NYSBA Planning Ahead Guide

How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death

Law Practice Management Committee
Subcommittee on Law Practice Continuity

Third Edition

NEW YORK STATE BAR ASSOCIATION

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by Sarah E. Gold, Esq.

The original NYSBA *Planning Ahead Guide* was published over twenty years ago. Like everything else, nothing is static and time moves along. It came to our attention that this publication needed some overdue updates. And with that task in mind, the Committee put our heads together and came up with the version that you see here. As always this *Guide* will always remain a work in process, as the NYSBA welcomes suggestions and feedback from lawyers in New York and other jurisdictions.

Why is this *Planning Ahead Guide* important?

It is not easy to think about circumstances that could render you unable to continue practicing law. Unfortunately, accidents, illness, disability, planned or unplanned retirement, and untimely death are events that do occur. Under any of these circumstances, your clients' interests, as well as your own, must be protected.

The *Planning Ahead Guide* can help you develop a plan to protect your clients' interests and your own in the event of your disability, retirement or death. The *Guide* includes information on the following topics:

- Ethical considerations for lawyers in planning for the future
- How to create a law practice succession plan
- How to manage your client files in the event of your disability, retirement or death
- Resources for lawyers and their families

The *Planning Ahead Guide* is a valuable resource for all lawyers, regardless of their age or practice area. It is a wise investment in your future and the future of your clients.

My sincere gratitude to anyone who contributed to the publication of the Third Edition, including Frank Carroll, Brenda K. Dorsett, Marian H. Fish, Anthony Q. Fletcher, Henry E. Kruman, Sarah D. McShea, M. Kathryn Meng, Anthony R. Palermo, Marian C. Rice, Joseph F. Saeli, Deborah A. Scalise, Vivan D. Wesson, Stacey Whiteley and the staff of the NYSBA Publications Department.

Sarah E. Gold, Esq.
Chair, Committee on Law Practice Management

Introduction
by Sarah Diane McShea, Esq.

The original *Planning Ahead Guide* was published a decade ago and quickly became one of the NYSBA's most popular publications. Recently a subcommittee of the Law Practice Management Committee updated the *Guide*, replacing citations to the old ethics rules with current references to the Rules of Professional Conduct and revising the model forms to reflect, among other things, changes in the law and some of the newer technologies used by many practicing lawyers. The result, we hope, is as "user friendly" as the original *Planning Ahead Guide*. The *Guide* includes free downloadable forms in Word and links to many of the cited references. The *Guide* will remain a work in process, as we welcome suggestions and feedback from lawyers in New York and other jurisdictions as they work with this publication.

The original *Planning Ahead Guide* was written by the NYSBA's Committee on Law Practice Continuity, chaired by David R. Pfalzgraf, Esq., a leader in the profession and the inspiring helmsman of the Law Practice Continuity Committee's work in assuring that lawyers prepare for the future and ensuring that there are safety nets for their clients and families when they have not done so.

The *Planning Ahead Guide* was the Law Practice Continuity Committee's first significant achievement. Its second significant achievement was its proposal of the Uniform Caretaker Rule to provide the necessary authorization and guidance for the appointment of caretaker lawyers to serve in emergency situations when disaster befalls a fellow member of the Bar. Although the proposed Uniform Caretaker Rule has not yet been adopted by the Appellate Division, it has nonetheless served to alert the courts and the legal profession to the need for guidance and court involvement in many situations when lawyers have not taken sufficient steps to plan for the future.

Special thanks go to the members of the Law Practice Management Committee's Subcommittee on Law Practice Continuity for their commitment and insights in updating the *Planning Ahead Guide*: Marion Hancock Fish, Patricia Spataro, Henry E. Kruman, Robert L. Ostertag, Anthony R. Palermo, Marian C. Rice, John R. McCarron, Anthony Q. Fletcher and Joseph F. Saeli, as well as William H. Roth, who assisted the Subcommittee in revising the updated *Guide*. Particular thanks go to the hardworking dedicated staff at the NYSBA, especially Katherine Suchocki, Jessica Patterson and Simone Smith, without whom we could not have completed this task.

We would remiss if we did not thank the leadership of the NYSBA for encouraging and consistently supporting the work of the Committee on Law Practice Continuity and the Law Practice Management Committee over the past twelve years. The original members of the Committee on Law Practice Continuity, which was responsible for the original *Planning Ahead Guide* and many continuing legal education programs around the State, included David R. Pfalzgraf (Committee Chair); James M. Altman (the original thinker behind the project), Francis X. Carroll (who has helped many lawyers in New York cope with personal and professional disasters), Anthony E. Davis, James F. Dwyer, Jeffrey M. Fetter, Susan F. Gibralter, S. Jeanne Hall (one of the chief authors of the original *Guide* and a leading light in the profession), Paul M. Hassett, Douglas C. Johnston, Kim Steven Juhase, Anne B. Keenan (to whom the original Guide was dedicated), Steven C. Krane, Anne Maltz, Sarah Diane McShea, Mark S. Ochs, Robert L. Ostertag, Timothy J. O'Sullivan, Anthony R. Palermo, Michael Philip, Jr., the Honorable Eugene F. Pigott (then a justice of the Appellate Division, Fourth

Department, and a consistent source of wisdom and practical guidance), Barbara F. Smith (one of the best draftsmen and most thoughtful Committee members participating in the project) and Leroy Wilson, Jr. Special thanks and gratitude must go to former NYSBA staff member Terry Brooks, whose fortitude and dedication insured the publication and excellence of the original *Planning Ahead Guide*.

And, finally, we dedicate this current edition to Gary Munneke, the former Chair of the Law Practice Management Committee, whose outstanding work and astonishing level of commitment was appreciated by all involved in this update project. I sincerely apologize to those who contributed but who inadvertently are not included here. The fault is mine and later editions will correct this unintentional oversight.

Sarah D. McShea, Esq.
Chair, Subcommittee on Law Practice Continuity

PREFACE

It is not easy to think about circumstances that could render you unable to continue practicing law. Unfortunately, accidents, illness, disability, planned or unplanned retirement, and untimely death are events that do occur. Under any of these circumstances, your clients' interests, as well as your own, must be protected.

Although there are no specific requirements in the New York Rules of Professional Conduct (RPC) specifying the steps a lawyer must take to protect his or her clients in the event of a sudden inability to continue in practice, several Rules and Comments, along with general principles of attorney professionalism and fiduciary duty, provide guidance on this issue. It is clear that there is a duty on the part of the attorney to protect his or her clients from the adverse consequences of such an event. For example, a lawyer who "neglects a matter" may violate RPC 1.3(b). By arranging in advance for the temporary management or closing of your practice, your ongoing matters will be handled in a timely manner and there will be less likelihood that a court date will be missed or a closing delayed (for example, because of an inability to access your escrow account), or clients' interests otherwise prejudiced. Funds and property belonging to your clients will be returned to them promptly, as required by RPC 1.15(c). You also will be assured that your clients' files will be protected and that your office bookkeeping records will be maintained as required by RPC 1.15(d).

Attorney professionalism is often equated with dedication to clients, service, competence and the display of good judgment. By formulating a plan today, you will be fulfilling your ethical responsibilities and your obligations of attorney professionalism. The information in this *Planning Ahead Guide* is designed to assist you in protecting your clients and your practice.

Following this introduction and overview are materials and model forms to assist you in this process. The *Guide* will help you to properly protect your clients and your practice if you personally are unable to act. To assist you in designing your Advance Exit Plan, this introduction refers by name to the forms and documents that are included in the Appendices. Chapter 3 in this *Guide*, for example, provides you with some frequently asked questions (FAQs) and checklists which raise issues that should be considered in making plans to protect clients' interests in the case of the sudden unavailability of a sole practitioner to manage his or her practice, or in closing one's own office or that of another attorney, or in temporarily assuming responsibility for another attorney's practice.

Note: Under the circumstances described in this *Guide* there are three categories of lawyers: (1) the lawyer whose disability, incapacity, retirement or death is the occasion for actions, is referred to as the "Planning/Principal Attorney," (2) the lawyer called upon to respond to the disability, incapacity, retirement or death of another lawyer, is referred to variously as the "Responsible Attorney," and (3) the lawyer who buys a law practice is referred to as the "Acquiring Attorney."

Establish an Advance Exit Plan

STEP 1: Designate the Responsible Attorney to manage or close your practice in the event of your disability, incapacity, retirement or death. This may be accomplished by a limited power of attorney (§ 5.6), a comprehensive agreement with detailed powers, or a short form authorization and consent form to close or manage a law practice. If you are a professional corporation, resolutions may be

necessary authorizing you, as sole shareholder and director, to appoint another attorney to manage or close your practice. Samples of such forms are set forth in Chapter 1.

STEP 2: Prepare written instructions to your family, your designated Responsible Attorney, your nominated executor, and your key office staff containing:

- General information and guidance to minimize uncertainty, confusion and possible oversights;
- Authorizations to release medical information (required by the Health Insurance Portability and Accountability Act) that may be needed to determine your incapacity (see HIPAA release form § 5.5)
- Specific and detailed information and authorizations needed to close your law practice;
- Steps to be taken to assure that your written instructions are updated and reviewed periodically for completeness and accuracy.

See "Checklist for Lawyers Planning to Protect Clients' Interests in the Event of the Lawyer's Death, Disability, Impairment or Incapacity" and "Checklist for Closing Your Own Office," set forth as § 1.7 and 1.8. See also § 1.4 for a form that lists your Law Office contacts, which should be kept up to date and given to your family, staff, and/or Responsible Attorney.

STEP 3: Discuss your Advance Exit Plan with the appropriate persons (*e.g.*, your family, designated Responsible Attorney, nominated executor, and key office staff) to avoid confusion or delay in the event of your disability, incapacity, retirement or death. For example, your executor should be aware of your wishes with respect to your practice in the event of death, including any instructions you may have given to the Responsible Attorney. Not only will this protect your practice, it will also save considerable time and expense that may be incurred in the administration of your estate. § 1.4 and § 1.5 provide you with a checklist for your executor, and a sample provision that can be used in your will giving instructions to your executor regarding your law practice.

STEP 4: Your Advance Exit Plan should describe arrangements you enter into with your designated Responsible Attorney (see § 1.1, § 1.2 and § 5.6 which are sample forms that could be used to accomplish this objective). They should cover the following:

- Authorization to obtain medical information to assist the Responsible Attorney (or other designated person, *e.g.*, family member) in determining your incapacity to continue in practice (see HIPAA release form at § 5.5);
- Authorization to provide all relevant people with notice of closure of your law practice;
- Authorization to the Responsible Attorney to contact your clients for instructions on transferring their files;
- Authorization to obtain extensions of time in litigation matters, where needed;
- Your Advance Exit Plan might also include sample letters notifying clients of your inability to continue in practice, and arranging for transfer or return of files. See "Letter from the Responsi-

ble Attorney Advising That Lawyer Is Unable to Continue Law Practice" (§ 3.6) and "Authorization for Transfer of Client File," "Request for File," and "Acknowledgment of Receipt for File" (§ 3.8, § 3.9, § 3.10).

At § 5.12, you will find a helpful list of questions and answers on the subject of file retention and preservation, providing you with guidance on file disposition. If you are retiring, you should prepare a letter to your clients advising them of your retirement, the need to obtain new counsel, and a procedure for transfer of their files. See "Letter from Planning Attorney Advising that Lawyer Is Closing Office" (§ 3.5). If there are other attorneys in your firm who would be available to represent the clients in the event of your own inability to practice, your Advance Exit Plan should include a letter from your colleague(s) to your clients advising them of your disability and their availability to continue handling their matter (§ 3.6).

Your Advance Exit Plan also should include instructions as to:

- Disposition of closed files;
- Disposition of your office furnishings and equipment;
- Authorization to draw checks on your office and trust accounts;
- Payment of current liabilities of the office;
- Billing fees on open files;
- Collecting accounts receivable;
- Access to important information (*e.g.*, passwords to your computer); and
- Insurance matters.

Your Advance Exit Plan also might include provisions that give the Responsible Attorney or executor, as the case may be, authority to:

- Wind down your business financial affairs;
- Provide your clients with a final accounting and statement of work done by you/your office;
- Collect fees on your behalf;
- Liquidate or sell your practice. (See § 1.1, § 1.2 and § 1.3 for sample language);
- Act on behalf of your PC or your PLLC in the event of your death or disability. (See § 1.3 for sample "Waiver of Notice of Special Joint Meeting of the Sole Shareholder and Sole Director of Corp." and "Minutes of the Special Joint Meeting of the Sole Shareholder and Sole Director of Corp.").

