

## Dissolution of a Law Partnership-Goodwill, Winding up Profits, & Additional Compensation

When forming a partnership or professional association, generally the last thing on any person's mind is the possibility of the dissolution of that entity. Ironic though it may be, lawyers, who spend a great deal of time advising their clients of the protection and expediency of taking prophylactic measures for such a contingency, often fail to utilize similar tools for their own benefit. As with most other contracts, the clauses in incorporation documents and partnership agreements that provide procedures in case of a break up are enforceable as long as that enforcement is not contrary to established legal principles. Confusion may arise in determining what those legal principles are. Contract and partnership principles must be supplemented by, and often superceded by, public policy, equity, and principles of professional responsibility.

Even partnerships and professional associations which anticipate the possibility of a disbandment and allot a portion of their initial agreement to provide therefor, often find, when the possible becomes the actual, that disputes arise over matters not covered in either the dissolution clause of the prime agreement or a subsequent amendment or agreement of dissolution. Many law firms, whether formed by a handshake or a written document, have left the resolution of all disputes to negotiations between themselves when, and if, they occur. Hence, the final meetings of many firms have and will end up being in a court of law.

On dissolution, a partnership is not terminated, but continues until the winding up of partnership affairs is completed.<sup>1</sup> The following are the three major steps in the winding up of a dissolved partnership: 1) pay debts and satisfy liabilities; 2) settle all questions of account among the partners; and 3) divide the unexhausted assets, if any, among the partners in proper proportions or, if assets are not capable of proper division, to even out

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1. See UNIFORM PARTNERSHIP ACT §30; A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP §83A (1968)(hereinafter cited as BROMBERG AND CRANE); H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 227 (1979)(hereinafter cited as REUSCHLEIN & GREGORY).

the deficiencies by contribution.<sup>2</sup> In the absence of any agreement to the contrary, upon the date of dissolution, the right to an accounting of his interest accrues to each partner against the winding up partner.<sup>3</sup> The partner's interest at the date of dissolution consists of his portion of firm assets and liabilities.<sup>4</sup> These assets and liabilities include the following: clients, present office location and telephone, accounts receivable, pending cases, contingent fees, contingent liabilities (including malpractice and tax claims), expenses of dissolution, furniture and fixtures (including law library), prepaid expenses and unamortized assets, cross insurance, and ancillary personnel.<sup>5</sup>

The winding up and accounting processes for partnerships and professional associations of attorneys at law are more complex than those for the average business. When a person retains a law firm, a contract is formed which binds every member of that firm until the fulfillment of the attorney-client obligation.<sup>6</sup> Therefore, while for the average partnership winding up may consist merely of liquidation of assets and the distribution of the proceeds therefrom,<sup>7</sup> the winding up process for a firm of lawyers is more apt to be extended until all contracts for legal services with the firm at dissolution have been executed.<sup>8</sup> Because of the attorney-client relationship, the nebulous fee arrangements, the impossibility of flat appraisals of future fees in a given case, as well as many other varying factors, the accounting of a legal practice partnership is more of an art than a mathematical formula.<sup>9</sup>

One phase of the dissolution or winding up of a firm of attorneys follows the general "mathematical formula" applicable to

2. E. SCAMELL, *LINDLEY ON PARTNERSHIP* 619-20 (12th ed. 1962)(hereinafter cited as SCAMELL). See also 39 Mo. L. REV. 632, 634 (1974).

3. *Id.* BROMBERG AND CRANE §87. An account is a statement of the partnership affairs and a payment of the amount of the interest in the partnership.

4. See generally UNIFORM PARTNERSHIP ACT §40(a), (b), (c); BROMBERG AND CRANE §90.

5. See generally Rutstein, *Handling the Breakup of a Professional Practice*, 21 PRAC. LAW 57 (Dec. 1, 1975).

6. *Frates v. Nichols*, 167 So. 2d 77, 81 (Dist. Ct. App. Fla. 1964).

7. See generally UNIFORM PARTNERSHIP ACT §42; BROMBERG AND CRANE §86.

8. Winding up of law partnership upon dissolution involves completing transactions begun but not then finished. *Childers v. United States*, 442 F.2d 1299, 1303 (5th Cir. 1971).

