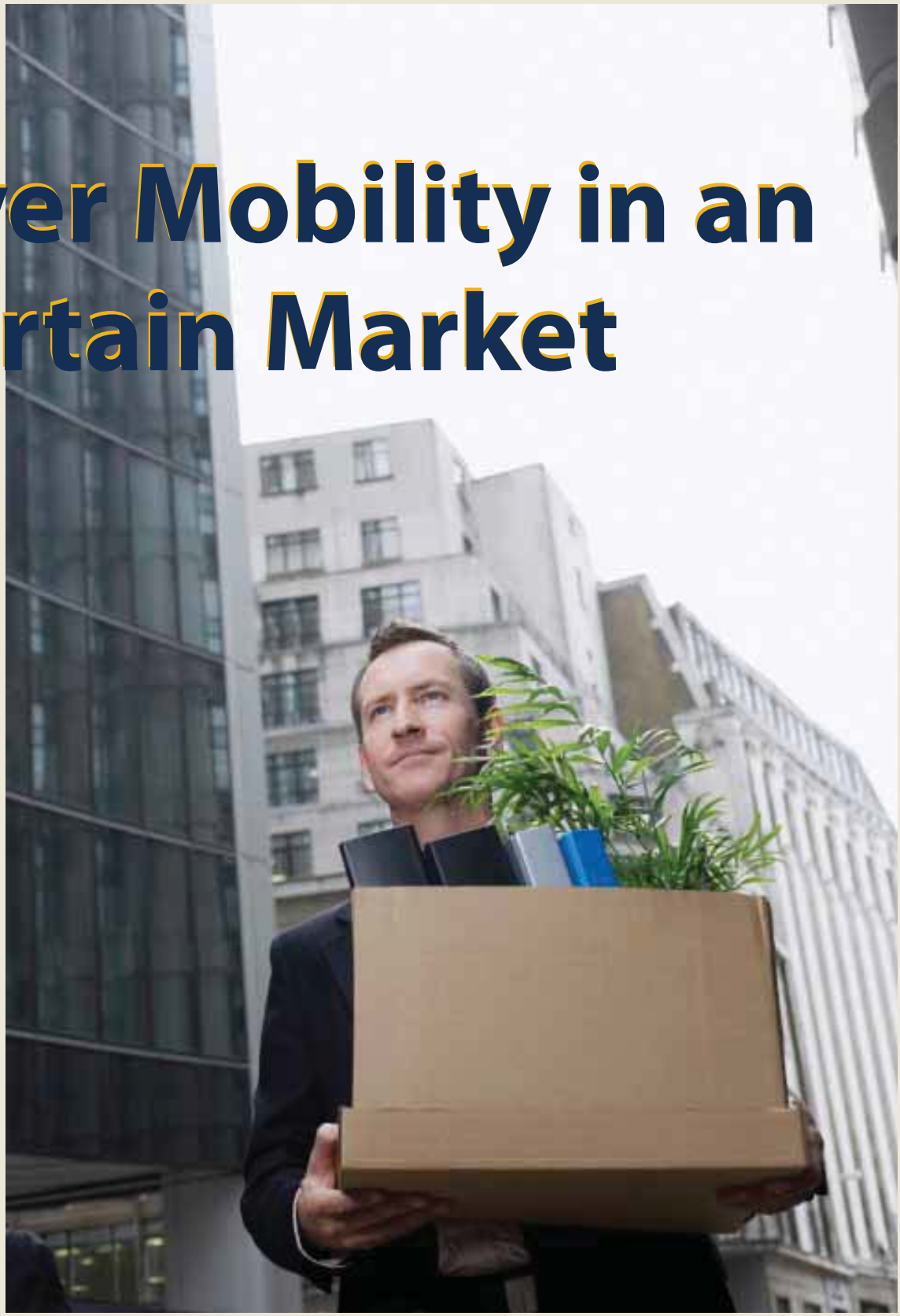
By Zachary Julian Freeman

Contractual & Ethical Issues of **Transition**

Lawyer Mobility in an Uncertain Market



In good economic times, lawyers regularly move their law practices from one firm to another in search of new and better opportunities. Unfortunately, in today's uncertain market, ever-rising numbers of lawyers are being forced to relocate involuntarily as the result of layoffs and downsizing.