Compensation to the Responsible Attorney and Staff

Your Advance Exit Plan should include an arrangement for payment by you or your estate to the Responsible Attorney and staff for services rendered on your behalf in closing, temporarily managing until your return, or managing your practice pending its sale. For example, the agreement with the Responsible Attorney may provide for compensation based on an hourly rate, for reimbursement of reasonably necessary expenses, and for billing on a monthly basis.

You also should address the issue of how to fund this compensation to the Responsible Attorney and support staff. You can direct that payment be made from your office receipts. If you are concerned that your law practice income will be insufficient to defray this expense, you may want to consider disability insurance in an amount sufficient to cover this potential liability. Business Overhead Expense Insurance is a variation on Disability Income Insurance that specifically covers the ongoing expenses of running your office (including non-lawyer staff salaries, rent, equipment leasing, etc.), in the event of your disability.

In the case of death, since your estate will be responsible for payment to the Responsible Attorney, your executor or other personal representative should be notified in advance of any arrangements you may have made with regard to this issue. You may want to consider including those instructions in your will, especially if you have not made such arrangements in a separate written agreement. As in the case of disability or incapacity, since your practice may be your only probate asset and insufficient to cover the cost of compensation to the Responsible Attorney and disbursements incurred in closing your practice, you may want to consider purchasing an insurance policy naming the estate as beneficiary and specify in your will that the proceeds from the policy be used for this purpose.

Conflicts of Interest and Confidentiality

Although the designation of the Responsible Attorney to assume responsibility for client files raises issues of client confidentiality, it is reasonable to read the Rules of Professional Conduct as authorizing such access and disclosure under these circumstances. (RPC 1.6, RPC 1.17, RPC 1.18). Remember that if the Responsible Attorney discovers evidence of legal malpractice or ethical violations, he or she may have an ethical obligation to take appropriate action. (See "What If? Answers to Frequently Asked Questions" set forth in § 3.1).

The Responsible Attorney also must be aware of conflict-of-interest issues and do a conflicts check if he or she is either providing legal services to your clients or reviewing confidential file information to assist with referral of your clients' files. The Responsible Attorney should be prepared to delegate to another attorney those files with which he or she has a conflict of interest, while being careful to protect materials and information that may be subject to attorney-client privilege or duty of confidentiality (§ 3.1).

Trust Accounts

If you do not make arrangements to allow another attorney access to your attorney trust account, your clients' money must remain in trust until a court authorizes access. This is likely to cause delay and put your clients and you in a difficult position if you are unable to conduct your prac-

tice. On the other hand, allowing access to your trust account is a serious matter. If you give access to your trust account to another attorney and that lawyer misappropriates money, then your clients will suffer, and you may be held responsible. There is no simple answer to this dilemma and other important decisions which you must make regarding your trust account (§ 3.1).

First, you must decide whether to appoint a co-signatory prior to your disability, or to grant access to the account at a specified future time or event. If you decide to allow unlimited access to the Responsible Attorney, then you can authorize the attorney as a signer on your accounts and contact the bank to sign all appropriate cards and paperwork. This allows easy access on the part of the Responsible Attorney if, for example, you are unexpectedly delayed on a trip. However, it opens the door to a host of other risks, as you are unable to control the signer's access. If you prefer not to have a co-signatory on your trust account while you are able to conduct your practice, you may nevertheless plan in advance and give such authority in the future. One option is to give the Responsible Attorney a power of attorney that takes effect upon your disability and includes as a power the authority to withdraw funds from your trust account. You may want to leave the executed power of attorney with a third party whom you trust to ensure that it will not be released until the specified event, *e.g.*, disability, occurs.

Another option is to give the Responsible Attorney access to your trust account in an agreement or consent and authorization form. (§ 1.1, § 1.2, and § 5.6). Again, the power may be conditioned upon the occurrence of a specified event. However, unlike a power of attorney, which ceases upon death, the agreement can authorize the Responsible Attorney to operate your trust account upon and after your death. In such case, this power may be used by the Responsible Attorney in winding up your practice.

Whichever method you choose, remember to check with the bank that holds your trust account to ensure that your power of attorney or agreement is acceptable to it and to sign additional documents that may be required. The New York Rules of Professional Conduct include detailed procedures which should be reviewed carefully by you and the Responsible Attorney to ensure that the appropriate steps are taken to safeguard all trust funds and to have the funds delivered to the appropriate parties on a timely basis. (RPC 1.16(e), RPC 1.15 and *Attorney Escrow Accounts, Rules, Regulation and Related Topics, 5th Ed.* (NYSBA)).

Include Family and Staff

Your Advance Exit Plan also should include written letters of instruction to your family and office staff. In the event of death, these letters should ease the administration of your estate by describing what you have, where it is located, how to access it, and what to do with it. Your family, your executor (in the event of death), your designated Responsible Attorney and your office staff need to share information and coordinate their activities in the event of your disability, incapacity or death. Care should be taken to safeguard against improper access to client files and information by unauthorized persons, *e.g.*, non-attorney family members. Generally, these instructions should cover the following:

- All pertinent personal and family information and financial information;
- Identification and location of all estate planning documents, including original wills/trusts;
- Location of personal and business insurance records, among other things.

Guidance to your staff should include directions as to:

- Notifying your professional liability carrier;
- Notifying all courts, tribunals, boards and administrative agencies where your matters are pending;
- Closing your office;
- Reviewing all depositories, including trust accounts and safe contents;
- Coordinating with your accountant.

In effect, you must create a system for the orderly winding up of your law practice and the settlement of your own estate. See "Checklist for the Fiduciary of a Solo Practitioner" (§ 3.4); "Law Firm Master List of Contacts and Important Information" (§ 1.4); and "Special Provisions for Attorney's Will Regarding My Law Practice" (§ 1.5).

Other Steps

There are other steps that you can take while you are in practice to make the closing of your office relatively smooth, timely and cost efficient in the event of disability, incapacity, retirement or death. These steps include:

- Making sure that your office procedures manual explains how to produce a list of client names and addresses for open files;
- Keeping a calendaring system with all deadlines and follow-up dates;
- Thoroughly documenting client files;
- Keeping your time and billing records up to date;
- Familiarizing the Responsible Attorney with your office systems;
- Reviewing and updating on a regular basis your written agreement with the Responsible Attorney;
- Periodically purging old and closed files (§ 5.12);
- Periodically communicating with clients for whom wills or other original documents are held by your firm to confirm that addresses are up to date and what documents are still relevant.

If your office is organized and in good order, your designated Responsible Attorney will be able to manage, close or wind down your law practice in a timely and cost-efficient manner. It also will make your law office a more valuable asset that may be sold and the proceeds remitted to you or your estate.

Special Considerations in the Event of Death

In the event of your death, your practice will be an asset of your estate. Your personal representative, be it executor or administrator, is the person ultimately responsible for the administration of this asset, including ensuring that all obligations to clients are met.

If you have designated a Responsible Attorney prior to your death, you should notify your personal representative of the appointment and review your Advance Exit Plan with him or her. This will avoid confusion and enable your personal representative to promptly, upon the award of letters testamentary or administration, authorize the Responsible Attorney to embark upon his or her duties. You may wish to include in your will a direction to your executor that authorizes and requests delegation of responsibilities relating to the administration and closing of your practice to the Responsible Attorney and refers, specifically, to the Advance Exit Plan, if appropriate.

If you have not designated a Responsible Attorney in advance of your death, your executor may appoint an attorney to manage and close (or assist in selling) your practice. You may want to include language in your will that provides guidelines to your executor and any attorneys that your executor may retain regarding the management or closing of your practice. For example, you may want to name specific attorneys to take over certain of your files and enumerate powers to close your practice similar to those set forth in an Advance Exit Plan. If your nominated executor is not an attorney, it is important that he or she avoid inappropriate access to client files and information and rely instead on an attorney or office staff to attend to these matters. (See "Special Provisions for Attorney's Will" (§ 1.5) and "Checklist for the Fiduciary of a Solo Practitioner" (§ 3.4)).

Whether or not you have an Advance Exit Plan, it is critical that you have a current will so that management and closing or transfer of your law practice can be addressed without delay and attendant harm to clients.

You also should consider a source of funding to compensate your designated Responsible Attorney, office staff, or attorney and staff retained by your executor who will be working during this transition period. Since your practice may be your principal probate asset and your operating account may not have sufficient funds for this purpose, you may want to consider an insurance policy as a source of funding to defray this expense. The beneficiary of the policy could be the estate, with specific instructions in your will that proceeds be used for this purpose.

Sale of a Law Practice

Your practice also may be an asset that can be sold to benefit you and/or your family or estate if you are no longer able to practice. Taking the appropriate steps as outlined above will not only protect your clients, but also may be necessary to preserve the value of your practice so that it may be transferred to another attorney or firm. Included in these materials are guidelines for the transfer of a practice (including an overview of RPC 1.17), detailed suggestions for structuring such a sale, and a sample agreement and forms that would be relevant if your practice is sold. (See "Transfer of a Law Practice" (§ 2.1); "Valuing a Law Practice" (§ 2.2); "Sample Asset Purchase Agreement" (§ 2.3); and "Confidentiality and Non-Disclosure Agreement" (§ 2.4)). The Confidentiality Agreement would be signed before a prospective seller provides the prospective buyer with confidential client information and other confidential information about the seller's practice, such as financial information.

Information for the Responsible Attorney Who Has Been Designated as a Successor, Caretaker or Closer of a Law Practice

The Responsible Attorney designated to manage or close another attorney's office will face myriad responsibilities, some of which will require immediate action. Where a detailed plan is in place (as described in these guidelines), the job of the Responsible Attorney will be easier. If no such plan is in place, the "Checklist for Closing Another Attorney's Office" (§ 3.2) and the checklists for concerns when assuming responsibilities of another attorney's practice (§ 2.5 and § 3.3), and the sample letters and forms regarding notification to clients and transfer of files (§ 3.5 and § 3.9) will be helpful to you. The checklists at § 1.7 and § 1.8 also may be useful for the Planning/Principal Attorney to review prior to designing his or her own Advance Exit Plan and to ensure that the issues raised in those checklists are dealt with in the plan the attorney develops.

Other Considerations

You will find in the *Guide* suggestions relating to file destruction or retention (§ 5.12). The *Guide* also provides information on how to provide for practice continuity issues when the law practice of a partner or associate becomes interrupted because of issues related to his or her alcoholism, drug addiction or other impairment. A firm must be aware of the principal employment and disability laws involved, as well as the resources available to members of the firm in their efforts to assist their colleague (§ 4.2, § 4.3 and § 4.4).

Should a law office suffer a complete failure due to unforeseen disaster, a suggested checklist and plan is included to help in planning for orderly transition and resumption of practice (§ 5.1).

The *Guide* sets forth the relevant statutes, rules of professional conduct, and ethics opinions relevant to advanced planning issues (§ 5.7, § 5.8, § 5.9 and § 5.10).

Finally, the *Guide* reproduces an article (also included in the original *Planning Ahead Guide*) by David Kee, a Maine attorney, listing the "do's" and "don'ts" of retirement (§ 1.6).

Start Now

We encourage you to develop and implement an Advance Exit Plan utilizing the basic guidelines discussed above. You can accomplish this now, at little or no expense, to protect your clients' and your own interests. Don't put it off – start the process today and keep it current and complete.

NOTE: The Planning Ahead Guide was originally written by the New York State Bar Association's Special Committee on Law Practice Continuity, which gratefully acknowledged the use of "Planning Ahead: Protecting Your Client's Interest in the Event of Your Disability or Death," published by the Ethics Department of the Virginia State Bar, as well as "Planning Ahead: A Guide to Protecting Your Clients' Interest in the Event of Your Disability or Death" by Barbara S. Fishleder, published by the Oregon State Bar Professional Liability Fund. The *Guide* and its model forms have now been revised and updated by the NYSBA Committee on Law Practice Management.

CHAPTER ONE

PLANNING FOR DISABILITY, RETIREMENT OR DEATH

Sarah Diane McShea, Esq.

INTRODUCTION

Death, disability or incapacity are a few of the unexpected but real threats to an attorney's ability to safeguard client matters. An attorney has a legal and moral responsibility to current and former clients and is charged with protecting client data even when it's no longer possible for the attorney to do so. This chapter invites the attorney to put in place documents and procedures specifically designed to ensure the attorney's ability to safeguard client information even in the attorney's absence. These sample lists, checklists, authorizations and other instruments may be used to create the guidelines that will help others take the appropriate steps to preserve the integrity of client matters.

Over decades of successful private practice, attorneys may well have developed practices that are not written down: tried and true procedures that they adopt automatically. This chapter urges the attorney to think about the steps that no one else is aware of and describe them. Providing as much detail as possible is the best way to ensure that client matters may be transitioned smoothly to a responsible attorney. The sample authorizations provided, for example, are intended not just for a responsible attorney but for use at financial institutions which sometimes provide the greatest hurdles to quickly handling client matters. Taking the time to prepare these documents should provide an attorney with the peace of mind of knowing that client matters will be protected and handled appropriately, whatever the circumstance.

