dowd's damages opinion witness, Todd Lundy. Lundy is a certified public accountant. The trial court specifically found that the evidence presented by Lundy, including his report, established certain damages. In preparing his report, Lundy testified that he read the pleadings, depositions, various financial documents from Dowd (such as paid bills, records of invoice collections) and some tax returns of GMS. His opinions were generally categorized as compensation and bonus-related damages, out-of-pocket damages and lost profit. The damage period was calculated beginning August 7, 1990, based on Leslie Henkels' testimony that on that date some of the defendants discussed their plan to leave Dowd. He noted that there was some dispute as to when the damage period was to begin (August 7 or September 25), so some calculations were computed based on both dates and listed separately. Lundy testified in detail as to the amounts he calculated and the supporting information for those amounts.

For instance, Lundy testified that it was his opinion that the total damages incurred in this case amounted to $2,591,605.54. Lundy determined that the compensation and bonus-related monies issued to Nancy Gleason, Maureen Gleason, Douglas Shreffler and Judith Gleason totaled $440,274. The lost profits totaled $871,199.75. Lundy testified that he used a two-year period for the lost profits because of the manner in which law firms perform their accounting and because the information provided to Harris Bank by defendants for GMS's line of credit included a two-year projection. Lundy's calculations also included, but are not limited to, the following: Gleason and Shreffler's salaries for the period August 7, 1990, to December 31, 1990, totaling $110,999.89; a $9,719.81 construction expense in Dowd's sublease; $5,817.35 for the reinsurance conference held in Bermuda in November 1990 attended by, among others, Virginia Vermillion, Nancy Gleason, and Allstate's Riley; $5,624 Allstate lawyers' section Christmas party; total compensation, bonus-related and out-of-pocket damages in the amount of $849,206.04; and $871,199.75 in lost profit damages for years' end December 31, 1991, and December 31, 1992.

The court held that the damages, as a result of defendants' breach of fiduciary duty and tortious interference with prospective economic advantage, totaled $2,464,889.46. This was based on the total compensation/bonus payments and out-of-pocket damages of $812,859.90 incurred between August 7, 1990, to December 31, 1992, minus salaries and bonuses paid to nonparties Judy Gleason and Maureen Gleason, plus two years of lost profits. The court did not include the costs of the trip to Bermuda or the Allstate lawyers' section Christmas party because "there is no way to determine whether or not the GMS firm benefitted from those matters, or if Plaintiff would have had them in any event, even if it had known that Gleason was leaving."

The assessment of damages by a trial court sitting without a jury will not be set aside unless it is manifestly erroneous. Vendo Co. v. Stoner, 58 Ill. 2d 289, 311, 321 N.E.2d 1 (1974). In the instant case, the damages award is based on the detailed testimony and exhibits provided by Dowd's expert witness. The forfeiture of salary represented a period of time beginning with the breach of defendants' fiduciary duty and ends with an allowance of damages for Dowd's lost profits for a two-year period. Illinois law permits a complete forfeiture of any salary paid by a corporation to its fiduciary during a time when the fiduciary was breaching his duty to the corporation. Levy v. Markal Sales Corp., 268 Ill. App. 3d 355, 373, 643 N.E.2d 1206 (1994) (case did not involve attorneys, but is nonetheless instructive). Though there was no indication that defendants did not work at the efficiency level or with the diligence that they had prior to deciding to leave Dowd, they cannot claim a right to retain the compensation earned while breaching their fiduciary duty to Dowd. Veco Corp. V. Babcock, 243 Ill. App. 3d 153, 165, 611 N.E.2d 1054 (1993).

Defendants next assert that the trial court erroneously required the forfeiture of bonuses Gleason[(5)] received as a part of her compensation prior to her resignation because all partners agreed sometime in August 1990 to issue bonuses and all partners received bonuses.

Ken Gurber, a nondeparting partner at Dowd, testified that bonuses were paid for past performance and service to the firm, based on individuals' performance history and work that was done that year. Gurber also testified that the amounts were tied to the amount of income that the firm had during the year and were an inducement for future performance and to keep qualified individuals at the firm. He testified that the pay out of bonuses left the firm "cash poor." Bob Yelton, another nondeparting partner, testified that bonuses were predicated upon past performance and an inducement for future performance. Even Michael Dowd, by way of deposition, testified that in 1990, year-end bonuses were distributed because they "made some money" and they "had some to distribute." The idea that Mike Dowd would not have approved bonuses had he known that defendants were intending to leave and form their own firm has no bearing on the fact that the bonuses were approved based, at least in part, on past performance.

