Dissolution of a Law Partnership: Effect on Representation of the Firm’s Clients

While some attention has been paid recently to the consequences of dissolution of a law partnership, very little has been written about the effect of dissolution on representation of the firm’s clients. The nature of the attorney-client relationship raises questions concerning both the obligations and the rights of former law partners in handling client files and pending legal matters after dissolution. Courts have clearly established that these questions must be answered with application of the principles of partnership law, supplemented by observance of the lawyer’s ethical and fiduciary duties.

**Partnership Liability For Malpractice After Dissolution**

The Uniform Partnership Act, adopted in most states, provides that dissolution does not cancel existing contracts between the partnership and third parties. Furthermore, partnership dissolution does not, in itself, discharge the liability of any partner with regard to such existing contracts. These principles have been applied repeatedly by courts in holding that dissolution of a law partnership does not disturb the contractual duty of the partners to partnership clients:

> The dissolution of a law firm does not dissolve the relation of the partners to their clients, and the clients may look to either or both for the performance of the duties growing out of the relation of attorney and client. If attorneys who are acting as copartners accept a retainer, the contract is joint, and neither can be released from the obligations or responsibilities assumed either by a dissolution of the firm or by any other act or agreement between themselves.

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Moreover, law partners retain fiduciary duties to partnership clients which are not involved in the dissolution of an ordinary commercial partnership. A well established principle is that by undertaking to represent a client, a law partnership and each member of it assume to conduct the case to a final conclusion, with all fidelity to the client. In recognition of this obligation, the ABA Code of Professional Responsibility sets up strict guidelines for withdrawal from employment which cannot be construed to release a partner from an attorney-client relationship automatically upon dissolution of his law firm.

In view of the lawyer's contractual and fiduciary duties, the conclusion seems inescapable that former partners must be held liable for legal malpractice with respect to partnership clients which occurs even after dissolution of the law partnership. This conclusion seems to have been adopted by the New York Supreme Court in denying a dissolved law firm's motion to dismiss an action for legal malpractice. In Vollgraff v. Block, the plaintiffs retained the defendant law partnership on July 10, 1976 to prosecute a personal injury action arising from an automobile accident. The defendant law partnership dissolved on December 31, 1976, without notice to the plaintiffs, and allegedly failed to commence the plaintiffs' personal injury action before the subsequent expiration of the statute of limitations.

The Vollgraff court conceded that, as to ordinary business relationships, dissolution may release the partners from liability for malpractice occurring after dissolution. Nevertheless, the court pointed out that "the relationship between a law partnership and its clients is not an

at any time, and the lawyer has no interest, right, or element of possession in the client's future legal business." Note, Dissolution of a Law Firm, 85 Case & Com. 3 (1980). In fact, partnership clients should be informed upon dissolution that they can select any partner or all partners to represent them or that they can remove their files to some other attorney if they so elect. Informal Op. 17 (1978), Mo. B. B. at 10 (April 1979).

6. As further support for this conclusion, consider that several courts have held specifically that partnership dissolution is not an adequate excuse for an attorney's delay in handling client matters. See, e.g., Servall, Inc. v. S. Cross Indus., 125 Ga. App. 88, 186 S.E.2d 499 (1971); Cronin v. City of New York, 18 A.D.2d 995, 238 N.Y.S.2d 734 (1963).

8. Id. at —, 458 N.Y.S.2d at 438.
9. Id.
10. Id. at —, 458 N.Y.S.2d at 440.
11. Id. at —, 458 N.Y.S.2d at 438.
ordinary business relationship, it is a fiduciary relationship and requires a high degree of fidelity and good faith." The court expressly disregarded a possible contract cause of action for legal malpractice and applied a negligence theory, holding that "the fiduciary duty is breached if a law partnership's clients are not advised of the partnership's dissolution and some prejudice thereby results." As authority for its decision, the Vollgraff court cited the attorney's duty to keep his client informed, and described its holding as "an application of the general rule that even after dissolution, the members of a partnership are liable to persons who have no knowledge of the firm and who deal with the firm." These limitations imply that a law partnership can terminate its fiduciary obligations to clients by notifying them of the partnership's dissolution. This implication, however, is contrary to the widely accepted principle that the option to terminate the attorney-client relationship upon dissolution lies solely with the client, leaving the former partners bound if entrusted with the future management of the client's business. Perhaps these limitations were merely intended by the New York court to insure a step-by-step procession through a largely undeveloped area of law which requires careful analysis of legal, ethical and fiduciary duties.