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§ 1.1
Agreement to Close Law Practice in the Future[1]

This _____ Agreement is entered into this ____ day of _____, 20__, by and between _____ ("Planning Attorney"), an individual admitted and licensed to practice as an attorney in the Courts of the State of New York and whose office for the practice of law is located at _____, and _____ ("Responsible Attorney"), an individual admitted and licensed to practice as an attorney in the Courts of the State of New York and whose office for the practice of law is located at _____.

RECITALS

WHEREAS, Planning Attorney is a sole practitioner engaged in the practice of law; and

WHEREAS, Planning Attorney recognizes the importance of protecting the interests of his clients in the event that he is unable to practice law by reason of his death, disability, incapacity or other inability to act; and

WHEREAS, Planning Attorney wishes to plan for the orderly closing of his law practice if he is unable to practice law for any of the above stated reasons; and

WHEREAS, Planning Attorney has requested Responsible Attorney to act as his agent to take all reasonable actions deemed necessary by Responsible Attorney to close Planning Attorney's practice on account of his inability to act and Responsible Attorney has consented to this appointment; and

WHEREAS, Planning Attorney and Responsible Attorney hereby enter into this Agreement to define their rights and obligations in connection with the closing of Planning Attorney's practice.

1. **Effective Date**. This Agreement shall become effective only upon Planning Attorney's death, disability, incapacity or other inability to act, as determined in accordance with paragraph 2. The appointment and authority of Responsible Attorney shall remain in full force and effect as long as it is reasonable to carry out the terms of this Agreement, or unless sooner terminated pursuant to paragraphs 8 or 9.

2. **Determination of Death, Disability, Incapacity**. Responsible Attorney shall make the determination that Planning Attorney is dead, disabled, incapacitated or otherwise unable to practice law, and if disabled or incapacitated that such disability or incapacity is permanent in nature or likely to continue indefinitely. Responsible Attorney shall base his determination on communications with the members of Planning Attorney's family, if available, and at least one written opinion of a licensed physician or other medical professional who either diagnosed, treated or was responsible for the medical care of Planning Attorney. As part of the process of determining

1 To ensure compliance with HIPAA, the Planning Attorney, upon execution of the Agreement to Close Law Practice, should also sign two written authorizations, one to the health care provider, and the second with the provider line blank, identifying the Responsible Attorney and authorizing the disclosure of information relating to the Planning Attorney's capacity to practice law upon request by Responsible Attorney. See HIPAA release form at § 5.5.

whether Planning Attorney is disabled, incapacitated, or otherwise unable to continue the practice of law, all individually identifiable health information and medical records may be released to Responsible Attorney, even though the authority of the Responsible Attorney has not yet become effective. This release and authorization applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended 42 U.S.C. § 201 and 45 C.F.R. § 160. In reaching the reasonable determination that Planning Attorney is unable to practice law by reason of his death, disability, incapacity or other inability to act, Responsible Attorney may also consider the opinions of colleagues, employees, friends or other individuals with whom Planning Attorney maintained a continuous and close relationship. In the event of Planning Attorney's death, Responsible Attorney's authority to act under this agreement shall be confirmed in writing by the representative of Planning Attorney's estate. Responsible Attorney shall sign an affidavit stating the facts upon which his determination is based, and such affidavit shall, for the purposes of this agreement, be conclusive proof that Planning Attorney is disabled, incapacitated, or otherwise unable to continue the practice of law.

3. **General Power and Appointment of Responsible Attorney as Attorney-in-Fact**. Upon reaching the determination that Planning Attorney is unable to continue the practice of law by reason of disability, incapacity or other inability to act as provided herein, and is unable to close his practice, Planning Attorney consents to and authorizes Responsible Attorney to take all reasonable actions to close Planning Attorney's law practice. Planning Attorney appoints Responsible Attorney as his attorney-in-fact with full power to do and accomplish all of the actions expressed and implied by this Agreement as fully and completely as Planning Attorney would do personally but for his inability.

4. **Specific Powers.** Planning Attorney consents to and authorizes the following actions by Responsible Attorney in addition to any other actions Responsible Attorney in his sole discretion deems reasonable to carry out the terms of this Agreement:

   a. **Access to Planning Attorney's Office**. To enter Planning Attorney's office and use his equipment and supplies as needed to close Planning Attorney's practice.

   b. **Designation as Signatory on Financial Accounts**. To replace Planning Attorney as signatory on all of Planning Attorney's law office accounts with any bank or financial institution including without limitation special accounts and checking and savings accounts. Planning Attorney's bank or financial institution may rely on this authorization unless such bank or financial institution has actual knowledge that this Agreement has been terminated or is no longer in effect.

   c. **Opening of Mail and/or Emails**. To receive, sign for open and review Planning Attorney's law practice mails and emails and to process and respond to them, as necessary.

   d. **Possession of Property**. To take possession, custody and control over all of Planning Attorney's property relating to his law practice, real and personal, including client files and records.

   e. **Access to and Inventory/Examination of Files**. To enter any storage location where Planning Attorney maintained his files and to inventory and examine all client case

files, including client wills, property and other records of Planning Attorney. If Responsible Attorney identifies a conflict of interest with a specific file or client, he shall assign the file to the Successor Responsible Attorney in accordance with paragraph 8(b). Any confidential information learned by the Responsible Attorney must not be revealed by him and consideration must be given as to whether the Responsible Attorney may continue to represent his own client.

f. **Notification to Clients**. To notify clients, potential clients and those who appear to be clients, of Planning Attorney's death, disability, incapacity or other inability to act, and to take whatever action Responsible Attorney deems appropriate to protect the interests of the clients, including advising clients to obtain substitute counsel.

g. **Transfer of Files**. To safeguard files and arrange for their return to clients, obtain consent from clients to transfer files to new attorneys, transfer files and property to clients or their new attorneys and to obtain receipts therefor.

h. **Storage of Files and Attorney's Records**. To arrange for storage of closed files, unclaimed files, and records that must be preserved for seven (7) years under Rule 1.15(d) of the New York Rules of Professional Conduct.

i. **Transfer of Original Documents**. To arrange for and transfer to clients all original documents including wills, trusts and deeds, unless other acceptable arrangements can be made.

j. **Extensions of Time**. To obtain client's consent for extensions of time, contact opposing counsel and courts/administrative agencies to obtain extensions of time, and apply for extensions of time, if necessary, pending employment of new counsel by clients.

k. **Litigation**. To file motions, pleadings, appear before court, and take any other necessary steps where the clients' interests must be immediately protected pending retention of other counsel.

l. **Notification to Courts and Others**. To contact all appropriate agencies, courts, adversaries and other attorneys, professional membership organizations such as the New York State Bar Association or local bar associations, the Office of Court Administration, and any other individual or organization that may be affected by Responsible Attorney's inability to practice law and advise them of Planning Attorney's death or other inability to act and further advise that Planning Attorney has given this authorization to Responsible Attorney.

m. **Collection of Fees and Return of Client Funds**. To send out invoices for unbilled work by Planning Attorney and outstanding invoices, to prepare an accounting for clients on retainer, including return of client funds, to collect fees and accounts receivables and, if deemed necessary or appropriate by Responsible Attorney, to arbitrate or litigate fee disputes or otherwise collect accounts receivables on behalf of Planning Attorney or Planning Attorney's estate and to prepare an accounting of each client's escrow fund and arrange for transfer of escrow funds, including obtaining consent

from clients to transfer escrow funds and acknowledge receipt of escrow funds by Planning Attorney, other counsel or client.

n. **Payment of Business Expenses to Creditors**. To pay business expenses such as office rent, rent for any leased equipment, library expenses, salaries to employees or other personnel, to determine the nature and amount of all claims of creditors including clients of Planning Attorney and to pay or settle same.

o. **Personnel**. To continue the employment of Planning Attorney's employees and other personnel to the extent necessary to assist Responsible Attorney in the performance of his duties, to compensate and to terminate such employees or other personnel, to employ new employees or other personnel if their employment is reasonably necessary to Responsible Attorney's performance of his duties hereunder, to employ or dismiss agents, accountants, attorneys or others and to reasonably compensate them.

p. **Termination of Obligations**. To terminate or cancel legal, commercial or business obligations of Planning Attorney including, if reasonable under the circumstances, terminating, cancelling, extending or modifying any office lease or lease of equipment, such as a copier, computer or other equipment.

q. **Insurance**. To purchase, renew, maintain, cancel, make claims against or collect benefits under fire, casualty, professional liability, or other office insurance of Planning Attorney, to notify any professional liability insurance carriers of Planning Attorney's death, disability, incapacity or other inability to act and to cooperate with such insurance carriers regarding matters related to Planning Attorney's coverage, including the addition of Responsible Attorney as an insured under said policy.

r. **Taxes**. To prepare, execute file or amend income, information or other tax returns or forms and to act on behalf of Planning Attorney's law practice in dealing with the Internal Revenue Service, any division of the New York State Department of Taxation and Finance, or any office of any other tax department or agency.

s. **Settlement of Claims**. To settle, compromise, or submit to arbitration or mediation all debts, taxes, accounts, claims, or disputes between Planning Attorney's law practice and any other person or entity and to commence or defend all actions affecting Planning Attorney's law practice.

t. **Execution of Instruments**. To execute, as Planning Attorney's attorney-in-fact, any deed, contract, affidavit or other instrument on behalf of Planning Attorney.

u. **Attorney as Fiduciary**. To resign any position which Planning Attorney holds as a fiduciary, such as executor or trustee, and to notify other named fiduciaries, if any, and beneficiaries of the estate or trust; if the trust or will does not name a successor fiduciary, to apply to the court for appointment of a successor fiduciary and to confer with the personal representative of the Planning Attorney's estate with respect to the obligation of such personal representative to account for the assets of the estate or trust that Planning Attorney was administering.

v. **Power of Sale and Disposition**. To sell or otherwise arrange for disposition of the Planning Attorney's furniture, books or other personal property, whether located in Planning Attorney's law office or off-site, so long as such property is incidental to his law practice.

w. **Representation of Planning Attorney's Clients**. To provide legal services to Planning Attorney's clients, provided that Responsible Attorney has no conflict of interest, obtains the consent of Planning Attorney's clients, and does not engage in conduct that violates Rules 1.7, 1.8 and 1.10, respectively, of the New York Rules of Professional Conduct. If Planning Attorney's clients engage Responsible Attorney to perform legal services, Responsible Attorney shall have the right to payment for such services from such clients.

x. **Access to Safe Deposit Box**. To open Planning Attorney's safe deposit box used for his law practice, to inventory same, and to arrange for the return of property to clients.

5. **Preservation of Attorney-Client Privilege and Confidences and Secrets of Client**. Responsible Attorney shall maintain the confidences and secrets of a client and protect the attorney-client privilege as if Responsible Attorney represented the clients of Planning Attorney.

6. **Sale of Planning Attorney's Practice**. In the event of Planning Attorney's death, disability, incapacity, or other inability to act, Responsible Attorney shall have the power to sell Planning Attorney's law practice in accordance with Rule 1.17 of the New York Rules of Professional Conduct. In the case of the death of Planning Attorney, the sale shall be approved by the Executor or Administrator of Planning Attorney's estate or other personal representative of the deceased Planning Attorney. Such power shall include, without limitation, the authority to sell all assets of the Planning Attorney's practice such as goodwill, client files and fixed assets such as furniture and books; to advertise Planning Attorney's law practice; to arrange for appraisals; and to retain professionals such as lawyers and accountants to assist Responsible Attorney in the sale of the practice. Upon the sale of the practice, Responsible Attorney will pay Planning Attorney or Planning Attorney's estate all net proceeds of sale.

[Note: Planning Attorney should consider adding a provision to his Will specifying the manner in which the sale of the law practice shall be conducted, such as whether the sale shall be consummated by Responsible Attorney, Executor or Administrator and by what method of valuation.]

Responsible Attorney shall have the right to purchase, in whole or in part, Planning Attorney's practice, provided that the purchase price is the fair market value as determined by an appraiser and that the terms of the sale are approved by the Executor or Administrator of Planning Attorney's estate or an independent third party [Note: Review Rule 1.17 of the New York Rules of Professional Conduct to ensure compliance with this or similar language.]

[Note: Planning Attorney should consider giving Responsible Attorney first option to purchase. Also, terms and conditions of sale may be described in this Agreement or separate agreement.]