ACCORDING TO THE U.S. DEPARTMENT OF LABOR, in 2008, the legal services section of the U.S. economy–which includes lawyers, paralegals, and legal assistants–shed approximately 6,800 jobs. In the first quarter of 2009, it has lost an additional 10,300 jobs. It seems that with each passing day, another law firm announces additional layoffs or cost-cutting measures. A lawyer moving his or her practice, regardless of the reason, must ensure that the relocation complies with all contractual, fiduciary, and ethical duties. This article identifies many of the important legal issues that mobile lawyers must address. Failure to do so could land a lawyer in the middle of a nasty, protracted, and all too often personal lawsuit.

Involuntary Termination

A law firm that is considering terminating a partner must ensure that the termination complies with the firm's contractual termination provisions and with the fiduciary duty of good faith. Even if the firm has a so-called guillotine termination clause that permits termination without cause and without notice, the termination of a partner must comply with the fiduciary duty of good faith. *Winston & Strawn v. Nosal,* 279 Ill. App. 3d 231, 240-41, 664 N.E.2d 239, 245-46 (1st Dist. 1996), is the controlling Illinois case on fiduciary duties in partner terminations. In *Nosal,* the Court stated that "[r]egardless of the discretion conferred upon partners under a partnership agreement, this [discretion] does not abrogate their high duty to exercise good faith and fair dealing in the execution of such discretion." *Nosal* held that the fiduciary duty of good faith, even in the context of partner termination, "prohibits all forms of secret dealings and self-preference in any matter related to and connected with the partnership and requires each partner to fully disclose partnership business to other partners."

Terminating a partner for personal self-gain or to appropriate that partner's partnership share would likely constitute a breach of the fiduciary duty of good faith. The adoption of the Illinois Uniform Partnership Act (1997), 805 ILCS 206/100 *et seq.*, which became fully applicable, but for the savings clause, on January 1, 2008 may have limited the scope of partners' fiduciary duties. For example, Section 404(e) provides that "[a] partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interests." This provision appears to protect a partner whose actions incidentally advance that partner's personal interests. It does not authorize predatory terminations because Section 404(d) still requires that a partner exercise all partnership rights "consistent with the obligation of good faith and fair dealing."

Outside of Illinois, courts have held that a termination to resolve a "schism" between partners complies with the fiduciary duty of good faith. *See, e.g., Holman v. Coie,* 522 P.2d 515 (Wa. App. 1975). The Texas Supreme Court in *Bohatch v. Butler & Binion,* 977 S.W.2d 543, 547 (Tex. 1998), in reliance on the "schism" jurisprudence, even held that a law firm can expel a partner for "reporting suspected overbilling by another partner." This is not Illinois law. *Nosal* is the controlling Illinois precedent. If the Texas Supreme Court's narrow view of fiduciary duties in the context of partner termination were adopted in Illinois, a lawyer could be expelled from a firm simply for complying with the ethical duties to report misconduct committed by other lawyers. This would place all lawyers in the untenable position of having to risk their employment status to comply with their ethical duties.