9. *In re Mondale and Johnson*, 150 Mont. 534, —, 437 P.2d 636, 638 (1968).

other partnerships.<sup>10</sup> That phase consists of the satisfaction of the firm's liabilities outstanding at the date of dissolution. Even after dissolution, partners are not discharged from liabilities which were incurred during the ordinary course of the partnership business. Debts are first discharged through liquidation of assets.<sup>11</sup> If the debts cannot be satisfied fully through liquidation, the former partners are jointly and severally liable to the creditors. Even so, amongst the partners themselves, the excess liability is to be borne according to the profit sharing proportions in the absence of an agreement stating otherwise.<sup>12</sup> All firm debts must at least be provided for before an accounting between the partners themselves can be decreed.<sup>13</sup>

Various issues have been raised in the courts concerning the winding up process for a dissolved legal partnership or professional association.<sup>14</sup> Is goodwill to be considered an asset of the firm upon dissolution? How are the winding up period profits to be divided? Is the attorney who completes a case pending at dissolution entitled to additional compensation over his usual partnership share for his efforts and expenses in completing the case? The courts have failed to solve these issues concretely. Some issues have brought contrary results in various jurisdictions. Even within the same jurisdiction, fine distinctions have been the basis of a decision one way or the other. Almost all of these controversial issues consist of the determination of either what must be included in the

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10. SCAMELL at 621.

11. BROMBERG AND CRANE §90, at 507. See also Reuschlein & Gregory at 366.

12. See SCAMELL at 621.

13. In one case two small notes were discounted at the bank by a firm. If the maker of either note defaulted, then the firm would be liable to the bank. The liabilities were small and contingent. Even so, these debts had to be accounted for before distribution of the firm assets among the partners. *Cunningham v. Mad-den*, 115 W. Va. 286, 175 S.E. 446 (1934).

14. Many of the problems unique to the winding up of a law firm exist because of the attorney-client relationship. The traditional relationship between attorney and client is the same whether the lawyer practices solo, in a partnership, or in a professional association. *In re H.H. Bar Ass'n*, 110 N.H. 356, \_\_\_\_, 266 A.2d 853, 855 (1970). In so far as the relationship of an attorney to his client and to the general public is concerned, practice in corporate form is substantially similar to the practice of law as it exists in firms operating as law partnerships. *In re R.I. Bar Ass'n*, 106 R.I. 752, \_\_\_\_, 263 A.2d 692, 698 (1970). Therefore, most of the problems that arise will be handled in a somewhat similar fashion irrespective of whether the firm is in partnership or corporate form.

firm assets or how those assets are to be divided into the individual partnership interests.

### A. *Good Will*

One issue raised is whether good will constitutes an asset of a partnership or professional association of attorneys which must be considered in determining what is payable to a retiring partner, or to the estate of a deceased partner, by a partner who takes over the property of the partnership and continues the business. Generally, the good will is sold with the physical assets of the business and must be accounted for like any other element of value.<sup>15</sup> In the case of professional or personal service partnerships, though, good will is likely to be personal to the partners individually and therefore, incapable of transfer.<sup>16</sup> The substantive law of jurisdictions throughout the United States indicates good will in a professional partnership, such as a law firm, which is based on personal skill, judgment, and reputation, has no value upon dissolution and cannot be distributed as an asset.<sup>17</sup> Nevertheless, where the partnership agreement provided for the arbitration of disputes and the arbitrator assigned a value to one partner's contribution of good will, an Arizona court sustained the arbitrator's award even though it was at variance with the substantive law of the state.<sup>18</sup> The Supreme Court of New Jersey has held that good will, should there in fact be any, is a component in determining the monetary worth of an attorney's interest in a professional partnership.<sup>19</sup> The court

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15. See generally Annot., 65 A.L.R.2d 521 (1959).

16. See BROMBERG AND CRANE at 478-84; 18 VA. L. REV. 651 (1932).

17. See, e.g., Cook v. Lauten, 1 Ill. App. 2d 255, 117 N.E.2d 14 (1954); Siddal v. Keating, 8 A.D.2d 44, 185 N.Y.S.2d 630 (1959), *aff'd*, 7 N.Y.2d 846, 164 N.E.2d 860, 196 N.Y.S.2d 986 (1959); Masters v. Brooks, 132 A.D.874, 117 N.Y.S.585 (1909); Harstad v. Metcalf, 56 Wash. 2d 239, 351 P.2d 1037 (1960). *Contra*, Rutan v. Coolidge, 241 Mass. 584, 136 N.E. 257 (1922).