7. **Compensation**. Responsible Attorney shall be paid reasonable compensation for the services performed in closing the law practice of Planning Attorney. Such compensation shall be based upon the time allocated to and complexity associated with successfully closing the law practice. Responsible Attorney agrees to maintain accurate and complete time records for the purpose of determining his compensation. Responsible Attorney's compensation shall be paid from the funds of Planning Attorney's law practice.

8. **Resignation of Responsible Attorney and Appointment of Successor Responsible Attorney**.

   a. Prior to the effective date of this Agreement, Responsible Attorney may resign at any time by giving written notice to Planning Attorney. After the effective date of this Agreement, Responsible Attorney may resign by giving sixty (60) days written notice to Planning Attorney, or if Planning Attorney is deceased to Planning Attorney's Executor or Administrator, subject to any ethical or professional obligation to continue or complete any matter to which Responsible Attorney assumed responsibility.

   b. If Responsible Attorney resigns or otherwise is unable to serve, Planning Attorney appoints as Successor Responsible Attorney, and Successor Responsible Attorney consents to this appointment as evidenced by his signature to this Agreement. Successor Responsible Attorney shall have all the rights and powers, and be subject to all the duties and obligations of Responsible Attorney. During the tenure of Responsible Attorney, Successor Responsible Attorney shall review and take any necessary action with respect to those client files of Planning Attorney in which Responsible Attorney identifies a conflict or potential conflict of interest.

   c. In the event of Responsible Attorney's resignation or inability to serve, Responsible Attorney shall provide five (5) days written notice thereof to Successor Responsible Attorney at his address set forth below.

   d. Responsible Attorney or Successor Responsible Attorney shall not be required to post any bond or other security to act in their capacity.

9. **Liability and Indemnification of Responsible Attorney**. Responsible Attorney shall not be liable to Planning Attorney or Planning Attorney's estate for any act or failure to act in the performance of his duties hereunder, except for willful misconduct or gross negligence. Planning Attorney agrees to indemnify and hold harmless Responsible Party from any claims, loss or damage arising out of any act or omission by Responsible Attorney under this Agreement, except for liability or expense arising from Responsible Attorney's willful misconduct or gross negligence. This indemnification does not extend to any acts, errors or omissions of Responsible Attorney while rendering or failing to render professional services as attorney for former clients of Planning Attorney.

10. **Revocation, Amendment and Termination**.

   a. After the effective date of this Agreement, Planning Attorney may at any time remove or replace Responsible Attorney or Successor Responsible Attorney, or revoke, amend

or alter this Agreement by written instrument delivered to Responsible Attorney and Successor Responsible Attorney, and such removal, replacement or revocation, as the case may be, shall be effective within three (3) days of the transmission of such written instrument to Responsible Attorney and Successor Responsible Attorney; *provided*, *however*, that any amendment modifying Responsible Attorney's obligations hereunder or his compensation hereunder shall require Responsible Attorney's prior written consent to be made effective.

b. This Agreement shall terminate upon (i) delivery of written notice of termination by Planning Attorney to Responsible Attorney and Successor Responsible Attorney; in accordance with this Section 10; or (ii) delivery of a written notice of termination to Responsible Attorney by the Executor or Administrator of Planning Attorney's estate upon a showing of good cause, or by a Guardian of the property of Planning Attorney appointed under Article 81 of the New York State Mental Hygiene Law pursuant to Court order.

11. Miscellaneous.

a. This Agreement shall be governed and interpreted in all respects by the laws of the State of New York.

b. Whenever necessary or appropriate for the interpretation of this Agreement, the gender herein shall be deemed to include the other gender and the use of either the singular or the plural shall be deemed to include the other.

c. The paragraph headings are for convenience only and are not to be relied upon for interpretation of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

_____ _____
Planning Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

_____ _____
Responsible Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

_____ _____
Successor Responsible Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

§ 1.2
Authorization and Consent to Close Law Office

This Authorization and Consent is entered into this _____ day of _____, 20__, by and between _____ and _____.

I, _____ ("Planning Attorney"), a sole practitioner who engages in the practice of law and has a principal office located at _____, authorize _____, ("Responsible Attorney") who engages in the practice of law and has a principal office located at _____, to take all actions reasonable to close my law practice upon my death, disability, impairment, or incapacity. These actions include but are not limited to:

- Entering my office and utilizing my equipment and supplies as needed to close my law practice;
- Opening and processing my mail;
- Taking possession and control of all property in my law office, or incidental to my law practice including client files and records;
- Examining files and records of my law practice and obtaining information concerning any pending matters that may require attention, except for those files in which Responsible Attorney has a conflict of interest;
- Notifying clients, potential clients, and others who appear to be clients that I have given this authorization and that it is in their best interest to obtain other legal counsel;
- Scanning or copying my files;
- Obtaining clients' consent to transfer files and clients' property to new counsel;
- Transferring client files and property to clients or their new counsel;
- Obtaining client consent to obtain extensions of time and contacting opposing counsel and courts/administrative agencies to obtain extensions of time;
- Applying for extensions of time pending engagement of other counsel by my clients;
- Filing notices, motions, and pleadings on behalf of my clients where their interests must be immediately protected and other legal counsel has not yet been retained;
- Contacting all appropriate persons, entities and professional organizations that may be affected by my inability to practice law and notifying them that I have given this authorization;
- Signing checks to draw funds from or making deposits to my bank, attorney trust or escrow account and providing an accounting to my clients of funds held in trust; and
- Contacting my professional liability insurer concerning claims and potential claims.

My bank or financial institution may rely on the authorizations in this Agreement unless such bank or financial institution has actual knowledge that this Agreement has been terminated or is no longer in effect.

The determination concerning my death, disability, impairment, or incapacity shall be made by Responsible Attorney on the basis of evidence deemed reasonably reliable, including but not limited to communications with members of my immediate family, if available, or a written opinion of one or more duly licensed physicians. Upon such evidence, Responsible Attorney is relieved from any responsibility or liability for acting in good faith in carrying out the provisions of this Authorization and Consent.

To the fullest extent permitted by law, Responsible Attorney agrees to preserve client confidences and secrets and to observe and comply with the attorney-client privilege of my clients, and further agrees to make disclosures only to the extent reasonably necessary to carry out the purpose of this Authorization and Consent. Responsible Attorney is appointed as my agent for purposes of preserving my clients' confidences and secrets, the attorney-client privilege, and the work product privilege. This authorization does not waive any attorney-client privilege.

I appoint Responsible Attorney as signatory on my lawyer trust account(s) upon my death, disability, impairment, or incapacity.

I understand that the Responsible Attorney will not process, pay, or in any other way be responsible for payment of my personal bills.

I agree to indemnify Responsible Attorney against any claims, losses or damages arising out of any acts or omissions by Responsible Attorney under this Agreement, provided the actions or omissions of the Responsible Attorney were in good faith and in a manner reasonably believed to be in my best interest. The Responsible Attorney shall be responsible for all acts and omissions of gross negligence and willful misconduct.

Responsible Attorney shall be paid reasonable compensation for services rendered in closing my law office.

Responsible Attorney may revoke this acceptance at any time prior to my death or disability and, after such time, Responsible Attorney has the power to appoint a Successor Responsible Attorney to serve in his place. Prior to my death or disability, I may revoke this Authorization and Consent by written notification to Responsible Attorney.

_____ _____

Planning Attorney Date

[Insert Address and Other Contact Information]

_____ _____

Responsible Attorney Date

[Insert Address and Other Contact Information]

ACKNOWLEDGMENTS

§ 1.3
PCs and PLLCs: Appointing the Appropriate Responsible Attorney to Manage a Solo Law Practice in the Event of Death, Disability, Incapacity or Other Inability to Practice Law

When an attorney practices law as a solo practitioner, he or she is able to delegate authority to act on his or her behalf through a power of attorney. However, if the attorney practices in the form of an entity such as a Professional Service Corporation (PC) or a Professional Limited Liability Company (PLLC) in which he or she is the only member, it is necessary that the appropriate entity pre-authorize someone other than the sole member to act on behalf of the entity in the event of such member's inability to practice law.

If the attorney and the entity have not properly planned for the attorney's death, illness or other inability of the attorney to conduct his affairs, the PC or the PLLC is not lawfully able to continue the practice of law during the incapacity because no authorized agent has been empowered to act on behalf of the entity. However, this can be easily remedied during the planning process by executing appropriate entity resolutions.

The PC or PLLC must have resolutions in place that state when and how the Responsible Attorney or other agent may act on behalf of the entity.

Sample minutes of a PC meeting that accomplish this purpose are set forth in this section. Similar documents should be prepared for a single-member PLLC.

In lieu of a formal meeting, the appointment of the Responsible Attorney or other agent by a sole practitioner who is the sole shareholder/director of a corporation may be accomplished by a Consent of Shareholder, pursuant to N.Y. Business Corporate Law § 615 (BCL), or consent of the Board of Directors for Action Without a Meeting, pursuant to BCL § 708.

In the case of a PLLC, the appointment of the Responsible Attorney or other agent may be accomplished by a provision in the PLLC's Operating Agreement, pursuant to N.Y. Limited Liability Company Law § 417 (LLC) or by Action Without a Meeting, pursuant to LLC § 407.

WAIVER OF NOTICE OF SPECIAL JOINT MEETING OF THE SOLE SHAREHOLDER AND SOLE DIRECTOR OF [NAME OF CORPORATION]

The undersigned, being the sole Shareholder and sole Director of [NAME OF CORPORATION], a New York professional corporation, does hereby waive notice of the time, place and purpose of the special joint meeting of the sole Shareholder and sole director of said corporation, and does hereby consent that the same be held at the office of the Corporation, [CITY], New York, on [DATE OF MEETING], at [TIME], for the following purposes:

1. To appoint an agent to act on behalf of the Corporation in the event of the death, disability or incapacity of the sole Shareholder of the Corporation; and

2. For the transaction of such other business as may properly come before the meeting.

SHAREHOLDER: DIRECTOR:

_____ _____

[Note: Similar Documentation Would Be Utilized for a PLLC]

MINUTES OF THE SPECIAL JOINT MEETING OF THE SOLE SHAREHOLDER AND SOLE DIRECTOR OF [NAME OF CORPORATION]

MINUTES OF THE SPECIAL JOINT MEETING OF THE SOLE SHAREHOLDER AND SOLE DIRECTOR of [NAME OF CORPORATION], a New York professional corporation, held at [CITY], New York, on [DATE OF MEETING], at [TIME].

The following was present, being the sole Shareholder and sole Director of the Corporation: _____.

The meeting was called to order and _____ acted as Chair and as Secretary of the meeting.

The Chair then stated that a quorum was present and that the meeting was called to order to transact business.

The Secretary presented a written Waiver of Notice signed by the sole Shareholder and sole then Director. The Chair directed that such Waiver be affixed to the minutes of this meeting.

The Chair stated that in the event the sole shareholder of the Corporation is no longer able to practice law, whether on a permanent or a temporary basis, a designee should be appointed who could thereafter act, in the capacity of the sole Shareholder. The Chair noted the sole Shareholder and Director could appoint a licensed attorney who would act in the position of President of this Corporation until such time as the practice of the Corporation is sold or, in the case of temporary incapacity, the sole Shareholder was able to return to practice. The Chair recommended that _____ be appointed to this position in such an event.

The Chair further stated that this individual would be appointed to act on behalf of the Corporation and to perform any and all duties, take any and all actions and to execute any and all documents necessary in the event the sole Shareholder of the Corporation could no longer perform the day-to-day operations of the Corporation due to death, disability or incapacity. After thorough discussion, upon motion duly made, seconded and unanimously adopted, it was

RESOLVED, that _____, is hereby appointed as the agent of the Corporation to act on behalf of the Corporation and to perform any and all duties, to take any and all actions and to execute any and all documents and agreements necessary which are associated with the maintenance of the Corporation's practice of law or the sale, winding-up, liquidation and/or dissolution of the Corporation in the event of the death, disability or incapacity of the sole Shareholder of the Corporation, and it was

FURTHER RESOLVED, that this Corporation be authorized and directed to enter into any Agreements and the officers of this Corporation are directed and authorized to execute and deliver any documentation that may be necessary to effectuate the foregoing resolution, and it was

FURTHER RESOLVED, that the Secretary of this Corporation be directed to append to the minutes of this meeting and to include in the records of the Corporation any and all agreements and documentation to which the Corporation is a party that evidence the appointment of _____ in the capacity set forth in the foregoing resolutions.

There being no further business to come before the meeting, it was, upon motion duly made, seconded and unanimously adopted, adjourned.

_____,
Secretary

§ 1.4
Law Firm Master List of Contacts and Important Information

Important note: In order to ensure access to a list in case of an emergency, a current copy of this list should be kept off-site, e.g., in case the copy at the law firm is destroyed, and should probably be provided to the attorney's spouse or other appropriate person(s). It may be preferable to keep all of this information in electronic format.