Voluntary Withdrawal

Just as the lawyer or law firm needs to comply with both contractual and fiduciary duties in the context of partner termination, a lawyer voluntarily withdrawing from a law firm needs to do the same. (The enforceability of important contractual terms is discussed below.) The voluntarily withdrawing lawyer has potentially conflicting fiduciary duties. A lawyer has a duty to safeguard the clients' interests and fiduciary duties to his or her partners and law firm. A withdrawing lawyer does not have to inform the law firm of his or her intention to withdraw immediately upon deciding to withdraw. To the contrary, the Supreme Court stated in *Dowd & Dowd, Ltd. v. Gleason,* 181 Ill. 2d 460, 470, 693 N.E.2d 358, 364 (1998), that before announcing his or her withdrawal a lawyer can engage in preparations that are "necessary for the practice of law." The Supreme Court permitted such pre-notification preparations to enable the withdrawing lawyer to safeguard the clients' interests. Pre-notification preparations are also needed to ensure that the client's choice of counsel is not unduly impacted. If the withdrawing lawyers could not prepare to withdraw, they would be at a competitive disadvantage vis-à-vis their old law firm with respect to continuing to represent their clients.

One potential preparatory step that merits special attention is pre-notification solicitation of partners and staff. There is no controlling Illinois precedent on the permissibility of asking colleagues to join a lawyer who is withdrawing from a firm, but there are numerous out-of-state opinions that, not surprisingly, promulgate different rules:

- The New York Rule provides that you can solicit your partners but not your employees. *Gibbs v. Breed, Abbott & Morgan,* 271 A.D.2d 180, 187 (N.Y. App. Div. 2000).
- The Maryland Rule provides that you can solicit the people in your "circle of friends." *Quality Sys., Inc. v. Warman,* 132 F. Supp. 2d 349, 354 (Md. 2001) (not a law firm case).
- The Virginia Rule provides that you can solicit out of the office and after hours. *Appleton v. Bondurant & Appleton, P.C.,* No. 04-1106, 2005 WL 3579087, at *19 (Va. Cir. Ct. July 5, 2005).

- The Massachusetts Rule provides that you can solicit the people with whom you are actively working. *Lampert, Hausler & Rodman, P.C. v. Gallant,* No. 031887BLS, 2005 WL 1009522, at *2 (Mass. Super. Apr. 4, 2005).

Given the absence of controlling Illinois authority, the safest approach for a withdrawing lawyer is not to solicit colleagues prior to informing the firm of the decision to withdraw. In the event that the lawyer is convinced that he or she would not be able adequately to represent his or her clients without the assistance of certain colleagues–as is frequently the case in complex litigation–the Supreme Court's emphasis in *Dowd & Dowd* on taking steps necessary to safeguard the clients' interests may permit a lawyer to solicit those lawyers before notifying the firm of his or her intention to withdraw.

Client Communication

Regardless of whether a lawyer is moving his or her practice voluntarily or involuntarily, the mobile lawyer and the old law firm need to pay particularly close attention to the timing and manner in which that lawyer's clients are informed that the lawyer has or will be leaving. The Supreme Court in *Dowd & Dowd* promulgated the general rule that pre-termination solicitation of clients in and of itself may establish a breach of fiduciary duty. The Court also appeared to create a limited exception to that rule, stating that departing partners have been permitted to inform clients with whom they have a prior professional relationship about their impending withdrawal and to remind each client of its freedom to retain counsel of its choice. For example, if the lawyer is relocating during the midst of a client emergency, such as a preliminary injunction proceeding, the lawyer might have a sound basis for pre-termination solicitation in order to avoid prejudice to the client in the lawsuit, so long as the principle of client choice is not infringed. Despite this possible exception, the best practice is to follow the general rule.

The American Bar Association has issued a formal, albeit non-binding, opinion: ABA Formal Opinion 99-414 (Sept. 8, 1999), which summarizes the best practices with respect to informing a client that a lawyer is moving his or her practice. According to the ABA opinion, lawyers should only notify clients for whom they are actively working. The lawyers should not urge their clients to sever their relationship with the former firm nor should the lawyers disparage their former firm in any way. Rather, lawyers should indicate a willingness to continue to serve their clients and should make clear that the client has the ultimate right to choose counsel. The lawyer should send a neutral letter and, whenever possible, should send a letter jointly with their former law firm.