18. The court found that it did not have to decide whether the good will was an asset of law firm under Arizona law. Because an arbitrator derives his powers from the parties and not from the law of the land, "He may do what no other judge has a right to do, he may intentionally decide contrary to law and still have his judgment stand." Snowberger v. Young, 24 Ariz. App. 177, \_\_\_\_\_, 536 P.2d 1069, 1072 (1975)(quoting Park Constr. Co. v. Independent School Dist. No. 32, 216 Minn. 27, \_\_\_\_\_, 11 N.W.2d 649, 652 (1943)).

19. Good will may be considered in determining economic value of husband's interest in law firm for use in a divorce proceeding. Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975).

noted, however, that the good will of a law firm may not be sold or transferred for a valuable consideration because of ethical reasons.<sup>20</sup>

The good will of the practice of a lawyer is not of itself an asset which may be sold.<sup>21</sup> The inalienability of the good will of a law practice is supported by several of the ABA CANONS OF PROFESSIONAL ETHICS. An allowance for good will to a retiring partner based upon future earnings, in the absence of his contribution in services or responsibility, would seem to be in direct violation of CANON No.34.<sup>22</sup> CANON No. 27, which prohibits solicitation, precludes a lawyer who purchases another lawyer's practice from soliciting the latter's clients to continue their business with him.<sup>23</sup> A predominant portion of an individual attorney's good will is his clientele. Furthermore, CANON No. 37 expounds the duty of an attorney to preserve the confidences and secrets of his client.<sup>24</sup> This obligation continues past the date of the termination of his employment by that client. Thus, a lawyer may not sell his law practice as a going business because to do so would breach his duty not to disclose such confidences and secrets.<sup>25</sup>

The general rule remains that the good will of a law firm attaches to the individual attorneys and attends each upon the dissolution of their firm.<sup>26</sup> The absurdity of the contrary rule is illustrated in the New York case of *Masters v. Brooks*.<sup>27</sup> A former partner claimed that the partner whose name was used in the name of the former partnership was accountable to him for appropriation of good will because he practiced under his own name af-

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20. *Id.* at —, 331 A.2d at 261 n.5.

21. "Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 266 (1945)(hereinafter cited as ABA OPINIONS).

22. *Siddall v. Keating*, 8 A.D.2d 44, —, 185 N.Y.S.2d 630, 633, *aff'd*, 7 N.Y.2d 846, 164 N.E.2d 860, 196 N.Y.S.2d 986 (1959). "No division of fees for legal services is proper, except with another lawyer based upon a division of services or responsibility." ABA CANONS OF PROFESSIONAL ETHICS No. 34 (hereinafter cited as ABA CANONS).

23. ABA OPINIONS, No. 266. *See* ABA CANONS No. 27. *See also* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 507 (1962).

24. "It is the duty of the lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . ." ABA CANONS No. 37.

25. ABA CODE, EC 4-6.

26. *See Crane, Partnership Goodwill*, 18 VA. L. REV. 651 (1932).

27. 132 A.D. 874, 117 N.Y.S. 585 (1909).

ter the dissolution. The court dismissed his argument pointing out that the logical conclusion would be that, whenever one whose name was used in a firm name broke out on his own, he would have to change his name or else share his earnings with his former partners for the rest of his life.<sup>28</sup>

### B. Division of Winding Up Period Profits

The extended winding up process of a law firm presents additional problems. Upon dissolution of a law partnership, the attorney-client relationship continues for those clients who engaged the firm to represent them prior to dissolution and whose cases are pending at the date of dissolution. All members of the former firm are obligated to carry through the contracts for legal services procured before the dissolution date.<sup>29</sup> Generally, the attorneys take with them the cases that were assigned to them prior to dissolution.<sup>30</sup> In the absence of an agreement stating otherwise, the fees generated from these cases are considered assets of the partnership and not of the individual attorney.<sup>31</sup>

The firm continues to exist during the winding up period, but only to the extent necessary to finish the pending cases, liquidate assets, pay off pre-dissolution debts, and allocate the remaining assets or liabilities to the various partnership interests. Unless the partners have agreed otherwise, profits and losses incurred during the winding up period are shared by the partners in proportion to their pre-dissolution ratios.<sup>32</sup> Most courts hold that the pre-dissolution profit distribution ratio applies.<sup>33</sup> There is authority,

28. *Id.* at —, 117 N.Y.S. at 588.