ATTORNEY INFORMATION

Full Name	
DOB	
SSN	
OCA Registration #	
Other Court Registration(s) #	
Office Address	
Office Phone	
Home Address	
Home Phone	
Cell Phone	
Email (W)	
Email (H)	
Who Has passwords	
Who Has Will Documents	
Firm Name	
EIN#	
CAF#	
IOLA Bank Account & Location	
Operating Bank Account & Location	
Other Bank Account & Location	
Business Credit Card #	
Date of Lease Expiration	
Insurance # (E&O)	
Insurance # (Office)	

IMPORTANT CONTACTS

Title	Name	Company	Email	Address (O)	Phone (W)	Phone (C)
Spouse						
Office Manager						

IMPORTANT CONTACTS

CPA						
Bookkeeper						
Landlord						
Backup Attorney						
Attorney to Close Practice						
Location of Will						
Process Service Company						
Of Counsel/ Office Share						
Insurance Agent (E&O)						
Insurance Agent (Property)						
Health Insurer						
Disability Insurer						
Life Insurer						
Workers Compensation Insurance						
Storage Location						
Financial Advisor						
Bank Branch (Local)						
Leased Equipment (Copier)						

IMPORTANT CONTACTS

Leased Equipment (Furniture)						
Software Contract Contact						
Software Contract Contact						
Software Contract Contact						
Business Credit Card Company						
Bar Association						

§ 1.5
Special Provisions for Attorney's Will: Instructions Regarding My Law Practice

I currently practice law as a solo practitioner. In order to provide a smooth transition for my clients and to assist my family, I am providing these guidelines to my Executor and any attorney(s) representing my Executor.

If my practice can be sold to a competent lawyer, I authorize my Executor to make such sale for such price and upon such terms as my Executor may negotiate, subject, however, to compliance with New York's Rules of Professional Conduct and other applicable provisions of law. If such sale is possible, I believe that it will provide maximum benefits for my clients as well as my employees and family. [It is my preference that the practice be sold to my associate, (name), if satisfactory terms can be reached with respect to such a sale; (or It is my wish that my Executor first consider a sale of my practice to my colleague, (name), if satisfactory terms can be reached with respect to such a sale . . .).

Such a sale should include the transfer of all my client files (and his/her agreement to hold the same or to transfer them to any clients requesting such transfer), as well as all office furnishings and equipment, books, and rights under my office lease and any outstanding contracts with my firm, such as software and publishing companies, equipment leases, . . .].

If my practice cannot be sold and I have active client files, I recommend that, subject to consent of my clients, estate planning and probate files be referred to (name); real estate files to (name); corporation, partnership, and limited liability company files to (name); family law matters to (name); and personal injury files to (name).

In either instance, I recognize that my practice has developed because of personal relationships with my clients and that they are free to disregard my suggestions.

Regardless of the method of disposing of my practice, I authorize my Executor to take all actions necessary to close my law practice and dispose of its assets. In doing so and without limiting the foregoing, my Executor may do each of the following:

(a) Engage one or more attorneys to wind up my law practice, make arrangements to complete work on active files and to allocate compensation for past and future services.

(b) Continue employment of staff members to assist in closing my practice and arrange for their payment, and to offer key staff members such incentives as may be appropriate to continue such employment for as long as my Executor deems it appropriate.

(c) Request that the attorney(s) engaged to wind up the practice, with my Executor's assistance, where appropriate:

    (i) Enter my office and utilize my equipment and supplies as helpful in closing my practice.

(ii) Obtain access to my safe deposit boxes and obtain possession of items belonging to clients.

(iii) Take possession and control of all assets of my law practice including client files and records.

(iv) Open and process my mail and email.

(v) Examine my calendar, files, and records to obtain information about pending matters that may require attention.

(vi) Notify courts agencies, opposing counsel, and other appropriate entities of my death and, with client consent, seek and obtain extensions of time.

(vii) Notify clients and those who appear to be clients of my death and that it is in their best interests to obtain other counsel.

(viii) Obtain client consent to transfer client property and assets to other counsel.

(ix) Provide clients with their property and assets and copies of material in their files and return unearned retainers and deposits.

(x) File notices, motions and pleadings on behalf of clients who cannot be contacted prior to immediately required action.

(xi) Contact my malpractice carrier concerning claims or potential claims, to notify of my death, and to obtain extended reporting or "tail" coverage.

(xii) Dispose of closed and inactive files by delivery to clients, storage, and arranging for destruction, remembering that certain records are to be preserved for a period of time in accordance with applicable ethics and court rules and best professional practice, and that files relating to minors should be kept for five years after the minor's eighteenth birthday.

(xiii) Send statements for unbilled services and expenses and assist in collecting receivables.

(xiv) Pay current liabilities and expenses of my practice, terminate leases, and discontinue subscriptions, listing, and memberships.

(xv) Determine if I was serving as registered agent for any corporations and, if so, notify the corporation of the need to designate a new registered agent (and perhaps registered address).

(xvi) Determine if I was serving as an Executor or Trustee of any estate or trust, or in any other fiduciary capacity and, if so, determine the appropriate parties to be notified of the need, if any, to designate a successor fiduciary; take the steps deemed necessary to obtain discharge of my responsibilities in such fiduciary capacity.

(xvii) Rent or lease alternative space if a smaller office would serve as well as my present office.

In performing the foregoing, my Executor is to preserve client confidences and secrets and the attorney-client privilege and to make disclosure only to the extent necessary for such purposes. For example: Client files are to be reviewed only by employees of my firm, to whom attorney-client privilege attaches (e.g., my secretary, my paralegal, my associates (if any), or attorneys retained by my Executor to assist him in closing the practice). It is for this reason that I have authorized my Executor to retain the services of these personnel, and to give them sufficient incentives to remain in the employ of the firm through its wind-up. Though there are special rules permitting disclosure of certain client information in connection with the sale of a practice, my Executor is to abide scrupulously with such rules. My Executor may rely on employees of my firm to (i) supply data concerning the outstanding fees owed by my clients at the time of my death, and the unused retainers paid by clients for which services have not yet been rendered; (ii) to communicate with clients concerning the disposition of their files; and (iii) to review clients' files in response to any inquiries that arise in the course of my estate's administration.

My Executor shall be indemnified against claims of loss or damage arising out of any acts or omissions where such acts or omissions were in good faith and reasonably believed to be in the best interest of my estate and were not the result of gross negligence or willful misconduct, or, if my Executor is an attorney licensed to practice in New York, such acts or omissions did not relate to my Executor's representation of clients as an attorney retained by those clients. Any such indemnity shall be satisfied first from assets of my law practice, including my malpractice insurance coverage.

§ 1.6
Ten Things Not to Do When You Retire

by David Kee*

1. Don't Rush

Relax. Don't try to immediately fill every moment. It's good, even essential, to have varied interests and hobbies, but there is no rule, or even a guideline, that says you initially have to fill each moment of every day. Learn to meditate. Try yoga. Take long walks alone or with someone you love. If you don't love anyone, consider getting a dog.

2. Don't Fret

Relax even more. Take a sabbatical. If you're like most of us you've never had one. Take a month (Type A) or six months or more (Type B) and do or don't do as you please (See 5). You can fill in (if you must) more "productive" activities later. You may simply enjoy having more time to talk with folks without looking at the clock. *You are more than what you did for a living.*

3. Don't Go Back Into the Workplace If You Are Not Totally Prepared for the Changes You Will Find

Unless you have a paid consulting or part-time position (read: if you were not afraid to let go totally) at your previous place of employment, your views are no more than that – your views. When you take your arm out of the water, there is no hole left behind. No one is indispensable, and that's as it should be.

4. Don't Try To Impress People With How Important, Competent, Etc., Etc., You Were In Your Past Life

You will be liked or disliked, accepted or rejected, happy or unhappy, based on who you are now.

5. Don't Overlook the Home Front

Call it home dynamics, or psychology of the home front. Call it anything you wish – but if you are living with a significant other, you are about to attach new meaning to the term "significance." *Neither of you is as psychologically prepared for the change as you thought you were.* Discuss the changes, as much as they can be envisioned, before retirement, and after, and discuss them often. After a few adjustments on everyone's part, life can be even more beautiful.

6. Thinking of Moving? Don't Buy!! Rent, Rent, Rent!!

Studies have shown that only four percent of retirees actually make a permanent move. Putting down roots is important, but so are new experiences (See 7). Find a new place you like? Rent for at

* David Kee is a Past President of the Maine State Bar Association and retired in 1998 after practicing law with Fellows, Kee & Tymoczko in Bucksport, Maine, for more than 30 years. He is a past Director of the Maine Assistance Program for Lawyers and Judges.

least a year before you buy. When you crunch the numbers, it makes great financial sense, especially if you are financing the new purchase from savings or other investments, or taking out a mortgage.

7. You Don't Have To Be Geographically Restricted

You can travel. Maine offers a huge variety of places and experiences. Colleges across the country rent out rooms. Inexpensive travel abroad is possible. Sponge off friends, but don't give out your address.

8. Don't Think Future Generations Won't Want To Know About You, What You Thought and Felt, Figured Out and Re-figured Out

Would you like to read interesting aspects of the life of your great grandparents? Future generations of your family will feel the same about you. You may not be considered the world's greatest autobiographer but you are a direct link to the past and future. Write about it.

9. Don't Be Afraid

Change can be frightening but not changing is even more so. Try new things that might interest you and know that it's okay to fall on your face. Who's judging? Who cares? Create something new – this may be as close as we ever get to God – even if it's a pottery salad bowl that looks like a frying pan. It never existed before you created it. Time can get away from us, so structure time to create.

The use of the imagination should come first – at least for some part of every day of your life.

– Brenda Ueland

10. Don't Overlook A Journey Inward

Don't be afraid of anything. It will all work out (whatever "it" may be for you). Get to know yourself and be yourself. Your value is not limited to what you did for a living.

Finally, when asked "What do you do in retirement?" you can honestly respond, "I enjoy life."

§ 1.7
Checklist For Lawyers Planning to Protect Clients' Interests in The Event of The Lawyer's Disability, Impairment, Incapacity or Death

1. Consider using retainer agreements with your clients that state that you have arranged for the Responsible Attorney to manage or close your practice in the event of your death, your temporary or permanent disability, impairment or incapacity, and identifying such attorney. Be sure to keep his/her identity current with your clients.

2. Have a thorough and up-to-date office procedure manual that includes information on:

   a. How to check for conflicts of interest;

   b. How to use the calendaring system;

   c. How to generate and maintain a current list of active client files, including client names, addresses, and phone numbers and email addresses;

   d. Where client ledgers are kept and if locked how to obtain access to them;

   e. How the open/active files are organized;

   f. How the closed files are organized and their assigned numbers;

   g. Where the closed files are kept and how to access them;

   h. The office policy on keeping original documents of clients and how to access them;

   i. Where original client documents are kept and how to access them;

   j. Where the safe deposit box is located, its number, and how to access it;

   k. The bank name, address, account signers, and account numbers for all law office bank accounts;

   l. The location of all law office bank account records (trust and general);

   m. Where to find, or who knows about, the computer passwords;

   n. How to access your voice mail (or answering machine) and the access code numbers;

   o. Business and personal insurance policies with contact information for brokers and insurance companies;

   p. How to access all current and past employee service personnel, provider and facility and equipment records.

3. Make sure all your file deadlines (including follow-up deadlines) are on your calendaring system.

4. Document your files. (Keep a master list of files, past and present. File documents in appropriate files.)

5. Keep your time and billing records up to date.

6. Have a written agreement and/or power of attorney with an attorney who will manage or close your practice (the "Responsible Attorney") that outlines the responsibilities delegated to the Responsible Attorney who will be managing or closing your practice. Include a procedure to enable the Responsible Attorney to determine whether your incapacity renders you unable to practice law, and complete, in advance, a medical release and authorization form as required by HIPAA permitting disclosure of medical information to assist in this determination. (§ 5.5). Determine whether the Responsible Attorney also will be your personal attorney. Choose a Responsible Attorney who is sensitive to conflict of interest issues.

7. If your written agreement authorizes the Responsible Attorney to sign trust or general account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only upon the happening of a specific event. In some instances, you and the Responsible Attorney will be required to sign bank forms authorizing the Responsible Attorney to have access to your trust or general account. Choose a Responsible Attorney wisely for he or she may have access to your clients' funds.

8. Familiarize the Responsible Attorney with your office systems and keep him or her apprised of office changes.

9. Introduce the Responsible Attorney to your office staff. Make certain your staff knows where you keep the written agreement with the Responsible Attorney and how to contact the Responsible Attorney if an emergency occurs before or after office hours. If you practice without a regular staff, make sure the Responsible Attorney knows whom to contact (the landlord, for example) to gain access to your office.