Client Files and Retaining Liens

Another issue that frequently arises when a lawyer leaves a law firm is whether the former firm is obligated to forward to that lawyer the files of the clients that are leaving with him. This issue typically arises when a client has not paid all of the former firm's bills. Property law cannot fully determine the client's entitlement to its files because this question implicates numerous ethical duties. Illinois Rule of Professional Conduct 1.15(b), in relevant part, requires a lawyer to provide a client with property that the client "is entitled to receive." Similarly, Illinois Rule of Professional Conduct 1.16(d), in relevant part, requires a lawyer prior to withdrawing from employment to deliver "to the client all papers and property to which the client is entitled." Neither of these rules provides much guidance because neither identifies exactly what property the client is *entitled* to receive.

However, the Illinois State Bar Association has provided a very detailed, albeit non-binding, answer to this question in ISBA Opinion No. 94-13. The ISBA opinion identified various types of documents that are commonly found in client files and stated what the lawyer should do with each category. First, property given to the lawyer by the client must be promptly returned to the client. Second, client correspondence, third-party correspondence, court filings, and legal documents such as contracts and wills must be made available to the client for copying at the client's expense. The ISBA opinion assumed that the client had already been provided with copies of these documents as required by Illinois Rule of Professional Conduct 1.4(a)'s requirement that a lawyer "keep a client reasonably informed about the status of the matter." Finally, administrative files, such as conflict checks and billing files, and attorney work product, such as research, memos, drafts and notes, do not need to be given to the client.

The ISBA opinion noted that the documents that should be produced, or at least made available for copying, can be withheld if the firm can assert an ethical retaining lien. A retaining lien is a common law possessory lien that arises when a client refuses to pay a bill. *In re: Thomas Leavy,* Il. Disp. Op. 04 CH 16, at *14 (ARDC 2005) (no retaining lien because lawyer never sent final bill). It is a passive lien, which means that the firm cannot enforce the lien in court unless the client brings a motion to compel. *Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co.,* 308 Ill. App. 3d 662, 675, 720 N.E.2d 636, 645 (1st Dist. 1999). Finally, the lien is discharged only when the client pays or posts adequate security; a statutory lien pursuant to 770 ILCS 5/1 is not considered adequate security to discharge a retaining lien. *Upgrade Corp. v. Mich. Carton Co.,* 87 Ill. App. 3d 662, 666, 410 N.E.2d 159, 162 (1st Dist. 1980).

A retaining lien should not be asserted if it would violate Illinois Rule of Professional Conduct 1.16(d)'s requirement that a lawyer take "reasonable steps to avoid foreseeable prejudice to the rights of the client." *Matter of Liquidation of Mile Square Health Plan of Illinois,* 218 Ill. App. 3d 674, 680, 578 N.E.2d 1075, 1080 (1st Dist. 1991). To determine if a retaining lien complies with Rule 1.16(d), a lawyer must balance the following factors:

- The client's financial situation and sophistication. If the client is insolvent, a retaining lien should not be asserted.
- The reasonableness of the attorney's fees and the client's understanding of its duty to pay the attorney's fees.
- The prejudice that asserting the retaining lien would have on the important rights or interests of the client or third-parties. If the client needs the property to defend against a criminal charge or to protect a significant personal liberty, a retaining lien should not be asserted.
- Whether there are less stringent means

available to secure payment and whether failure to assert the lien would result in fraud or gross imposition by the client.

Even if a retaining lien can be asserted ethically, a firm considering asserting such a lien should consider the business implications of such a decision and whether the benefits of the lien outweigh the inevitable loss of good will generated by withholding a former client's files.