29. *See Frates v. Nichols*, 167 So. 2d 77 (Fla. Dist. Ct. App. 1964).

30. *See, e.g., Frates v. Nichols*, 167 So. 2d 77 (Fla. Dist. Ct. App. 1964). *Olive v. Williams*, 42 N.C. App. 380, 257 S.E.2d 90 (1979).

31. "When a professional partnership between attorneys at law is dissolved . . . , when considering the unfinished business entrusted to the firm, [one] must consider such cases as an asset of the partnership." *In re Mondale and Johnson*, 150 Mont. 534, —, 437 P.2d 636, 641 (1968)(from MONT. REV. CODES ANN. §63-502 (1947)).

32. Each partner of a dissolved law firm is entitled to his aliquot share of net proceeds winding up period based upon the usual percentage under the terms of the partnership agreement. *Dreier v. Linden*, 70 A.D.2d 820, 417 N.Y.S.2d 496 (1979); *Accord, Cohen v. Lansburgh*, 366 So.2d 154, 156 (Fla. Dist. Ct. App. 1979); *Olive v. Williams*, 42 N.C. App. 380, 257 S.E.2d 90 (1979).

33. *See, e.g., Frates v. Nichols*, 167 So. 2d 77 (Fla. Dist. Ct. App. 1964); *Olive v. Williams*, 42 N.C. App. 380, 257 S.E.2d 90 (1979). *Cf. Welsh v. Carroll*, 378

though, indicating that, without a superceding agreement among the members of a professional association providing otherwise, all fees received by former members for winding up cases subsequent to dissolution must be divided among the former members in accordance with their shareholder's percentage because the fees are simply assets of the association.<sup>34</sup>

The parties to an agreement to form or dissolve a partnership may contract for a distribution of assets upon dissolution in a manner other than that which ordinarily flows by operation of law.<sup>35</sup> Partners may agree that a certain account never be considered as a partnership asset, even during the life of the partnership. Such an account cannot be drawn into the partnership assets upon dissolution, but will remain the exclusive asset of the partner in his individual capacity.<sup>36</sup> Upon dissolution, the partners may allocate the pending cases and agree that each will have exclusive rights in the fees from those cases assigned to him and will not be entitled to any interest in the fees from cases assigned to others; or that the partner completing a case will be entitled individually to a certain percentage of the fee from that case and the partnership as a whole entitled to the rest of that fee; or that for a cash settlement a partner may relinquish all his rights in fees received subsequent to dissolution. Neither an out of court settlement of an honest dispute nor an agreement supported by consideration among the partners for distribution of partnership assets will be set aside unless vitiated by fraud, deception, or some other invalidating element, such as mistake or mental incapacity.<sup>37</sup> In the absence of a settlement or agreement, the general rules apply and each partner is entitled to his share of partnership assets, a portion of which may be earned

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So.2d 1255 (Fla. Dist. Ct. App. 1979)(professional association, implied contract to divide winding up profits according to employment contracts), *cert. denied*, 386 So. 2d 643 (Fla. 1980).

34. "The assets of the P.A. after the payment of the P.A.'s liabilities shall be distributed to stockholders in proportion to their stockholdings." Kreutzer v. Wallace, 342 So.2d 981 (Fla. Dist. Ct. App. 1977). *Accord*, Melby v. O'Melia, 93 Wis. 2d 51, 286 N.W.2d 373 (Ct. App. 1979)(dicta)(When a member of a professional association leaves that association he may be entitled to compensation for his shares in the professional association at a fair value).