**Fiduciary Character of the Partnership Relationship**

The members of a partnership owe a duty of loyalty to one another which includes an obligation to refrain from obtaining individually the benefits of partnership business left unfinished at the time of dissolution. This duty begins with the formation of the partnership and extends through the winding up of its affairs after dissolution. For the average partnership, this winding up process may be completed fairly simply by liquidating assets and distributing the proceeds. The
winding up of a law partnership, however, is likely to be more complicated because, although not saleable,20 pending legal matters are generally considered assets of the firm.21

In the usual situation, responsibility for pending legal matters is assigned by mutual agreement among the partners and is generally assigned to the partner who had been in charge of the client’s file before dissolution.22 At times, however, a client may insist upon dealing with a particular partner or partners.23 In either situation, interesting questions can arise as to whether the acting attorney is accountable to his former partners for fees generated by professional services rendered after dissolution.24

Two general arguments have been developed that answer these questions of accountability in the negative. The first assumes that individual lawyers are entitled to extra or perhaps exclusive compensation for post-dissolution work because of the professional nature of the services they provide. This argument was first stated in dicta in the 1879 Supreme Court case Denver v. Roane.25 After recognizing “an implied obligation on every partner . . . to devote his services and labors for the


22. See, e.g., Heywood v. Sooy, 45 Cal. App. 2d 423, 114 P.2d 361 (1941); Lamb v. Wilson, 3 Neb. 496, 92 N.W. 167 (1902). It has been suggested that “many clients will prefer not to be asked to make invidious choices and will accept whatever arrangements are made for the continuing care of their business.” Editorial, Breaking Up is Hard to Do, 35 New L.J. 22 (1983).

23. “[A] client has a right to select the attorney he prefers to serve him and . . . a member of a firm cannot force himself upon a client of the firm merely because he is a member of that partnership.” Platt v. Henderson, 227 Or. 212, ____ , 361 P.2d 73, 85 (1961).

24. For a discussion of the extent to which the acting partner may be accountable to his former partners, see generally Comment, Dissolution of a Law Partnership - Goodwill, Winding Up Profits, Additional Compensation, 6 J. Legal Prof. 277 (1981).

promotion of the common benefit of the concern," the court suggested without deciding that "[t]here 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." Adopting this view, the Supreme Court of Nebraska decided in *Lamb v. Wilson* that two former law partners were entitled individually to fees representing their post-dissolution services for a firm client, although the client's case had commenced prior to the law firm's dissolution. The court held the rule against individual gain from the winding up of partnership affairs inapplicable where time, skill and labor have been expended by a partner in continuing partnership business.

The second argument is isolated in the decision of the Supreme Court of Wisconsin in *Puffer v. Merton*. The executor of a deceased law partner's will brought an action against the other former partners for part of the proceeds received for legal services rendered after dissolution. In addition to holding that the completion of law business on hand is more than simply winding up a partnership, the court emphasized that pending legal matters held on the general retainer basis are not vested interests of a law firm because clients can dispense with the services of the firm at any time. Consequently, the deceased partner's estate did not share in the fees rendered after dissolution.

Generally, however, courts have held that retainer contracts existing at the time of the dissolution of a law firm are assets which must be liquidated for the benefit of the firm. Although each partner is free to practice law individually and may accept new retainers from persons who had been clients of the firm, the winding up partner occupies the position of a trustee in relation to the unsettled and unfinished business of the partnership. This obligation is one of the risks assumed

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26. *Id.* at 358.
27. *Id.* at 359.
28. 3 Neb. 496, 92 N.W. 167 (1902).
29. *Id.* at 359, 92 N.W. at 168.
30. 168 Wis. 366, 170 N.W. 368 (1919).
31. *Id.* at 368, 170 N.W. at 368.
34. See Little v. Caldwell, 101 Cal. 553, , 36 P. 107, 108 (1894).
by a lawyer in entering into a law partnership.\textsuperscript{35}

The distinction between unfinished partnership business and new retainers appears to have been applied by the New York Supreme Court in \textit{In re Silverberg}.\textsuperscript{36} Faced with a dispute between former law partners over an alleged breach of fiduciary duty in the form of client solicitation, the court decided that the fiduciary relationship between law partners ends on dissolution and cited \textit{Tally v. Lamb}\textsuperscript{37} to the effect that each law partner is entitled to receive new retainers from firm clients.\textsuperscript{38} At this point, the court added in a footnote that "[t]he partner charged with winding up the affairs of the partnership still retains a fiduciary duty as an agent of the remaining partners with respect to liquidation of the firm."\textsuperscript{39} This footnote can be interpreted to mean that proceeds from existing retainers must be presented for the benefit of the partnership as a whole, although admittedly, this interpretation turns on the assumption that the New York court would include finishing client contracts as part of the liquidation of the firm.