Firm Documents

One question that a mobile lawyer will inevitably have to address is which documents he can pack up and take with him. There is no Illinois precedent on this precise question, but the American Bar Association and courts from other jurisdictions have provided some useful guidance. First, a lawyer can take the work product he created–including documents relating to former clients–as long as the confidentiality of the documents is preserved. *See* ABA Formal Op. 99-414 (Sept. 8, 1999). Second, the Illinois Trade Secret Act, 765 ILCS 1065/1 *et. seq.*, may preclude the lawyer from taking certain documents. Documents that may be protected by the trade secret act are legal forms, practice guides, and legal summaries generated by the firm as resources for the firm's attorneys. Third, a lawyer should be especially careful with client lists. *See Reeves v. Hanlon,* 95 P.3d 513, 522 (Cal. 2004); *Fred Siegel Co. v. Arter & Hadden,* 707 N.E.2d 853, 862-63 (Ohio 1999). These documents may be trade secrets, and the fact that a lawyer took the firm's entire client list could be evidence of an intent to solicit all of the firm's former clients–including clients that the withdrawing lawyer had not previously represented. If a client is not in a lawyer's personal rolodex, then there is likely no pre-existing relationship that could justify a direct solicitation on behalf of the withdrawing lawyer.

Attorney Screens and Former Clients

Lawyers who move their practice between firms need to pay close attention to any conflicts of interests that arise as a result of their affiliation with the new firm. Illinois Rule of Professional Conduct 1.10(b) creates particular problems because it provides that a firm should not represent a client if a newly associated lawyer–or that attorney's former law firm–formerly represented a person in a matter that the firm knows or reasonably should know is the same or is substantially related. There are two important exceptions to this broad imputed disqualification rule. First, the firm can continue to represent the client if the newly associated lawyer has no confidential or material information. Second, the firm can continue to represent the client if the lawyer is timely screened. Illinois Rule of Professional Conduct 1.10(e) sets forth the criteria needed to set up an adequate attorney screen: (1) isolation from the matter; (2) isolation from the client; (3) no conversation about the matter; and (4) affirmative steps by the firm to accomplish the foregoing.

On February 16, 2009, the American Bar Association modified its model rule relating to imputed disqualification to permit attorney screens. The ABA Model Rule 1.10(b), while similar to Illinois Rule 1.10(b), has three important differences: (1) the screened lawyer cannot be apportioned any fee resulting from the representation that requires the screen; (2) the former

client must be notified of the conflict to allow that client to object to the adequacy of the firm's screening procedures; and (3) the firm must provide the former client with certificates of compliance with the screening procedures at reasonable intervals.

Contractual Covenants

There are three types of contractual covenants that cause the most concern to mobile lawyers: (1) non-competition clauses; (2) non-solicitation clauses; and (3) notice provisions. Non-competition clauses are only enforceable if they relate to retirement benefits such as a pension or when they relate to the sale or transfer of a law practice. Non-competition clauses are not enforceable because Illinois Rule of Professional Conduct 5.6(a) 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 either benefits upon retirement or an agreement pursuant to the provisions of Rule 1.17 [relating to the sale of transfer of a law practice]." *See Dowd & Dowd,* 181 Ill. 2d at 480-83, 693 N.E.2d at 368-70. A provision that gives a retiring partner the right to choose between continuing to practice law and receiving retirement benefits is enforceable. *Hoff v. Mayer, Brown and Platt,* 331 Ill. App. 3d 732, 735-41, 772 N.E.2d 263, 266-71 (1st Dist. 2002).

Non-solicitation provisions are similarly unenforceable. Clauses that preclude withdrawing attorneys from contacting clients are unenforceable because they interfere with the client's right to choose counsel. *See* ISBA Opinion No. 91-12. Clauses that preclude withdrawing attorneys from soliciting paralegals and secretaries have also been held to be unenforceable. *See Jacob v. Norris, McLaughlin & Marcus,* 607 A.2d 142, 153 (N.J. 1992). The unenforceability of non-solicitation agreements does not permit a lawyer to solicit all of his or her old firm's former clients. Such action could violate the ethical restrictions on solicitation. For example, the lawyer would violate Illinois Rule of Professional Conduct 7.3(b)(2) if he or she knows that the old firm's clients do "not desire to receive a communication" from him or her. Further, as discussed in more detail above, such action could constitute a breach of fiduciary duty and a violation of the Illinois Trade Secrets Act. The best practice, as stated in ABA Formal Opinion 99-414, is for a lawyer only to solicit clients for whom he or she is actively working.