35. Lazar v. Orr, 207 So.2d 23 (Fla. Dist. Ct. App. 1968).

36. *E.g.*, Lazar v. Orr, 207 So. 2d 23 (Fla. Dist. Ct. App. 1968); Cofer v. Hearne, 459 S.W.2d 877 (Tex. Civ. App. 1970)(agreement as to Hudson fee).

37. *See* Law v. Mackie, 373 Pa. 212, 95 A.2d 656 (1953).

in the winding up period.<sup>38</sup>

### C. *Additional Compensation for Participation in the Winding Up Process*

The general rule is that any partner who has not wrongfully dissolved the partnership has a right to participate in the winding up of the partnership affairs.<sup>39</sup> Usually none of the partners of a dissolved firm is entitled to compensation for services rendered in winding up the partnership affairs unless it is expressly agreed otherwise, or can fairly be implied from the circumstances.<sup>40</sup> This is the no additional compensation rule generally applicable to partnerships.

In the case of law firms, where the winding up process consists of more than just collecting outstanding claims, paying debts, and distributing the surplus among partnership members, many courts have limited the non-compensation rule.<sup>41</sup> The need for a distinction was recognized by the United States Supreme Court, which, after announcing the general principle in *Denver v. Roane*,<sup>42</sup> stated: "There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor."<sup>43</sup> It has been recognized that when the surviving partner of a firm dissolved by the death of a partner carries on the business in a manner beneficial to the partnership as a whole, the surviving partner should be allowed to deduct additional compensation from the profits before distribution

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38. See *In re Mondale and Johnson*, 150 Mont. 534, 437 P.2d 636 (1968).

39. REUSCHLEIN & GREGORY §240.

40. *Lamb v. Wilson*, 3 Neb. (Unof.) 496, 92 N.W. 167 (1902)(Winding up consists of collecting outstanding claims, paying debts, and distributing the surplus among members.)

41. The no additional compensation rule should not be extended beyond the requirements of merely winding up the partnership affairs. The closing of a case is distinguishable from the activities of merely winding up on partnership. The skill and labor performed by the closing attorney makes a firm's contract valuable. *Lamb v. Wilson*, 3 Neb. (Unof.) 496, 92 N.W. 167 (1902). "(A)n exception should be made to the general rule to the extent of allowing reasonable compensation for the extra services necessary to complete and carry out a contract or close employment already undertaken." *Jones v. Marshall*, 24 Idaho 678, —, 135 P. 841, 842 (1913).

42. 99 U.S. 355 (1879).

43. *Id.* at 359.



among the partnership interests.<sup>44</sup>

Many jurisdictions have modified the no additional compensation rule for the winding up of the affairs of a partnership or professional association of lawyers.<sup>45</sup> Most of these courts have quoted, and thereby adopted, the reasoning of the 1902 Supreme Court of Nebraska in *Lamb v. Wilson*.<sup>46</sup> That reasoning is as follows:

[W]hen it appears that time, skill, and labor have been expended by a partner in the continuance of the partnership business, which inure to the general benefit, he ought to receive, from the profits from his skill and labor, a reasonable compensation, varying according to the nature of the business, the difficulties and results of the undertaking, and its necessity or desirability, . . . [T]his view, it seems to us to be founded upon the plainest principles of equity and justice, especially when applied to partnerships among professional men, where the profits are almost wholly the result of professional skill and labor.<sup>47</sup>

A 1934 West Virginia case, *Cunningham v. Madden*,<sup>48</sup> distinguishes between the winding up or liquidation of a partnership and the carrying on of the firm's unfinished business. The former falls within the doctrine against additional compensation. For the performance of the latter, though, a member of a dissolved partnership is entitled to reasonable compensation for his services; the balance that those services yield above that amount is to be treated as a partnership asset.<sup>49</sup>

Generally, absent agreement, a partner has no right to compensation for work performed on behalf of the firm.<sup>50</sup> His share in

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44. "Though partners, in the absence of special agreement receive no compensation, yet 'a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.'" *Jacobson v. Wikholm*, 29 Cal. 2d 24, \_\_\_, 172 P.2d 878, 879 (1946)(construction firm)(quoting CAL. CIV. CODE § 2412(f)).