10. Inform your spouse or closest living relative and your named executor of the existence of this agreement and how to contact the Responsible Attorney.

11. Renew your written agreement with the Responsible Attorney each year. If you include the name of the Responsible Attorney in your retainer agreement, make sure the information concerning that attorney is current.

§ 1.8
Checklist for Closing Your Own Office

1. Finalize as many active files as possible.

2. Write to clients with active files, advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their matters. The letter should explain how and where they can pick up copies of their files and should give a deadline for doing so. ("Letter from Planning Attorney Advising That Lawyer Is Closing Law Office").

3. For cases that have pending court dates, depositions or hearings, discuss with affected clients how to proceed. Where appropriate, request extensions, continuances and the rescheduling of hearing dates. Send written confirmations of these extensions, continuances and rescheduled dates to opposing counsel and to your client.

4. For cases before administrative bodies and courts, obtain clients' permission to submit motions and orders to withdraw as counsel of record.[2]

5. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.

6. Select an appropriate date and check to see if all matters have a motion and order allowing your withdrawal as counsel of record or a Substitution of Attorney filed with the court.

7. Make copies of files for clients and yourself. All clients should either pick up their files (and sign a receipt acknowledging that they have received them) or sign an authorization for you to release their files to their new attorneys. (Authorization for Transfer of Client File and Acknowledgement of Receipt of File).

8. Write to all clients for whom you have retained original wills, advising them that you are closing your office and request that they pick up their original will. Ask them to sign a receipt and maintain a record of all wills that are retrieved. Advise them of consequences of failure to comply. ("FAQs re Document Destruction and Preservation,").

9. Tell all clients that they can pick up their closed files or where they will be stored and whom they should contact in order to retrieve them. Obtain all clients' permission to destroy their files after approximately seven years (§ 5.12). If a closed file is to be stored by another attorney, obtain the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number.

10. If you have sold your practice, you will have already advised your clients of your prior intent to do so, but advise them also of your having completed the transaction, the location of their files in the event some clients have declined to retain the successor attorney and have not col-

2 *See* RPC 1.16.

lected or released their files, and readvise your clients of the name, address and phone number of the purchasing attorney.

11. If you are a sole practitioner, arrange to have your calls and emails forwarded to you or another person who can assist your clients. This eliminates the problem created when clients call your phone number or email, and get an automated response, and do not know where else to turn for information.

12. Maintain a complete and up-to-date employee file, including resumes, employment agreements, payroll and tax records and other significant documents (§ 1.4).

13. Identify all outside service personnel and providers by name, address, phone and fax numbers, and email addresses. (§ 1.4).

14. Maintain a complete record of all current and past facility and equipment records, including deeds, mortgages, leases and related materials. (§ 1.4).

15. If possible, provide sufficient advance written notice of the closure for your practice so as to provide clients with reasonable and sufficient time to make other arrangements.

CHAPTER TWO

SALE OF A LAW PRACTICE

INTRODUCTION

The sale of a law practice has been ethically permitted in New York State for more than 30 years.

In this chapter we provide guidance for this relatively new process. We review the applicable ethical rules, relevant ethics opinions, and judicial interpretations of these rules. This chapter also includes a sample Asset Purchase Agreement and other forms, and an article prepared by a CPA about valuing a law practice.

Since the sale of a law practice is still a relatively new process in New York State, there is not a lot of guidance from the courts and ethics committees. We recommend that any attorney considering the sale or purchase of a practice review any new developments in this area.

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§ 2.1
Transfer of a Law Practice[1]

Until 1989, lawyers in America were perhaps the only corps of professional people who were prohibited from recognizing any financial value from their good names and the goodwill of their practices. We were told that clients were not chattels or vendible commodities, that lawyers were not tradesmen, and that the sale of law practices would necessarily involve the disclosure of client confidences and secrets, a serious violation of a core principle of the profession. Lawyers, therefore, had nothing to sell but their office furniture and their libraries.

In 1989, however, the Supreme Court of California promulgated a new rule of professional conduct that for the first time permitted the sale of the goodwill aspects of a deceased lawyer's practice by the surviving spouse or estate. In 1990, given that impetus, the American Bar Association (ABA) adopted a Rule 1.17 to its Model Rules of Professional Conduct,[2] which proposed, even more expansively, to permit the sale of law practices. Since the ABA has no authority to promulgate rules enforceable in any of our jurisdictions, each had to decide for itself whether it would follow California's and the ABA's lead. Indeed, it was not long before a substantial number of them did, and now no fewer than 41 jurisdictions permit such transfers, whether by rule or otherwise New York included. New York's rule governing the sale of a law practice can be found at Rule 1.17, of the New York State Rules of Professional Conduct (RPC).[3]

RPC 1.17 provides, in general terms, is that lawyers, their personal representatives and their estates may transfer for value, under specifically stated limited conditions, not only the property comprising the physical plants in which they practice, but also the value of their own good names, their reputations, and the cases and matters they have in their offices, and they can do so whether upon a lawyer's retirement, disability, or death. Attorneys licensed to practice in more than one jurisdiction, therefore, should take extreme care to identify the conditions under which they may transfer their respective practices for value. The following information pertains only to the New York rule.

Who May Transfer a Law Practice for Value?

Lawyers retiring from the private practice of law, or law firms one or more of whose members are retiring from the private practice of law within the firm, or the personal representatives of deceased, disabled or "missing" lawyers may sell the lawyers' or firms' law practices, including their goodwill.

We deal here primarily with solo practitioners, however. For many years, law firm partners have found legitimate ways, though not authorized by rule, to transfer the value of their practices upon retirement, disability or death, usually by means of in-house contractual arrangements with their

1 *See* Edward Poll, *The Business of Buying, Selling, Merging or Closing a Law Practice*, American Bar Association, Robert L. Ostertag, *$ale of a Law Practice*, GPSOLO (ABA) Vol. 17, No. 1 (Feb. 2000) at 22.

2 Model Rules of Professional Conduct, American Bar Association, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

3 New York Rules of Professional Conduct (RPC), New York State Bar Association, https://nysba.org/attorney-resources/professional-standards/.

long-existing or even newly-acquired partners or associates. Until now, solo practitioners have never had that opportunity, and that was the inequity of the former rule. Now they may do so.

But not only may solo practitioners or their personal representatives, by specific rule, and for value, transfer the goodwill and other proprietary aspects of their practices upon retirement, disability or death, so also may non-solo law firms by specifically stated means. It would appear, therefore, that the inclusion in the rules of a specific grant of right to members of non-solo law firms represents merely the drafters' acknowledgment of the existence of an already acceptable, long-standing end, but not necessarily its means.

Interestingly, the rule also applies to situations wherein lawyers are missing, but it does not define the term "missing." We will use "missing" to refer to attorneys absent without explanation or reason for more than 21 days.

To Whom May a Law Practice Be Transferred for Value?

A private practice may be sold to one or more other lawyers or law firms. That obviously includes any practitioner licensed and in good standing to practice law in the State of New York and any similarly situated New York law firm. Does it mean that a practice may be sold to a non-New York lawyer or law firm? The rule doesn't address the question, but since those unlicensed in New York are generally not entitled to practice here, presumably they would be excluded.

What about multi-jurisdictional firms, i.e., those with offices in more than one jurisdiction, where each such office is staffed by attorneys licensed to practice in the state wherein they are assigned by the firm as, for example, in New York? Presumably they would qualify for such purpose.

And what about firms whose professional staffs are not licensed to practice in New York and who do not have a presence here? Under proposed multi-jurisdictional practice rules, out-of-state attorneys would be authorized to represent clients in New York in specially restricted *ad hoc* situations. Would they qualify as purchasers? Obviously, RPC 1.17 does not address that unforeseen issue either, but again, since unlicensed out-of-state lawyers cannot maintain ongoing practices in New York, presumably the application of the rule would prohibit such transfers to them as well.

Clients' Confidential Information; Conflicts

Most sensitive is the issue of clients' confidences and secrets. RPC 1.17(b) states the conditions under which confidential client information may be disclosed in the course of negotiations involving the transfer of law practices. It is a critical section of the New York Rules of Professional Conduct that cannot be ignored. Initially, RPC 1.17(b)(1) provides that the seller of a law practice may provide prospective buyers with any information not protected as confidential information under RPC 1.6. RPC 1.6 is the key disciplinary rule in New York's Rules of Professional Conduct that governs the preservation of clients' confidential information. It defines confidential information as information "gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." RPC 1.6(b) then recites when confidential information may be revealed by a lawyer. Reference to it is virtually mandatory in the practice transfer process.

RPC 1.17(b)(2) then provides that, notwithstanding the provisions of RPC 1.6, the seller may provide the prospective buyer with information as to the identity of his or her individual clients (the word "individual" not meant to exclude corporate, partnership or other similar entities) except where the seller has reason to believe that such information or the fact of such representation is itself confidential information (which usually it is not). In that instance, if the client has first been advised of the identity of the prospective purchaser and has granted consent to the proposed disclosure, such information may be provided.

RPC 1.17(b)(2) also states, again notwithstanding the provisions of RPC 1.6, that the selling attorney may provide information concerning the status and general nature of an individual client's matter, together with information that is available in public court files and information concerning the financial terms of the attorney-client relationship and the payment status of the individual client's account. But there are rather complex qualifications. RPC 1.17(b)(3) provides in substance that prior to disclosing any disclosable confidential information, a selling attorney must provide the prospective purchaser with information regarding matters involved in the proposed sale that [hopefully] will be sufficient to enable the prospective purchaser to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, however, the seller may make such disclosures as are necessary for the prospective purchaser to determine whether any conflicts of interest exist, subject, however, to the provisions of RPC 1.17(b)(6). If the prospective purchaser determines the existence of conflicts of interest prior to reviewing such information, or determines during the course of review that a conflict of interest exists, the prospective purchaser cannot review or continue to review the information unless the seller has obtained the consent of the client in accordance with the provisions of RPC 1.6(a)(1).

Since the identity of clients is usually not deemed to be confidential information, it would appear that the revelation of the identity of a seller's clients (presumably from a client list) would be among the first items of information to provide a prospective purchaser so that he or she might exclude conflicted clients from the transaction or at least render further consideration as to whether their representation would indeed present an impermissible conflict. Not necessarily so, however, under the Rule. It is particularly when the identity of a client is itself confidential that the complexity is at its greatest.

What other identifications might be necessary? Certainly the identities of opposing parties. Some observers believe that the identity of all lawyers representing the parties, as well as of judges and hearing officers, should be disclosed.[4]

The protection of confidential client information has always been the core of our professional obligation to our clients. The point to be made about RPC 1.17(b)(3), particularly its second sentence, is that this segment of the negotiation process can be very delicate and the seller should give extreme care in disclosing the very kind of information that the prospective purchaser may require not only to determine whether a conflict exists, but whether he or she even wishes to pursue the business aspects of the proposed transaction. It clearly would not be difficult to fall into a violative trap that subsequently could result in disciplinary proceedings commenced by a discontented client.

4 *See Simon's New York Rules of Professional Conduct Annotated* 908–38 (Thomson Reuters 2015 ed.).

It also is important to note that where confidences and secrets are disclosed to a prospective purchaser, he or she must maintain the same confidentiality of such information as if he or she represents the client. That appears clear enough from the rule and it should not be difficult to adhere to unless, of course, such information will somehow impact upon a prospective purchaser's representation of another client in another unrelated matter. Temptation frequently leads to misconduct. A sample confidentiality agreement can be found in § 2.4.

"Reasonable Restrictions" and Geographic Considerations

RPC 1.17(a) provides that a seller and buyer may agree upon reasonable restrictions on the seller's private practice of law notwithstanding any other provision of the Rules of Professional Conduct. Obviously this speaks to the seller's subsequent practice of law and thus to the issue of non-compete agreements. RPC 1.17(a) also provides that "[r]etirement" shall include the cessation of the private practice of law in the geographic area, meaning the county and city, and any other county and city contiguous thereto, wherein the practice to be sold has been conducted.

RPC 5.6(a) prohibits attorneys from participating in a partnership or being party to an employment agreement with other attorneys that restricts the right of any of them to practice law after the termination of a relationship created by the agreement except as a condition to payment of retirement benefits. RPC 1.17(a) overrides that rule with respect to the sale of law practices. The right of clients to select their own lawyers has always been considered paramount to the right of lawyers to participate in non-compete agreements of their own. What is "reasonable" within the context of the sale of a law practice, of course, has never been tested in New York, at least not in published opinions up to this writing.

