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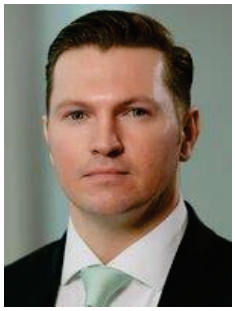
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Keys To Protecting Clients During Law Firm Dissolution

By **John Schmidt and Colin Fitzgerald** (February 23, 2021, 5:30 PM EST)

John Schmidt



Colin Fitzgerald

In recent years, several notable firms have closed their doors, including some of the profession's biggest names, such as Dewey & LeBoeuf LLP, Heller Ehrman LLP, LeClairRyan PLLC and Howrey LLP, as well as Cellino & Barnes PC, which reached a deal to wind down last year.

Some would say that the typical law firm business structure and the increasing mobility of lawyers have made law firms particularly susceptible to the travails of business divorce,[1] while others might say that it's just our personalities.

Whether a law firm dissolution is amicable or adversarial, the process can be complex, with many ethical, financial and legal pitfalls to avoid or address. This article explores the most important consideration in a law firm breakup: clients.

**The Interests of the Clients Are Paramount**

Law firm dissolutions take a tremendous toll on those involved — partners, associates, staff and accountants. The focus tends to be on the winding down of business affairs and life after the firm's death. But the primary obligation should be to a law firm's primary asset — its clients.

The lawyer-client relationship creates a fiduciary duty that does not abruptly end when a law firm decides to dissolve. That duty requires a high degree of fidelity, good faith, full and fair disclosure, and maintenance of confidentiality until the winding down of the business is complete and all legal matters are properly concluded.

**Ensuring Competent and Continuous Representation**

During the winding down period of a dissolving law firm, partners have a continuing duty to provide competent representation to clients. The general rule is that clients employ the firm as an entity, and not a particular attorney.

Each partner has an obligation to serve the partnership and may be responsible for another partner's failure in that respect. Even after dissolution, lawyers are not immediately discharged of these obligations.

The case of RLS Associates LLC v. United Bank of Kuwait PLC illustrates this continuing duty.[2] In RLS, a client retained a law firm to provide representation in a commercial dispute with a bank.[3] After the law firm filed suit, it dissolved.[4]

The U.S. District Court for the Southern District of New York held in 2006 that when a law firm dissolves, the former equity partners are bound to honor the professional obligations to which they agreed before dissolution.[5] The court highlighted the need to make appropriate arrangements before or during the dissolution process to ensure the firm's clients are adequately represented throughout.[6]

The bottom line is that lawyers of the dissolving firm remain responsible until the firm is discharged by the client and new counsel is substituted, which may well be the same lawyers at a new or succeeding firm.

These obligations to clients are dictated not just by professional responsibility, but also contract law. And let's not forget common sense — a law firm dissolution can be very unsettling to clients. Proper communication and heightened client service cannot be overemphasized.

**Clients Cannot Be Allocated by the Partners**

Throughout the dissolution process, the partners have the daunting task of allocating various partnership rights, assets and other interests. Division of tangible assets, such as office equipment, is relatively straightforward. Allocating clients, however, is more complicated.

Naturally, the partners may want to divide up the firm's clients, or simply keep the respective clients/matters they handle. But clients have the right to choose their legal counsel.[7] They are not chattels to be bartered or distributed according to the partners' wishes.

In keeping with this principle, clients must receive prompt communication about any material changes in the circumstances of their representation.[8] Even if a lawyer anticipates continued representation beyond dissolution, notice should be sent early enough so that the client has sufficient time to make an informed decision regarding the impact of the firm's dissolution and the client's representation moving forward.[9]

In a somewhat analogous situation, the American Bar Association's Standing Committee on Ethics and Professional Responsibility advises that a departing lawyer and his/her firm may communicate that information unilaterally, but the firm and the departing lawyer should work toward a joint communication to the clients with whom the departing lawyer had significant contact.[10]

A few states, such as Florida and Virginia, have specific procedures for informing and soliciting clients during a law firm dissolution.[11]

**Preservation of Client Files and Return of Client Property**

In addition to the duty to provide appropriate notice to clients, partners of a dissolving law firm are obligated to ensure client files are maintained and client property is returned. Dissolution does not relieve a lawyer of this obligation.