Notice provisions that require a lawyer to provide the firm with advance notice of withdrawal may be fully enforceable depending on how much advance notice is required. In fact, notice provisions requiring 90 days advance notice of a lawyer's intent to withdraw have been upheld. *Dowd & Dowd, Ltd. v. Gleason,* 284 Ill. App. 3d 915, 931-32, 672 N.E.2d 854, 865-66 (1st Dist. 1996). Short notice provisions appear to be consistent with Rule 5.6(a) and the Illinois Supreme Court's emphasis on safeguarding the clients' interests and right to choose counsel. As the duration of the notice provision increases, however, this justification recedes, and an unduly long advance notice provision could prejudice the withdrawing lawyer's ability to represent that client and the client's right to choose counsel.

Avoiding Dissolution

One final issue that both the lawyer and the law firm must consider is whether the lawyer's withdrawal or termination triggers dissolution of a firm. In the absence of a term that permits the law firm to continue following the withdrawal or termination, the lawyer's departure could trigger dissolution of the firm. *Nosal,* 279 Ill. App. 3d at 241-42, 664 N.E.2d at 246. Further, a termination that violates the fiduciary duty of good faith could lead to a judicial dissolution even if the partnership agreement permitted the partner's termination. The analysis for law firms that are organized as corporations is different unless the law firm is deemed to be a close corporation, which would trigger application of partnership fiduciary principles. *Hagshenas v. Gaylord,* 199 Ill. App. 3d 60, 70-72, 557 N.E.2d 316, 322-24 (2d Dist. 1990).

There are numerous legal implications if the firm is deemed dissolved as a result of a partner's departure. One of the most important implications is that all of the firm's assets must be wound up and accounted for. The existing matters in the law firm at the time of dissolution are treated as assets that are subject to the wind-up and all fees subsequently earned on those cases belong to the dissolved firm. *Ellerby v. Spiezer,* 138 Ill App. 3d 77, 81-83, 485 N.E.2d 413, 416-17 (1st Dist. 1985); *In re Labrum & Doak, LLP,* 227 B.R. 391, 408 (Bankr. E.D. Pa. 1998) ("[E]very other court confronted with this issue of division of post-dissolution proceeds of a law partnership has held that pending cases, regardless of whether they are hourly-fee cases or contingent-fee matters, are unfinished business requiring winding up after dissolution…"). While the profits gained from the existing matters are shared pursuant to the partnership agreement, under Section 401(h) of the Illinois Uniform Partnership Act (1997), the lawyers winding up the existing matters are entitled to reasonable compensation for their efforts.

There are a whole host of additional issues that arise when lawyers moves their practice from one firm to another and this article does not purport to address them all. The resolution of many of these issues depends on the corporate structure of the law firm–partnership, LLC, or corporation–and on the specifics of the partnership agreement or bylaws. The case law in this area of the law is still developing, which means that courts have a lot of discretion in determining compliance with the applicable fiduciary and ethical duties. Mobile lawyers–and the law firms they are leaving or joining–must be aware of these duties.

A prudent lawyer will attempt to avoid any hint of improper conduct by being reasonable and focusing on his or her clients' interests. Withdrawal and termination decisions are exceedingly difficult, involving both professional obligations and personal relationships. Knowing the applicable fiduciary and ethical is the first step in successfully navigating this decision. A lawyer who is unsure about the scope of these duties or the propriety of his or her actions should seek legal counsel. Objective advice and guidance can provide some welcome support in these uncertain economic times. ■

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