45. *Jones v. Marshall*, 24 Idaho 678, 135 P. 841 (1913); *In re Mondale and Johnson*, 150 Mont. 534, 437 P.2d 636 (1968); *Lamb v. Wilson*, 3 Neb. (Unof.) 496, 92 N.W. 167 (1902); *Cofer v. Hearne*, 459 S.W.2d 877 (Tex Civ. App. 1970); *Cunningham v. Madden*, 115 W. Va. 286, 175 S.E. 446 (1934).

46. 3 Neb (Unof.) 496, 92 N.W. 167 (1902).

47. *Id.* at \_\_\_, 92 N.W. at 168.

48. 155 W. Va. 286, 175 S.E. 446 (1934).

49. *Id.* at \_\_\_, 175 S.E. at 447.

50. 39 Mo. L. Rev. 632, 637 (1974).

the profits is his remuneration for his participation in the partnership.<sup>51</sup> Nevertheless, he who seeks equity, must do equity. Therefore, a withdrawing or nonparticipating partner who demands that profits from the winding up of the partnership be accounted for should give credit for the time, skill, and efforts expended by the continuing partners which have produced the profits.<sup>52</sup>

A few courts still apply the general partnership doctrine of no additional compensation to the winding up of the affairs of a dissolved law firm.<sup>53</sup> In a 1964 Florida case, *Frates v. Nichols*,<sup>54</sup> when a voluntarily withdrawing member of a professional association of attorneys finished up several of the cases he had been assigned prior to, but still pending at his departure, the members of his old firm claimed that he was entitled to no interest in the fees generated from those cases. The Florida court said that the withdrawing member was entitled to income for his services in winding up the cases of his old firm, but only to the extent of his partnership share in the net fee of each case he completed.<sup>55</sup> Citing cases from four other jurisdictions,<sup>56</sup> the court declared, "the proposition is universally accepted that a law partner in dissolution owes a duty to his old firm to wind up the old firm's pending business, and that he is not entitled to any extra compensation therefor."<sup>57</sup>

In three cases subsequent to *Frates v. Nichols*, the Florida appellate courts have upheld the adoption of the no extra compensation doctrine in regard to the winding up of the affairs of a law

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51. *Id.*

52. *Id.*

53. The no additional compensation rule does not mean that the partner who completes a case will not receive any reward for his work. The rule simply maintains that, for all cases pending with the firm upon dissolution, the fees generated from their completion will be divided in the same manner as fees earned during the life of the partnership. At least one court has extended the no additional compensation rule to the expenses an attorney incurs in completing pending cases after the date of dissolution. *Olive v. Williams*, 42 N.C. App. 380, 257 S.E.2d 90 (1979). *Cf. Hawkesworth v. Ponzoli*, 388 So. 2d 299 (Fla. Dist. Ct. App. 1980) (distinguishes between direct expenses, which are traceable, and indirect, which are not).

54. 167 So.2d 77 (Fla. Dist. Ct. App. 1964).

55. *Id.* at 82.

56. *Walker v. Goodrich*, 16 Ill. 341 (1855); *Felt v. Mitchell*, 44 Ind. App. 96 88 N.E. 723 (1909); *Shelley v. Smith*, 271 Mass. 106, 170 N.E. 826 (1930); *Platt v. Henderson*, 227 Or. 242, 361 P.2d 73 (1961).

57. *Frates v. Nichols*, 167 So. 2d 77, 80 (Fla. Dist. Ct. App. 1964).

partnership. In *Kreutzer v. Wallace*,<sup>58</sup> the court reiterated its former position: "[T]he retention of a law firm obligates every member thereof to fulfilling that contract, and . . . , upon a dissolution any of the partners is obligated to complete that obligation without extra compensation."<sup>59</sup> The court also affirmed the lower court's distribution of the professional association's excess assets over liabilities in proportion to the stockholdings of each member in the former association.<sup>60</sup> In a more recent case, *Welsh v. Carroll*,<sup>61</sup> the court found an implied contract between the former partners to divide the proceeds from the winding up business in accordance with their former employment contracts with the firm. The parties did not abandon their employment contracts, but believed them to be in full force during the winding up period. Therefore, the court found implied contracts which superceded the provisions in the original partnership agreement.<sup>62</sup> The court emphasized that the contracts did not amount to a provision for extra compensation, but simply provided the same method of compensation that was in effect before the dissolution of the association.<sup>63</sup> In the most recent Florida case, *Hawkesworth v. Ponzoli*,<sup>64</sup> the court pondered the allocation of overhead expenses attributable to the completion of pending cases during the winding up period. The court noted that the costs directly traceable to a particular file could be deducted from the income produced by that file by the attorney who handled the case before he contributed the remainder to the firm's assets.<sup>65</sup> The general overhead (office salaries, rent, library costs and other indirect expenses) generated in the production of the partnership's post-dissolution income, however, was not to be deducted