No such assumption is necessary in assessing the impact of the opinion of the Maryland Court of Special Appeals in \textit{Resnick v. Keplan}.\textsuperscript{40} The court affirmed a grant of summary judgment against a former law partner who claimed to be entitled to all of the fees paid by firm clients whose cases he handled exclusively after dissolution. The court held expressly in reference to both cases worked on by the appellant and the remaining firm contracts handled by the other partners that: "These were contractual, professional obligations and it was the duty of the respective partners to see to their completion . . . . In the performance of these contracts, the fiduciary character of their relationship as partners continued."\textsuperscript{41} The court rejected the appellant partner's argument based on the principle that a client has a right to select the attorney he prefers by holding that this principle, though sound, does not change the rule that fees earned thereafter must be accounted for to the partnership in accordance with the fiduciary duty imposed between partners.\textsuperscript{42} The court also rejected the appellant's argument that different rules apply to the winding up of a professional

\textsuperscript{35} \textit{Id.}
\textsuperscript{36} 81 A.D.2d 640, 438 N.Y.S.2d 143 (1981).
\textsuperscript{37} \textit{Id.} at Misc. \textit{____}, 100 N.Y.S.2d 112 (N.Y. Sup. Ct. 1950).
\textsuperscript{38} \textit{In re Silverberg}, 81 A.D.2d at \textit{____}, 438 N.Y.S.2d at 144.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} 49 Md. App. 499, 434 A.2d 582 (1981).
\textsuperscript{41} \textit{Id.} at \textit{____}, 434 A.2d at 587.
\textsuperscript{42} \textit{Id.} at \textit{____}, 434 A.2d at 588.
partnership as distinguished from business partnerships, noting that the definition of business in the Uniform Partnership Act includes "profession."\footnote{Id.}

The nature of the fiduciary duty between former law partners with regard to the post-dissolution representation of firm clients is made most clear by the recent decision of the California Court of Appeals in \textit{Rosenfield, Meyer & Susman v. Cohen}.\footnote{Id. at \_\_\_, 194 Cal. Rptr. at 184.} In 1968, Rectifier hired the appellant law firm (RM&S) to commence a major patent antitrust action on a contingent fee basis.\footnote{Id.} The appellee attorneys (C&R) were senior partners in litigation at RM&S.\footnote{Id.} Most of the attorney services rendered by RM&S to Rectifier were performed by C&R.\footnote{Id.} No other partner other than C&R had more than a passing interest in the Rectifier case, but the Rectifier account significantly increased RM&S's expenses in the way of rent for additional office space and compensation for additional support personnel and attorneys.\footnote{Id.} Sometime in late 1973 or early 1974, C&R demanded a higher percentage of the fees to be paid by Rectifier, threatening to withdraw from RM&S and take the Rectifier case with them.\footnote{Id. at \_\_\_, 194 Cal. Rptr. at 185.} In April, 1974, C&R withdrew from RM&S.\footnote{Id.} In May, 1974, Rectifier discharged RM&S and retained C&R as attorneys in the antitrust action.\footnote{Id.}

The issue here, formed and answered in the affirmative by Associate Justice Nebron was whether "a former partner at will [owes] any fiduciary duty to former partners after dissolving the partnership and subsequently agreeing with former clients of the dissolved partnership to accept and carry on business which was originally a portion of the assets of the dissolved partnership?"\footnote{Id. at \_\_\_, 194 Cal. Rptr. at 184.} Specifically, the court ruled that "[t]he existence of the fiduciary duty prohibiting partners of a dissolved partnership from entering into contracts for personal gain in connection with unfinished business of the partnership is well established."\footnote{Id. at \_\_\_, 194 Cal. Rptr. at 191.} The test of what constitutes unfinished business was defined as "whether there existed, at the time of the dissolution, any contract of employ-
ment between the partnership and the clients for the performance by the partnership of the services thereafter claimed to be 'unfinished business.'” Finally, the court decided that "though Rectifier had a right to terminate the contract with RM&S and hire C&R, C&R could not avoid what was tantamount to a conflict of interest - i.e., the fiduciary duty it owed to RM&S.”

Conclusion

This comment has attempted to highlight the recurring questions encountered by the courts in considering the effect of law partnership dissolution on the partners' subsequent representation of firm clients. Although the courts are by no means unanimous in their decisions, two general principles pervade the holdings: First, that former law partners are bound by both contractual and fiduciary duties to continue representation of firm clients after dissolution; and second, that former law partners must observe fiduciary duties to one another with respect to the proceeds arising from post-dissolution representation of firm clients in legal matters pending at the time of dissolution. Obviously, the practical effects of the application of these principles are to extend the winding up phase of law partnership dissolution for a much longer period of time than is normally involved in an ordinary commercial partnership and to complicate the settlement of rights and obligations among the former partners and between the partners and firm clients. At first impression, it seems strange that controversies arising from these effects have not flooded the courts. Instead, the scarcity of reported cases suggests that former partners are anxious to avoid publicized disputes in favor of settling their differences among themselves, perhaps mindful of their clients' ever present option to take their business elsewhere.

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54. _Id._ at ____, 194 Cal. Rptr. at 190 (quoting Heywood v. Sooy, 45 Cal. App. 2d 423, 426, 114 P.2d 361, 363 (1941)).

55. _Id._ at ____, 194 Cal. Rptr. at 191-92.