



# Parting Ways:

## What a Lawyer and Law Firm Need to Consider When a Lawyer Leaves the Firm

BY D. JASON BRITT

Many firms in today's market boast that they have a collegial and family-like environment that promotes a balance between work and family.<sup>1</sup> But, regardless of the great work environment that many firms now provide, it is not uncommon for lawyers to leave those firms to head toward "greener" pastures.<sup>2</sup> Why? Well, only the departing lawyer can answer that question. However, this is not the real question on which to focus. The more important question that needs to be addressed is, "How do I handle the separation in the right way for my clients, my former associates and myself?"

Therefore, the crux of this article is to point out the major issues that need to be addressed when a lawyer leaves a firm to ensure the separation is handled in the right way for all parties involved (the law firm, the departing lawyer and the clients) so that their interests are protected to the fullest extent possible.

### What Are the Departing Lawyer's Financial Obligations to the Firm?

It is no secret that law firms derive substantial value from intangible assets such as intellectual capital, human capital, relationship capital, reputation capital,

and, finally, goodwill.<sup>3</sup> The main intangible asset of a law firm is the goodwill of the lawyers.<sup>4</sup> When lawyers leave the firm, they take their professional goodwill with them. Therefore, the departure of a lawyer from a firm can leave the lawyer and the firm at odds with each other over future financial obligations, particularly when the departing lawyer leaves to start a new firm as opposed to leaving to join an established firm.

If you have a well-thought-out firm agreement or employment contract, then many potential problems could be completely alleviated.<sup>5</sup> However, the potential problems that come when a lawyer leaves a firm will only be alleviated when the firm agreement addresses the following topics:

1. Determine what the firm owes the withdrawing lawyer for equity;
2. Establish a payment schedule detailing how the lawyer's equity will be repaid;
3. Agree what the firm will owe the withdrawing lawyer for his/her inventory of contingency matters, accounts receivable and work-in-process;
4. Determine whether the withdrawing lawyer is responsible for unfunded firm liabilities;
5. Address the timing and tax consequence and potential impact of

future Internal Revenue Service ("IRS") audits; and

6. Address the limitation or right of the withdrawing lawyer regarding access to client files, firm software, disclosure of proprietary information, copying of firm documents, removal of firm property, inducement of other firm employees to leave, and the right of the firm to exclusive use of the firm name.<sup>6</sup>

If the financial issues described above are addressed in the firm agreement or employment contract, then the departure will be less stressful for all of the parties involved.<sup>7</sup>

However, what happens when the firm does not have a well-thought-out firm agreement or employment contract.<sup>8</sup> Well, there can be problems. At this point the continuing financial obligations depend largely on your status in the firm.

Generally, since an associate is simply an employee of the firm he/she has no continuing financial obligations. The only time an associate should have a continuing financial obligation to the firm is when the associate entered into some type of contractual arrangement.

A withdrawing partner, on the other hand, is a completely different story. Partners do have fiduciary obligations. According to the *Code of Alabama* §10-8A-404 (1975): "[A] partner owes to the

partnership and the other partners . . . the duty of loyalty and the duty of care.”<sup>9</sup>

In addition to the fiduciary duties mentioned above, a partner may also have existing contractual obligations if the partner signed a personal guarantor or suretyship agreement on behalf of the firm with respect to its business affairs including, but not limited to, lines of credit, leases, etc.<sup>10</sup>

As always, regardless of your status in the firm, it is advisable for you to check your firm agreement, personal guarantees, lines of credit and lease documentation to determine the extent of your liability.<sup>11</sup>

## Are There Any Administrative Issues that Need to Be Addressed When a Lawyer Departs from the Firm?

There are numerous administrative issues that need to be addressed when a lawyer departs from a firm. Among them:

1. Make sure there is an agreement on how departing case files will be

physically removed from the firm. Do not allow files to leave the firm until the client has given approval.