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58. 342 So. 2d 981 (Fla. Dist. Ct. App.), *cert. denied*, 353 So. 2d 680 (Fla. 1977).

59. *Id.* at 982.

60. Income produced during the winding up period is to be divided according to each former member's interest in the total assets and fees of the professional association. *Id.*

61. 378 So. 2d 1255 (Fla. Dist. Ct. App. 1979), *cert. denied*, 386 So. 2d 643 (Fla. 1980).

62. "[T]he party's interpretation of their own contract will be followed unless it is contrary to law." Parties acted as if employment contracts, and not the dissolution provisions of incorporation agreement, controlled in winding up period. *Id.* at 1257.

63. *Id.*

64. 388 So. 2d 299 (Fla. Dist. Ct. App. 1980).

65. *Id.* at 300 n.1.

before post-dissolution fees were contributed to the former firm's assets.<sup>66</sup> The court said reimbursement for general overhead expenses would violate the no additional compensation rule.<sup>67</sup>

In deciding a 1970 case, *Cofer v. Hearne*,<sup>68</sup> a Texas court acknowledged the existence of competing authority on the rule to be applied in disposing of legal fees paid for services performed partly before and partly after the voluntary dissolution of a law partnership on business that had come into the partnership office before its dissolution. The Texas court conceded the view that no partner of a voluntarily dissolved partnership is entitled to extra compensation for finishing up pending firm business in the absence of an agreement providing therefor had recently gained support in Florida and, perhaps more significantly, was the prevailing view of an earlier Texas decision, *Phoenix Land Co. v. Exall*.<sup>69</sup> Nevertheless, the court decided to join the group supporting the rule set forth in *Lamb v. Wilson*.<sup>70</sup> Stating that the prior rule in Texas was harsh, unconscionable, and inequitable, the court adopted the principle that legal work on partnership business after the voluntary dissolution entitles a former law partner of that firm to extra compensation for his work in addition to his usual partnership share.<sup>71</sup> *Cofer* and *Phoenix* are both the product of civil appeals courts; the issue has not yet been raised before the Supreme Court of Texas. Therefore, within the same state, there exists authority on both sides of this issue.

The commentators agree that no compensation is usually permitted a partner of a voluntarily dissolved partnership for his services in winding up except by agreement or for a surviving partner.<sup>72</sup> One commentator has noted, however, that special circumstances may exist in professional partnerships.<sup>73</sup>

Clearly, special circumstances do attend the legal profession so that the rule generally applicable to partnerships serves little use in the context of a law partnership, or any other professional service partnership or association for that matter. In the learned pro-

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66. 388 So.2d 299 (Fla. Dist. Ct. App. 1980).

67. *Id.* at 301.

68. 459 S.W.2d 877 (Tex. Civ. App. 1970)(Austin).

69. 159 S.W. 474 (Tex. Civ. App. 1913)(Dallas).

70. 3 Neb. (Unof.) 496, 92 N.W. 167 (1902).

71. *Cofer v. Hearne*, 459 S.W.2d 877, 880 (Tex. Civ. App. 1970).

72. BROMBERG AND CRANE §83(c); REUSCHLEIN & GREGORY §240.

73. BROMBERG AND CRANE §83(c).

fessions compensation is for the exercise of personal skills and knowledge. The profits of a professional, whether he works individually or jointly with other professionals in his field, are recognized as personal service income since the return attributable to capital rather than individual skill and labor is negligible.<sup>74</sup> Furthermore, the attorney-client relationship is a personal one. While the responsibility and obligation of each attorney to his clients extends to his firm, in most cases even with large firms, a client has one attorney upon whose integrity and legal skills he primarily relies. Although initially a client may employ a certain attorney because of the reputation of the firm of which he is a member, that client will stay with that firm only if he develops confidence in the individual attorney with whom he deals. Hence, one may conclude that whether a client remains with a firm throughout the completion of a certain case and whether that client will return to that firm for subsequent legal counsel depends to a large extent on the individual personality of his primary counsel and only to a minor extent on the association that lawyer has with a certain firm.