Rules vary on how long client records must be maintained, depending on jurisdiction and the type of

record. Rule 1.15(a) of the ABA Model Rules of Professional Conduct states, in part, that "[c]omplete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation."[12]

Some states require preservation for six or seven years for certain documents. New York, for example, requires the retention of these records for at least seven years:

- Records of all deposits in, and withdrawals from, client trust accounts or firm bank accounts;
- A record for special accounts;
- All retainer agreements and compensation agreements with clients;
- Statements to clients or others showing disbursement of funds to them (such as closing statements, distribution of settlement proceeds, etc.);
- Copies of all bills rendered to clients;
- Copies of all records showing payments to other lawyers, investigators or other vendors for services performed;
- Copies of all retainer and closing statements filed with the Office of Court Administration; and
- All checkbooks, stubs, statements, prenumbered canceled checks and duplicate deposit slips, such as trust and estate banking documents and records.[13]

Aside from certain codified obligations, there are no specific time requirements for retention of client files in most states. Rather, the retention (or destruction) of file contents should be governed by sound judgment; client needs; applicable statutes of limitations; and regulatory, contractual or otherwise prudent preservation requirements.[14]

Generally, client files should be preserved to: (1) service and protect clients; (2) comply with state ethics rules; (3) check for future potential conflicts of interest; and (4) protect against any potential malpractice claims.

Lawyers in a dissolving law firm must also protect a client's interests by returning their papers and property.[15] This includes tangible personal property; items with intrinsic value or that affect valuable rights, such as securities, negotiable instruments, wills or deeds; and documents provided by the client.[16]

In contrast, a client may not be entitled to materials that the lawyer generated primarily for the lawyer's own purposes. Given the complexities of a law firm's record retention obligations, lawyers are well advised to confirm the legal and ethical requirements in their jurisdiction and adhere to a robust document retention policy, even through dissolution.

**Settling of Trust Accounts**

Client trust accounts must be properly reconciled as well. Law firms have an obligation to refund any advance payment of fees or expenses that have not been earned or incurred, including retainers.[17] All

funds in which a client or third person has an interest (settlements, verdicts, judgments, transactions, fee-sharing, etc.) must be disbursed before the accounts can be closed.

In some instances, a lawyer may be unable to locate a client. Most states have specific rules for dealing with unclaimed client funds. New York, for example, requires a lawyer to apply for a court order directing payment to the lawyer of any fees and disbursements owed by the client, and any balance to the Lawyers' Fund for Client Protection for safeguarding and disbursement to those entitled to the proceeds.[18]

**Maintaining Client Confidentiality**

Another dilemma that can arise during a law firm dissolution, particularly when the former partners/members join new firms, is appropriate access to client files. A fundamental principle in the client-lawyer relationship is confidentiality.

In the absence of a client's informed consent, a lawyer must not reveal information relating to the representation.[19] This principle applies to closed files as well.[20] Accordingly, client case files cannot automatically follow an attorney to a new law firm. The proper transfer authorizations must be obtained first.

Adherence to these requirements likely presents greater challenges for a larger firm with many attorneys and matters. The greater the volume of departing attorneys and client files, the more difficult it may be to parse out who is entitled to have access to what files, and who should not.

Further complicating matters, lawyers may properly keep copies of work product such as research and pleadings.[21] Navigating these rules within a dissolving firm or the surviving new firm's information technology infrastructure can be complex. "Just make a copy of everything" will likely be too simple an answer and could possibly create ethical and risk management issues.

**Conclusion**

Whether a dissolution or attorney departure is negotiated or litigated, these recurring topics of ethics, obligations, dispute, personal discipline and reasoned business judgment highlight the importance of having a prior agreement (e.g., a partnership agreement). Above all, the interests of the firm's clients must remain paramount as the lawyers move on or out to new firms.

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*John Schmidt Jr. is a partner and Colin Fitzgerald is an associate at Phillips Lytle LLP.*



[1] John Morley, Why Law Firms Collapse, The Practice, 2017, at https://thepractice.law.harvard.edu/article/why-law-firms-collapse/ (last visited Feb. 3, 2021).

[2] 417 F. Supp. 2d 417 (S.D.N.Y. 2006).

[3] Id.

[4] Id.

[5] Id. at 420.

[6] Id.

[7] ABA Comm. on Ethics and Prof. Resp., Formal Op. 489 (2019)("clients decide who will represent them going forward when a lawyer changes firm affiliation").

[8] Model Rules of Prof. Conduct R. 1.4.

[9] Id.

[10] ABA Comm. on Ethics and Prof. Resp., Formal Op. 489 (2019).

[11] VA Rules of Prof. Conduct R. 5.8; F.S.A. Bar Rule 4-5.8.

[12] Model Rules of Prof. Conduct R. 1.15(a).

[13] N.Y. Rules of Prof. Conduct R.1.15(d)(1).

[14] ABA Comm. on Ethics and Prof. Resp., Informal Op. 1384 (1977).

[15] Model Rules of Prof. Conduct R. 1.16.

[16] ABA Comm. on Ethics and Prof. Resp., Formal Op. 471 (2015).

[17] Model Rules of Prof.Conduct R. 1.16(d).

[18] N.Y. Rules of Prof. Conduct R. 1.15(f).

[19] Model Rulesof Prof.ConductR. 1.6.

[20] Id., cmt. 20.

[21] ABA Comm. on Ethics and Prof. Resp., Formal Op. 471 (2015).