2. Stop or transfer subscriptions of the departing attorney.
3. Cancel online services and collect password/ID cards.
4. Identify and act upon changes needed in signage, firm letterhead, Web site, e-mail address, marketing material, electronic filing systems, etc.
5. Notify Martindale-Hubbell, the Alabama State Bar and other professional services.
6. Notify the mailroom and receptionist of mail and phone transfer procedures.
7. Collect and inventory all keys, swipe cards, passwords, credit cards, and unused business cards.
8. Oversee the removal of personal effects from the office.
9. Notify professional liability insurance carrier and inform departing lawyer of any continuing coverage (or lack thereof).

10. Advise the lawyer concerning termination of benefits programs and issue COBRA notification, as appropriate.

11. Terminate computer access.

12. Cancel or transfer cell phone contracts, as appropriate.<sup>12</sup>

The proper preparation will save the departing lawyer, the firm and the client from much unneeded stress.

## What Is the Impact on the Client When a Lawyer Leaves the Firm?

When lawyers part ways it is frequently compared to a divorce, “right down to the custody battle over the clients.”<sup>13</sup> Therefore, it is easy to see that the impact of a lawyer leaving the firm can be tremendous on a client.

To ensure that the client’s interests are protected, the lawyers involved in the split need to make sure that the lawyer-client relationship is properly severed.<sup>14</sup> In order to sever this relationship you



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must first perform an audit of the departing lawyer's pending cases. "In the audit, the firm and departing lawyer should review each file for action dates; check statutes; review paralegal assignments; identify issues involved; bill work-in-process; and address accounts receivable (resolve client disputes)."<sup>15</sup>

Once you have determined who the clients are of the departing lawyer, you need to notify those clients in writing of the change.<sup>16</sup> In this notice the client must be given the following information:

1. An explanation for the lawyer's withdrawal and possible unavailability;
2. The time frame after which the departing lawyer will no longer be available;
3. The status of client's matter;
4. The client's right to choice of counsel;
5. The identity of person to contact regarding client's file;
6. An accounting for client's property in the firm's possession, whether received directly from client or third person; and
7. The status of fees earned and amounts owed.<sup>17</sup>

Once the client has an opportunity to review this notice, the client must decide who will represent him or her. Remember, the file belongs to the client, not the firm or the lawyer working on the case.<sup>18</sup> If the client decides to stay with the firm, it is very important to transfer the case to another lawyer within the firm so that the clients' interests are still protected.<sup>19</sup> If, however, the client decides to stay with the departing lawyer, the firm should insist upon a discharge letter from the client, file a withdrawal notice with the court, if applicable, and notify key departments in the firm such as accounting and records.<sup>20</sup>

## **Are There Any Potential Malpractice Issues that Need to Be Addressed?**

When a lawyer leaves a firm there is potential for great exposure to liability issues. In fact, one of the most frequent sources of liability is the failure of the lawyer to take care of old business.<sup>21</sup>

Therefore, it is vital to both the firm and departing lawyer to document how the transition will occur and keep the client informed during the entire process.

Many departing lawyers believe their actions are still covered by their prior firm's malpractice insurance; however, this is not necessarily true. Professional liability insurance policies are generally written on a claims-made basis.<sup>22</sup> This means that the insurance company will only provide coverage for claims made during the policy period.<sup>23</sup>

If you are leaving a firm, you should evaluate the following:

1. Check to see whether the policy of your former firm covers you after you are gone;
2. If a potential malpractice claim arises after you are gone, and you are relying on your former firm's insurance coverage, you will have to report the claim to the former firm—and be sure the firm reports it to its carrier—or the claim may not be covered; and,
3. Consider obtaining a malpractice insurance policy that provides prior acts coverage. Without the protection, a risk created years earlier while you worked at another firm could become a costly surprise later.<sup>24</sup>

## **Conclusion**

Lawyers have serious ethical and legal obligations to each other and their clients. If you decide to head toward that greener pasture, you need to make sure that you have answered the question: How do I handle the separation in the right way for my clients, my former associates and myself?