Equitable principles also support the view that in the context of the winding up of professional partnerships extra compensation should be received by the partner who is directly responsible for the generation of post-dissolution income for the partnership. Surely, the partner participating in the winding up processes should at least be entitled to reimbursement for out of pocket expenses, direct or indirect, which aided in the generation of post-dissolution fees. The maxim "he who seeks equity, must do equity" is applicable in this situation. When all the members of a firm benefit from the extra energies or personal funds expended by one of their members after dissolution, those who wish to share in the profits thereby produced should grant the member responsible therefor additional compensation for his efforts and reimbursement of his expenses.

In most partnerships the winding up process may consist of merely the minimal tasks of collection and liquidation of assets, payment of outstanding liabilities, and disbursement of the remainder of assets or liabilities among the former members. Be-

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74. "[T]he practice of his profession by a doctor, lawyer, . . . will not be treated as a trade or business in which capital is an income-producing factor . . . his capital investment is regarded as only incidental to his professional practice." Treas. Reg. §1.1348-3(a)(3)(ii) (1976).

cause the attorney is obligated to execute all existing contracts for legal services pending with his firm at dissolution, the winding up process for legal partnerships is more extended and involves the use of that attorney's personal skill and effort to a greater degree than with other types of partnerships. The members of partnerships that dissolve have the option to liquidate immediately or continue for a discretionary period if it appears that liquidation at a later date may be more profitable.<sup>75</sup> There is no such option upon dissolution of a law partnership. The members of the former firm are all obligated at the client's option to expend their skill and effort in the completion of any and all contracts for legal services existing with the firm at the date of dissolution, even though it may be more profitable for them to drop all the work assigned them through the firm and expend all energies on behalf of new clients acquired after dissolution. Surely the effect of the no additional compensation rule is a decrease in the quality and amount of time and energy expended by attorneys for left over clients since they are certainly better compensated for their efforts on behalf of their new clientele.

Finally, the resolution of the question of whether the no additional compensation in winding up the affairs of a dissolved partnership rule should be applicable to law firms seems to fall within the spirit, if not the letter, of ABA Canons of Professional Ethics No. 34 titled "Division of Fees". No. 34 provides, "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." The responsibility of an attorney to his client extends to all members of a firm with which he is associated. Upon dissolution, this relationship continues at the option of the client. While under the letter of the law, all former members of a firm are responsible for seeing to the execution of all the firm's pending business, in reality each attorney sees to the completion of the cases he was assigned prior to the break up. The attorney who was assigned the case is primarily responsible in providing the services for the client. The firm only provides a back up if the primary lawyer does not fulfill his obliga-

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75. A retiring partner or the estate of a deceased partner can either compel liquidation or allow a continuance of the business. REUSCHLEIN & GREGORY §235. Continuation agreements upon dissolution, rather than liquidation, are likely to be more profitable as the partnership may be disposed of as a going concern. BROMBERG AND CRANE §83A(c).

tion. The firm is not likely to have to provide this back up service. If the primary attorney fails to do what his client considers an adequate job, he and the firm as a whole are likely to be discharged by that client before the completion of the case. At least, if the post-dissolution fees are to be split, each fee received after dissolution should be split according to the services and responsibility contributed by the former firm members individually in earning that particular fee. The ABA Committee on Professional Ethics has stated the following: "Any attorney who takes over an unfinished case may properly, when the entire service is paid for by the client, pay to the widow or heirs of the deceased attorney, a proportion of the total compensation fairly representing the proportion of the service rendered by the deceased attorney up to the time of his death."<sup>76</sup> Similarly, the attorney who completes a case after dissolution should receive additional compensation for the services he performs subsequent to the date of dissolution.

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76. ABA OPINIONS No. 266 (1945).