American Bar Association Formal Opinion 06-444[5] deals with an attorney agreeing to restrictions on practice as a condition of receiving retirement benefits. This opinion provides:

"Rule 5.6(a) and the associated comments express a strong disapproval of restrictive covenants in lawyer agreements. The exception for restrictions concerning the receipt of retirement benefits must therefore be construed strictly and narrowly."

Even though a lawyer must retire to be permitted to sell a practice, the seller may assist the buyer "in the orderly transition of active client matters for a reasonable period of time after the closing of the sale." However, the client cannot be charged by either attorney for these transition services.[6]

But RPC 1.17(a) does define as reasonable a geographic area that includes the county and city wherein a lawyer practices, together with a county and city contiguous thereto. Thus, for example, a retiring New York City attorney would "reasonably" be restricted from practicing law in all five counties within the city, as well as in the City of Yonkers, and in Westchester and Nassau counties as well. Note in the rule the use of the mandatory third person "shall" as to the stated geographic areas. Whether a contractual restriction beyond the mandated geographic limits would be "reasonable" has not been decided but probably would be fact-intensive.

5 Retirement Benefits, Restrictive Covenants Permissible, https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/.

6 *Id.*

Note also NYSBA Ethics Op. 707,[7] which opines that a lawyer may not retire from one part of a law practice and continue to practice in another part within the same geographic area. RPC 1.17(a) thus is said not to contemplate retirement from one or more areas of practice without retirement from all others within the same geographic area.

What does "in which the practice to be sold has been conducted" mean? Does it mean the city or county of one's primary office? Does it mean, more likely, any office locale from which one practices? Does it mean any city or county wherein a lawyer regularly or even occasionally has appeared during the course of his or her private practice even though it is not the city or county wherein this office is located? If a Queens County litigator appears regularly throughout Long Island but maintains his or her only office in Queens, can he or she be foreclosed by agreement from practicing in Suffolk County? Would that be a "reasonable" restriction? We do not yet know. If a lawyer maintains offices in several counties throughout New York State, as some do, are the geographic areas wherein those offices are located included within the rule? May a lawyer retire from the practice of law in Westchester County where he or she maintains an office, but not in Albany County where he or she also maintains an office? Such issues have not yet been determined by precedent.

Notification to Clients

When financial evaluations finally have been completed along with other details of the transaction and a basic agreement has been reached for it to be consummated, it is necessary for both participants, jointly and in writing, to notify each of the seller's clients of the proposed sale.[8] Such notice must include a statement as to the client's right to retain other counsel or to take possession of their file, and also as to the fact that the client's consent to such a file transfer will be presumed if the client, upon such notice, neglects to take action or fails otherwise to object to it within 90 days from the sending of such notice, subject, however, to any court rule or statute mandating express approval by a client or a court. That imposes upon each client the obligation to take an affirmative step to prevent the transfer of his or her file to the purchasing attorney if that is desired. The rule obviously is intended to avoid prevention of the transaction merely by reason of a client's neglect, inaction or lack of concern in the approval process. And, of course, despite their own neglect, inaction or lack of concern resulting in the transfer of their files to the purchasing attorney, clients may thereafter always terminate the services of the purchasing attorney.

With regard to fees, clients must also be notified in writing, jointly by both the seller and the buyer, that the existing fee arrangement with the selling attorney will be honored, or that proposed fee increases will be imposed. Obviously, that is of particular concern to clients in the grant or withholding of consent. It is important to note that the fee charged to a client by the purchaser cannot be increased by reason of the sale unless permitted in the original retainer agreement with the client or otherwise specifically agreed to by the client.[9]

The joint written notice to each of the seller's clients must also include the identity and background of the purchasing attorney, the location of the purchasing attorney's principal office address,

7 Ethics Opinions, NYSBA, https://nysba.org/news-center/?show_category=ethics-opinions, (NYSBA Ethics Op).

8 RPC 1.17(c). *See also* Formal Opinion 1999-04: Law Firm Mergers, New York City Bar, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-1999-04-law-firm-mergers.

9 RPC 1.17(e).

the attorney's bar admissions and number of years in practice within the jurisdiction, whether the prospective purchaser has ever been disciplined for professional misconduct or convicted of a crime, and whether the prospective purchaser intends to re-sell the practice.

Finally, attorneys should be aware that the former rules that proscribed the sale of a law practice were predicated upon serious concerns about client confidentiality and the fiduciary obligations owed by lawyers to new clients. The current rule that permits the transfer of law practices strikes a different balance. Accordingly, the current rule should ideally be construed strictly and should be expected to result in disciplinary action should it be violated. All doubts as to the propriety of a proposed transfer, or of any ingredient of it, should reasonably be resolved against the transfer.

Matter of Fitzgerald[10] involved an attorney who was admitted to practice in both New York and New Jersey, and who purchased a New Jersey law practice. He failed to give the required notice to clients and improperly increased client fees, in violation of both New Jersey and New York ethics rules. In a reciprocal disciplinary proceeding the New York court imposed a public reprimand, the same discipline that had been imposed by the New Jersey court. The New York court did not discipline the attorney for violating a New Jersey rule requiring published notification of the sale, since New York did not have an analogous rule.

The Name of the Firm

Several recent ethics opinions concerning the name of a law firm may be relevant to the sale or purchase of a practice.

It is permissible for an attorney who purchases the practice of another attorney to continue to use the selling attorney's name or firm name.

An attorney who purchases a law firm may continue to use that firm's name, provided it is not misleading. For example, a purchasing attorney could not continue to use the word "Group" in the firm name if the firm now had just one attorney. One of the purchased assets is the goodwill of the selling firm, and "the name of a law firm is central to its goodwill."[11]

A firm which purchased the practice of a retiring attorney may list the name of that attorney's firm and dates of operation on its letterhead, even after the death of that attorney.[12]

A firm may generally continue to use in the firm name the name of a former partner who becomes "Of Counsel" to the firm, or who leaves the firm for non-legal employment.[13]

10 153 A.D.3d 315, 59 N.Y.S.3d 364 (1st Dept. 2017).

11 NYSBA Ethics Op. 1168 (2019).

12 NYSBA Ethics Op. 1204 (2020).

13 NYSBA Ethics Op. 1217 (2021).

It is not ethically permissible for a firm to include on its letterhead the name of an attorney who had no prior affiliation with the firm or its predecessors.[14]

Finally, as the result of a 2020 amendment to RPC § 7.5(b) a firm may use a trade name that does not include the name of any lawyer practicing in the firm, so long as it is not false, deceptive or misleading. Also, a firm name may continue to include the name of a retired partner.[15]

Valuation

A fundamental consideration in the entire negotiation process involves the question as to what value may be ascribed to a selling practice. That is an issue requiring outside expertise in most instances. It is not the purpose of this material to describe the various means by which a practice may be appraised. Suffice it to say that the determination may become very complex. The reader is referred to the various materials listed at the end of this segment.

Terms of Sale

The Rules of Professional Conduct governing the sale of a law practice do not address the terms of sale. It is not uncommon for the seller of a practice to finance a portion of the sale price, typically over a period of five to ten years. It is generally difficult for the purchaser of a professional practice to obtain financing from a bank for the purchase.

It is possible that the selling price may be based, at least in part, on future revenue generated by the clients of the selling attorney. NYSBA Ethics Op. 961 provides that a lawyer may sell a practice contingent on the receipt of a percentage of future fees, subject to certain conditions. However, under NYSBA Ethics Op. 699 it was determined to be not ethical for a newly elected judge to sell his practice with the price based in part on future fees collected from the transferred clients (20% of fees collected for five years). This might be an inducement to the judge to assist the acquiring firm in retaining his former clients, and could result in impropriety or the appearance of impropriety by exploiting his judicial position.

A retiring attorney who transfers his wills to another attorney can receive a referral fee for new representations of the testators or estates, if he assumes joint responsibility for the representation.[16]

An Ethics Opinion which did not involve the sale of a law practice but which is relevant provides that an attorney who was referred a case by an attorney who later retired is permitted to pay a referral fee to the retired attorney, provided the retired attorney assumed joint responsibility for the matter.[17]

14 NYSBA Ethics Op. 1230 (2021).

15 NYSBA Ethics Op. 1207 (2020).

16 NYSBA Ethics Op. 1172 (2019).

17 NYSBA Ethics Op. 1201 (2020).

A firm is ethically permitted to pay a former firm lawyer who has assumed public office a share of the fees for matters on which that lawyer rendered service.[18]

Conclusion

The rules relating to the transfer of law practices in New York have not been the subject of much judicial interpretation. Nor do we yet have any authoritative statistics as to the extent to which RPC 1.17 has been utilized. The rule was intended primarily to place solo practitioners on an equal footing with non-solo practitioners in terms of their ability to obtain monetary value from their years of private practice. It probably is fair to state that many solo practitioners are general practitioners, and that some of them have relatively few institutional clients. Assuming that to be true, one cannot help but wonder what monetary value those solo practices may have where they consist of an ever changing clientele, and where (unlike non-solo firms wherein a continuing firm name and its continuing professional staff may provide value) the goodwill aspect of the practice to be sold consists exclusively of the character and professional reputation of the selling attorney who, upon sale, will no longer be an element of the practice. That factor, it would seem, tends to place the solo practitioner on something other than the equal footing that the rule was intended to provide. But for those who in fact have value to sell, as many solo practitioners do, the rule exists to be used. While nothing may be gained from it in many situations, nothing can be lost, and all solo practitioners should at least consider the marketable value of their practices before simply shutting down.

18 NYSBA Ethics Op. 1218 (2021).

§ 2.2
Valuing a Law Practice*

There are several major approaches to valuing a law practice, or any business for that matter. This section highlights the major areas.

1. *Market Value*

One method of valuing a law practice is using the market value method. This involves comparing the subject law firm to the actual sales price of similar firms. Since there is little or no data that is generally available for actual sales of law practices, this method is not commonly employed.

2. *Rule of Thumb*

A rule of thumb valuation method is simple and direct. However, these attractive features are also the downfall of the method. It is usually too simplistic to value something as complex and varied as law firms using a tool that is overly simplified.

In general, the rule of thumb method would call for a valuator to multiply the firm's gross receipts by a multiplier to arrive at fair market value. For instance, the rule of thumb for law practices may be 50% to 100% of gross receipts equal fair market value.

Example:	Gross Receipts	600,000.00
	Multiplier	75%
	Fair Market Value	450,000.00

As you can see, not only is the formula overly simplistic, but the range of values that could be derived from the rule of thumb formula is quite wide ($300,000 at 50% to $600,000 at 100%).

For these reasons, the rule of thumb value method should be used only as a very loose guide to determine if other, more helpful, methods are on target.

3. *Buy-Sell Agreements*

Various partnership or shareholder agreements are often found in larger law practices and are often determinative of the value of an ownership interest.

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For instance, our firm has valued many large law firm partnership interests, and it is not at all unusual to see that all of the partners who leave the partnership are paid exactly what is called for in the controlling document. There is no better indication of value than the actual sales price of similar ownership interests.

In smaller practices of say two or three partners, the buy-sell agreements might indicate values that have nothing to do with actual fair market values, but instead are instituted for life insurance planning, estate planning, marital/divorce planning, etc.

4. *Accounting Formulas*

There are at least three commonly used accounting formulas for valuing law practices:

a. *Discounted Future Returns Method* – This method is used when past performance is not at all an indicator of future results. For instance, a two-year-old practice that is growing 100% per year would be a candidate for this method.

b. *Capitalized Returns Method* – This method is used when past results are expected to be a close approximation of future results. The benefit of this method is that balance sheet information is not required.

c. *Excess Earnings Method* – This is the most popular method for valuing small law practices. It is a combination of an income approach and an asset-based approach. In essence, it looks at what the practice has generated in the past in terms of assets and income and assigns a value to those items.

The example below illustrates how the excess earnings method works:

Balance Sheet

Assets:

Cash	$ 5,000.00
Accounts Receivable	40,000.00
Work in Process	10,000.00
Supplies Inventory	2,000.00
Total Current Assets	$ 57,000.00
Fixed Assets: Accumulated Depreciation Net Fixed Assets	$ 20,000.00 <17,000.00> $3,000.00*

Total Assets	$ 60,000.00
Liabilities and Equity:	
Current Liabilities	
Accounts Payable	$ 2,500.00
Wages Payable	1,500.00
Total Current Liabilities	4,000.00
Long Term Debt	6,000.00
Equity	$ 50,000.00
Total Liabilities and Equity	$ 60,000.00

* Assume Net Fixed Assets equals fair market value.

Income Statement

	2021	**2020**	**2019**	**2018**
Revenue	220,000	210,000	250,000	200,000
Expenses	100,000	90,000	80,000	70,000
Net Income before Owner's Draw	120,000	120,000	170,000	130,000

Excess Earnings Formula

Step One – Determine the average annual earnings for the firm before owner's compensation. Remove any unusual items such as one-time contingency fees or one-time expenses.