Although the bonuses were based in part on work performed antecedent to the period of breach (established here as beginning on August 7, 1990), they were properly included in the damages award in that the departing partners had already contemplated and discussed leaving the firm by the time the bonuses were voted upon. Nonetheless, they did not notify the firm of their intentions until after both bonuses had been issued. Because the bonuses issued here appear to be based on both past performance and as an inducement to perform well in the future, we cannot say that it was an abuse of discretion for defendants to have to forfeit those amounts. In our view, similar to the appropriateness of forfeiting salaries for the period of the breach of one's fiduciary duty, the forfeiture of bonuses during that same period may be included in the damages calculation if supported by the record. Moreover, the trial court held that Dowd proved damages with a reasonable degree of certainty, and based on the evidence, we cannot say that the holding was manifestly erroneous. See Vendo, 58 Ill. 2d at 311.

Defendants further postulate that the damages improperly reflect fees generated by work done on files that were opened at Dowd and transferred to GMS and fees on every new assignment given to Gleason at her new firm in 1991 and 1992. In defendants's view, the trial court's decision and award of damages "effectively negates Rules 1.5 and 5.6 of the Rules of Professional Conduct as promulgated by the Supreme Court."

Rule 1.5 of the Rules of Professional Conduct (134 Ill. 2d R. 1.5(f)) states that a lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a disclosure. Rule 5.6 (134 Ill. 2d R. 5.6) provides that a lawyer shall not participate in offering or making a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement, or an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

We do not believe that the court's ruling for damages violates either of these rules of professional conduct, as the court did not include fees for services rendered in 1991 and 1992 at GMS, but for profits that resulted from their misconduct.

A "fee" is defined as a "charge for labor or services, esp. professional services" (Black's Law Dictionary 629 (7th ed. 1999)) and fee-splitting is "[t]he division of attorney's fees between the lawyer who handles a matter and the lawyer who referred the matter" (Black's Law Dictionary 631 (7th ed. 1999)). A profit is defined as "the excess of revenues over expenditure in a business transaction." Black's Law Dictionary 1226 (7th ed. 1999). This case involves a breach of fiduciary duty, and the law clearly states that a defendant should not be permitted to retain any profits from such a breach. Regnery v. Meyers, 287 Ill. App. 3d 354, 365, 679 N.E.2d 74 (1997).

Generally, a plaintiff must present competent proof of lost profits from which a reasonable basis of computation can be derived. Nordhem v. Harry's Cafe, Inc., 175 Ill. App. 3d 392, 396, 529 N.E.2d 988 (1988). Since lost profits are determined by many factors, it must be shown with a reasonable degree of certainty that defendants breached caused a specific portion of the lost profits. Midland Hotel Corp. v. Reuben H. Donnelly Corp., 118 Ill. 2d 306, 316, 515 N.E.2d 61 (1987). Here, plaintiffs' expert provided a report and explanation of how he arrived at the lost profits included in his damages opinion. The inclusion of lost profits represents the monies Dowd would have earned had Allstate remained with the firm. The trial court found the exhibit and accompanying testimony to be calculated to a reasonable degree of certainty and defendants do not even raise such an issue.

2. Punitive Damages

Defendants next assert that the trial court's punitive damages should be reversed because the court's ruling was favorable to Dowd even though Dowd "never proved the amounts on which the court based its judgment or that a specific defendant was responsible for a specific element of the claimed damages."