Remember, successfully departing a firm means knowing and doing much more than simply gathering up your belongings and as many client files as you can before you go. It is critical for both the departing lawyer and the law firm that there is careful planning and attention to detail with respect to future financial obligations, administrative, ethical and professional responsibility, and client issues. If there is good planning, then the chances of preserving the relationship with your former partner and clients will be greatly improved. ■

## Endnotes

1. Most law firm Web sites on that great void we call the World Wide Web promote this type of work environment because it leads to a better workflow and team-oriented approach to the practice of law. However, it begs the question: If the work environment is so good, then why are so many lawyers leaving?
2. Read the "About Members, Among Firms" section of *The Alabama Lawyer* and you will realize that many lawyers are changing firms or starting their own solo practice.
3. H. Edward Wesemann, "The Value of Partnership," *Accounting & Financial Planning for Law Firms* newsletter, [www.law.com/jsp/article.jsp?id=1147338329173](http://www.law.com/jsp/article.jsp?id=1147338329173), (May 12, 2006).
4. Brian F. Corbett, "Dividing an Interest in a Law Firm. A Discussion of the Various Approaches Used in Valuing a Law Firm upon Equitable Distribution," [www.wfu.edu/~palmitar/Law&Valuation/Papers/2000/Corbett-ED-law-firm.htm](http://www.wfu.edu/~palmitar/Law&Valuation/Papers/2000/Corbett-ED-law-firm.htm) (April 22, 2000).
5. Frank Kollman, "What Happens When Partners Part," *National Clothesline* [web.newsguy.com/natclo/0212/kollman.htm](http://web.newsguy.com/natclo/0212/kollman.htm), (December 2002).
6. David Goodwin, "When an Attorney Leaves," N.H.B. Assn., *Bar News*, [www.nhbar.org/publications/archives](http://www.nhbar.org/publications/archives), (November 2000).
7. *Id.* I am not saying this is the magic formula to avoid disputes but it will substantially lessen the threat of litigation evolving from a lawyer's departure.
8. I have learned, through personal experience and through my research for this article, that many lawyers do not have well-crafted partnership agreements. And, unfortunately, many lawyers do not even have a written partnership agreement.
9. It is important to point out that these obligations cannot be waived or eliminated in the partnership agreement; see generally, *Ala.Code* §10-8A-103(b) (3)-(5) (1975).
10. Mary Louise Hopson, "Parting Company—When Lawyers Leave the Firm," [www.dallasbar.org/members/headnotes.asp?item=860](http://www.dallasbar.org/members/headnotes.asp?item=860), (accessed April 28, 2007).
11. *Id.*
12. See supra n.7.
13. Ann Massie Nelson, "Risk Management: Have License, Will Travel, Part IV: File Custody Disputes Are Common When Lawyers Leave Law Firms," Vol. 71 *Wis. Law. No.* 9, (September 1998).
14. See supra n.7.
15. See supra n.7.
16. Thomas J. Watson, "Breaking Up is Hard to Do," Vol. 79 *Wis. Law. No.* 12, (December 2006).
17. Angus G. Goetz, Jr., *Break Away Lawyers*, [www.michbar.org/opinions/ethics/Articles/oct98.cfm](http://www.michbar.org/opinions/ethics/Articles/oct98.cfm), (accessed April 28, 2007).
18. Ala. St. B. Op. 86-02 (1986). ("The Commission reasoned that the materials in the file are furnished by or for the client and are therefore the client's property. Building on this foundation, it would then follow that the files belong wherever the client wishes for them to belong. If the Client directs that the files be in the possession of a particular lawyer or law firm, then they should be in the possession of that individual. The only exception would be in the instance where the lawyer is asserting a valid 'attorney's lien' for services rendered for the client"); see generally, Alabama State Bar Op. 91-06 (1991).
19. See supra n.7.
20. See supra n.7.
21. Texas Lawyers' Insurance Exchange, "Changing Law Firms Can Create a Gap in Coverage/Malpractice Hazards," [www.tlie.org/riskmgmt/news/93isu2.htm](http://www.tlie.org/riskmgmt/news/93isu2.htm), (last updated July 7, 1999).
22. See supra n.17.
23. *Id.*
24. *Id.*

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