There is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of plaintiff's compensatory recovery. Deal v. Byford, 127 Ill. 2d 192, 204, 537 N.E.2d 267 (1989). The purpose of punitive damages is to punish defendants and to deter others from the same conduct; they should be awarded only in aggravated circumstances involving fraud, willfulness, wantonness or malice. Petty v. Chrysler, 343 Ill. App. 3d 815, 828, 799 N.E.2d 432 (2003). Punitive damages are allowable where the wrong involves some violation of a duty arising from the relationship of trust and confidence. Home Savings & Loan Ass'n v. Schneider, 108 Ill. 2d 277, 284, 483 N.E.2d 1225 (1985), quoting Laughlin v. Hopkinson, 292 Ill. 80, 89, 126 N.E. 591 (1920). Similarly, punitive damages are appropriate to punish and deter conduct where the defendant is guilty of an intentional breach of fiduciary duty. Citicorp Savings v. Rucker, 295 Ill. App. 3d 801, 810-11, 692 N.E.2d 1319 (1998). Whether to award punitive damages is an issue that we leave at the sound discretion of the trial court, which decision will not be disturbed absent an abuse of discretion. Levy v. Markal Sales Corp., 268 Ill. App. 3d 355, 379, 643 N.E.2d 1206 (1994).

The trial court here reasoned that the appropriate punitive damage award in this case is $200,000 against Gleason and Shreffler, individually. The court reasoned that the actions of Gleason and Shreffler were intentional and in deliberate disregard of the fiduciary relationship existing between Dowd and defendants. The court concluded that defendants' conduct "was not only secretive, but it was malicious." The court also noted that defendants "took a client" and valuable confidential firm information, including mailing lists, service lists and firm reference books and updated them for their own personal use. Notably, the court declined to award attorney fees absent any guiding authority to do so. Based on the court's reasoning and the evidence provided at trial, we cannot say that the court's punitive damages ruling was an abuse of its discretion.

We, therefore, affirm the damages award of the trial court.

IV. MOTION FOR MISTRIAL

Defendants assert that they should have been granted a mistrial for several reasons. The decision to grant a mistrial rests within the sound discretion of the trial court based upon the particular circumstances of the case. Juarez v. Commonwealth Medical Associates, 318 Ill. App. 3d 380, 385, 742 N.E.2d 386 (2000). The trial court's ruling will not be disturbed on appellate review absent a clear abuse of discretion. Juarez, 318 Ill. App. 3d at 385.

Defendants initially draw our attention to Dowd's assertion in its opening statement that there would be evidence that a Dowd interviewee was recruited for GMS. Although the Dowd interviewee was identified as a witness who would testify that he was told by Virginia Vermillion that he was being interviewed for

GMS, he was not called at trial. Nonetheless, Virginia Vermillion denied speaking to the interviewee about joining the new firm.

The comments made by an attorney in an opening statement concerning evidence to be introduced at trial are not improper if made in good faith and with reasonable belief that the evidence is admissible, although the intended proof referred to is later excluded. Yedor v. Centre Properties, Inc., 173 Ill. App. 3d 132, 144, 527 N.E.2d 414 (1988); Hilgenberg v. Kazan, 305 Ill. App. 3d 197, 210, 711 N.E.2d 1160 (1999). Moreover, similar to jury trials, opening statements in a bench trial are not evidence. See Nassar v. County of Cook, 333 Ill. App. 3d 289, 304-05, 775 N.E.2d 154 (2002). In a bench trial, in the absence of evidence to the contrary, it is presumed that the court considers only competent evidence and the admission of incompetent evidence is harmless. In re Application of the County Collector for Judgment & Sale Against Lands & Lots Returned Delinquent for Nonpayment of General Taxes and/or Assessments for the Year 1985 and Prior Years, 219 Ill. App. 3d 396, 405, 579 N.E.2d 936 (1991).

Defendants next argue that the line-of-credit evidence was irrelevant and therefore requires a mistrial. The determination of the relevancy of evidence is largely within the discretion of the trial court, and reversal of its decision is not warranted absent abuse of that discretion. O'Brien v. Hertl, 238 Ill. App. 3d 217, 223, 606 N.E.2d 225 (1992). Kenneth Gurber's testimony that he was not consulted regarding the line-of-credit payoff and that Maureen Gleason did not have the authority to write a check for $187,000 without approval from the board of directors is relevant as evidence of defendants' improper use of confidential information and acting for their own interest to the detriment of their other partners. Nancy Gleason's October 1990 financial statement provided that she was a guarantor on Dowd's line of credit at American Bank that had $184,999 outstanding, but it was expected to be paid in full in two weeks. Judy Gleason's financial statement to Harris Bank indicated that she was a co-signer on Dowd's line of credit and it would have a zero balance in the immediate future. Shreffler's financial statement also indicated that the Dowd line of credit would have a zero balance in the near future. As a guarantor of Dowd's line of credit, anyone paying off that outstanding balance would create a more attractive credit situation, which would enable him or her to secure the Harris Bank line of credit for the new firm. This is so, despite Varnerin's statement that he did not consider the payoff in granting the line of credit.

Defendants further contend that the trial court's consideration of the evidence at the reopened evidence hearings necessitates a mistrial. In rendering its decision, the trial court should consider whether the moving party has provided a reasonable excuse for failing to submit the additional evidence during trial, whether granting the motion would result in surprise or unfair prejudice to the opposing party, and if the evidence is of the utmost importance to the movant's case. In re Marriage of Weinstein, 128 Ill. App. 3d 234, 248-49, 470 N.E.2d 551 (1984). The decision of whether to reopen proofs is in the sound discretion of the trial court. See Chicago Transparent Products, Inc. v. American National Bank & Trust Co., 337 Ill. App. 3d 931, 942, 788 N.E.2d 23 (2002). Further, in a bench trial, we presume that the trial court considered only the properly presented evidence in making its decision. Wildman, Harrold, Allen & Dixon v. Gaylord, 317 Ill. App. 3d 590, 597, 740 N.E.2d 501 (2000).

The evidence presented at the hearing included two versions of GMS's 1991 tax return. Dowd hoped to damage the credibility of defendants' witnesses by proving that the documents had been illegally altered in some way. Further, it was brought to the court's attention that an Attorney Registration and Disciplinary Commission (ARDC) proceeding was had regarding Nancy Gleason and the returns may have been presented there. James Hayes, a forensic document examiner, testified that the first version (exhibit 109A) contained the signature of Maureen Gleason, a nonlawyer, naming her as the general partner and taxpayer partner for GMS. Hayes opined that Maureen Gleason's signature, the name "Maureen T.," an identifying number and the date that she signed it were deleted from the tax return to create another tax return (exhibit 109). Hayes also noted that Charles Farley's name, "Nancy J." and a social security number were added to exhibit 109. Dowd argued that the evidence was relevant because it impacted the credibility of Maureen Gleason, Doug Shreffler and Judith Gleason, since exhibit 109 was admitted at trial as Defense exhibit 84. Defense counsel argued that exhibit 109A was a draft and it is unknown whether it was actually filed.

Notably, the trial court explicitly states in its written order that it could not "make a complete determination of this [tax return] issue because the Court has no way of knowing which of these Returns was actually produced at the ARDC proceeding.[(6)]"

The reopened proofs also involved Dowd's attempt to prove that defense witnesses perpetrated some type of bank fraud by using the allegedly falsified documents in their loan applications. The court wrote in its order that it could "make no final determination on this as this issue is not properly before the Court."

In both apparent attempts to discredit defendants, the trial court ultimately declined to reach the issues raised therein. As courts are presumed to have considered only competent evidence and the admission of incompetent evidence is considered harmless in a bench trial, no prejudice resulted to defendants. Moran Transportation Corp. v. Stroger, 303 Ill. App. 3d 459, 472, 708 N.E.2d 508 (1999). The trial court here did not abuse its discretion in denying defendants' motion for a mistrial.

V. CONCLUSION

For the forgoing reasons, we affirm the trial court's rulings and award of damages.

Affirmed.

GORDON and McNULTY, JJ.

1. A full factual background can be found in Dowd & Dowd v. Gleason, 284 Ill. App. 3d 915, 672 N.E.2d 854 (1996).

2. Now deceased.

3. The supreme court noted that the dismissal of the conspiracy count as duplicative of other theories of recovery alleged in the complaint was, at that point in the proceedings, premature. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 486 (1998).

4. The projected profit and loss statement for the new firm is not cited to in the briefs.

5. Though defendants mention only Gleason, the trial court's order refers to all defendant-attorneys.

6. Timothy Nolan filed a complaint with the ARDC in September 1994 against Nancy Gleason, which was dismissed sometime in the fall of 1994.