In an example, the firm has a $40,000 fee in 2022 from a personal injury case which is non-recurring, so an average income is calculated as follows:

2018	130,000
2019	130,000 (adjusted)
2020	120,000
2021	120,000
	500,000
Divided by 4	÷ 4

Average Earnings Before	
Owner's Compensation	125,000

Step Two – Determine what the average lawyer with similar training and experience will earn.

In our example we will say that the average lawyer with similar training and experience earns $85,000.

Step Three – Determine a fair rate of return on the assets used in the business.

In our example, the equity of the firm including accounts receivable and work in process is $50,000. If we assume that a fair rate of return on this amount is 10%, then the return to the owner on capital should be $5,000.

Step Four – Determine a capitalization rate. This is generally a complicated process which requires more space than I have here to explain. For our purposes, let's assume that a potential buyer of this law practice will require a rate of return of 25% on his investment in order to induce him to invest. (Capitalization rates typically range from 18% to 33%.)

Step Five – Calculate the excess earnings value.

Average four-year earnings before owner's	
Compensation	$125,000
Less: reasonable replacement wage for similar attorney	<85,000>
Earnings attributable to the business	40,000
Less: reasonable return on invested assets	
(50,000 x 10%)	<5,000>
Excess earnings	35,000
Capitalized at 25% (Divided by 25%)	÷ .25
Value indicated for goodwill	140,000
Add equity from balance sheet	50,000
Fair market value of firm as of 12/31/21	$190,000

Other Issues

Cash basis accounting – Keep in mind that most law practices keep their books on a cash basis of accounting. As a result, neither accounts receivable nor work in process will appear on their financial statements or tax returns. Therefore, when valuing a cash basis law practice, the figures have to be adjusted to include these items.

Contingent fees – Contingent fees can also be an issue in valuing some law practices. Practitioners are split on whether to consider contingent fees to be simply a part of work in process or as something that is so speculative as to be useless to try to value. Those following the latter approach would simply "carve out" the contingent fees and deal with them when and if they are collected.

Client disbursements – Technically the IRS treats money that a lawyer disburses on behalf of a client as an account receivable, not an expense. Many practitioners are unaware of this and take a deduction in the year the disbursement is made. The proper treatment is to record a client disbursement as an account receivable and write off the amount only when and if it is certain to be uncollectible.

Often in sales of law practices the seller will keep the cash, accounts receivable, contingent fees, etc. and simply sell the goodwill portion and the fixed assets to the buyer. The excess earnings formula illustrated above can easily be modified to accomplish this result.

§ 2.3
Sample Asset Purchase Agreement

THIS ASSET PURCHASE AGREEMENT is entered into as of the day of [date], by and between _____, as surviving spouse of _____, ESQ. and Executor-Nominee of the ESTATE OF _____, ESQ. (hereinafter collectively referred to as "Seller") and _____ ("Purchaser"), a New York professional corporation.

W I T N E S S E T H :

WHEREAS, on [date] _____, Esq. ("_____") died in _____, New York (for purposes of this Agreement, the defined term of "Seller" shall include _____); and

WHEREAS, at the time of _____'s death, _____ had in his possession and owned certain Assets (as defined below) which assets are now in the possession of Seller; and

WHEREAS, Seller desires to sell the Assets and Purchaser desires to purchase the Assets.

NOW, THEREFORE, in consideration of the mutual promises and premises contained herein, the sum of One Dollar ($1.00), each to the other paid in hand, and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Sale of Assets. In accordance with the terms and conditions contained herein, Seller shall sell to Purchaser, and Purchaser shall purchase from Seller, all of the Seller's clients records and files pertaining to _____'s client files and matters as such records and files were utilized by _____ in the operation of his practice of law ("Business"). Notwithstanding the foregoing, Purchaser shall have the right to reject any client file which would result in a conflict of interest to Purchaser or for any other reason as determined by Purchaser. In the event Purchaser elects to reject or decline any client matter or file, Purchaser will use its reasonable best efforts to assist the client in engaging substitute legal counsel.

2. Definitions. Whenever used in this Agreement:

(a) "Assets" shall mean those assets of the _____ utilized in the operation of his business and in _____'s possession or under _____'s control on the date of his death, as specifically set forth on **Schedule 2(a) and Schedule 13(g)**, attached hereto and made a part hereof, including but not limited to Seller's client records (in paper and electronic formats), telephone numbers and goodwill.

(b) "Closing Date" means the execution date of this Agreement.

(c) "Closing Place" shall be at the offices of Seller, in [city], New York, or such other place as the parties may mutually agree.

(d) "Liabilities" shall mean all liabilities of Seller, including but not limited to, any liabilities to employees of any nature, accounts payable, payroll taxes, promissory notes or liabilities for taxes based on income, sales, use, employment or otherwise.

3. Purchase Price and Allocation.

(a) Purchase Price. The purchase price for the Assets to be purchased hereunder shall be _____ and 00/100 Dollars ($_____) ("Purchase Price").

(b) Allocation. The Purchase Price shall be allocated among the Assets in accordance with **Schedule 3(b)**. Seller and Purchaser jointly shall complete and separately file Form 8594 with their respective federal income tax returns for the tax year in which the Closing Date occurs in accordance with such allocation and the IRS guidelines, and neither Seller nor Purchaser shall, without the written consent of the other, take a position on any tax return or before any governmental agency charged with the collection of any such tax, or in judicial proceeding, that is in any manner inconsistent with the terms of such allocation.

4. Method of Payment. Upon execution of this Agreement, the Purchase Price shall be paid in thirty-six (36) equal monthly installments commencing on the _____ ( ) day of _____ 20__ of _____ and 00/100 Dollars ($_____) each and a final payment on the _____ ( ) day of _____ 20_ of _____ and 00/100 Dollars ($_____ pursuant to the terms and conditions of a promissory note, attached hereto as **Exhibit A**, and made a part hereof (the "Note"). Interest on the outstanding balance shall be computed at the rate of percent (%) per annum. An amortization schedule shall be attached as a Schedule to the Note.

5. Exclusion of Seller's Other Assets. Purchaser is not acquiring any right, title or interest in or to the following:

(a) Seller's cash or cash equivalents;

(b) Any personal belongings of Seller;

(c) Seller's Accounts Receivable; and

(d) Seller's office equipment and office supplies.

6. Accounts Receivable. Purchaser shall not purchase, and Seller shall not sell, any right, title, or interest in Seller's accounts receivable ("Accounts Receivable"). Seller shall continue to collect his outstanding Accounts Receivable after the Closing. If, at any time after the Closing Date, Purchaser shall collect or receive any monies, in any manner whatsoever, in payment of any of Seller's Accounts Receivable, Purchaser shall immediately forward such amount(s) to Seller at no cost to Seller.

7. Assumption of Liabilities. Purchaser shall not assume any Liabilities of Seller whether firm or contingent, known or unknown. In addition to the foregoing, Purchaser shall not assume Seller's IOLA accounts. _____ and _____, Esq. were co-signatories on IOLA funds for the benefit of Seller's clients, as such account, client sub-accounts and a general ledger of

such are set forth on **Schedule 7**, attached hereto and made a part hereof. **Schedule 7** shall be certified by Seller as to the correctness thereof. Purchaser shall use its reasonable best efforts to comply with the provisions of Rule 1.15(g) pertaining to the designation of successor signatories with respect to Seller's IOLA funds provided, however, that Purchaser shall not assume or be liable for any inaccuracies or liability with respect to such accounts. Seller will indemnify and hold Purchaser harmless for any and all liability, cause of action or loss with respect to such IOLA account.

8. Transfer of Client Records. At Closing, Seller shall deliver to Purchaser his files and records (including but not limited to all electronic records related to such files) relating to all clients included on **Schedule 2(a) and Schedule 13(g)** for which Seller has provided services. **Schedule 2(a) and Schedule 13(g)** shall include a list of all client names and all addresses of such clients. Seller and Purchaser shall comply with New York Rules of Professional Conduct Rule 1.17 ("Rule 1.17") pertaining to the sale of a law practice in all respects, including the written notice to each of Seller's clients. Seller will cooperate with Purchaser and assist Purchaser with obtaining any client consents that may be required in order to transfer any client property to Purchaser.

9. Delivery of Documents.

(a) At the Closing, Seller shall deliver to Purchaser the following:

(i) a bill of sale and an assignment which effectively transfer, assign and convey to Purchaser good and marketable title to all of the Assets free and clear of all mortgages, pledges, liens, security interests, restrictions, or other encumbrances;

(ii) all Assets subject to the terms of this Agreement; and

(iii) all other documents, instruments or writings required to be delivered to Purchaser at or prior to the Closing pursuant to this Agreement and such other certificates of authority and documents as Purchaser may reasonably request.

(b) At the Closing, Purchaser shall deliver to Seller the following:

(i) the Promissory Note;

(ii) cash or a certified check for sales tax pursuant to this Agreement;

(iii) all other documents, instruments or writings required to be delivered to Seller at or prior to the Closing pursuant to this Agreement and such other certificates of authority and documents as Seller may reasonably request.

10. Seller's Representations and Warranties. Seller makes the following representations and warranties to Purchaser, each of which is true and correct on the date hereof, shall remain true and correct to and including the Closing Date, shall be unaffected by any investigation heretofore or hereafter made by Purchaser, or any knowledge of Purchaser other than as specifically disclosed in the disclosure schedules delivered to Purchaser at the time of the execution of this Agreement, and shall survive the Closing of the transaction provided for herein.

(a) Authority. This Agreement constitutes a valid and binding agreement of Seller in accordance with its terms and does not require any consent, notification to or other action of any person, entity or governmental agency other than filings with respect to sales and other transfer taxes. Seller has complete power to own and to sell, transfer and deliver all assets to be transferred hereunder and instruments to be executed to vest effectively in Purchaser good and marketable title to the Assets.

(b) Effect of Agreement. The execution, delivery and performance of this Agreement by Seller is not conditioned on or prohibited by, and will not conflict with or result in the breach of the terms, conditions or provisions of, or constitute a default under any law applicable to Seller or any agreement or instrument to which Seller is a party or is otherwise subject.

(c) Licenses and Permits. At the time of _____'s death, _____ was in compliance with all permits, licenses, franchises and authorizations necessary for the operation of his law practice (the "Business") as operated and all such permits, licenses, franchises and authorizations were, at the time of _____'s death, valid and in full force and effect. All applications, reports and other disclosures relating to the operation of the Business required by the appropriate governmental bodies have been filed or will have been filed by the Closing in a timely manner.

(d) Assets.

(i) **Schedule 2(a)** hereof contains a complete and accurate list, as of the date hereof, of certain assets owned or leased by Seller which are used or useful in the operation of the Business and which are being purchased by Purchaser.

(ii) On the Closing Date, Seller shall have good and marketable title to all the Assets, free and clear of all mortgages, liens (statutory or otherwise), security interests, claims, pledges, licenses, equities, options, conditional sales contracts, assessments, levies, easements, covenants, reservations, restrictions, exceptions, limitations, charges, encumbrances or any rights of any third parties of any nature whatsoever (collectively, "Liens").

(iii) All tangible assets constituting Assets hereunder are in good operating condition and repair, free from any defects (except such minor defects as do not interfere with the use thereof in the conduct of the normal operations of Seller), have been maintained consistent with Seller's historical practice and are sufficient to carry on the business of Seller as conducted during the preceding twelve (12) months.

(f) Insurance. All of the Assets used or useful in the operation of the Business which are to be conveyed to Purchaser hereunder and which are of an insurable character are insured above deductible limits by financially sound and reputable insurance companies against loss or damage by fires and other risks to the extent and in the manner customary for such assets. Copies of the pertinent insurance policies have been delivered to Purchaser and are in full force and effect. Seller will maintain such insurance between the date hereof and the Closing Date. There are no pending claims. No notice of cancellation or termination has been received with respect to any such policy.

(g) Litigation. There is as of the date hereof no suit, action or legal administrative arbitration or other proceeding or governmental investigation (including workers' compensation claims) pending or threatened against the Seller, including without limitation, any malpractice suit, action or legal proceeding against Seller.

(h) Taxes. Seller has duly filed with the appropriate federal, state and local governmental agencies all tax returns and reports which are required to be filed by Seller, and has paid in full all taxes (including interest and penalties) owed by Seller arising prior to the Closing Date. Seller is not a party to any pending action or proceeding, nor, to the best knowledge of Seller, is any action or proceeding threatened, by any governmental authority for assessment or collection of taxes, and no claim for assessment or collection of taxes has been asserted against Seller.

(i) Contracts. Each contract, agreement, lease and commitment to which Seller is a party is in full force and effect and constitutes a valid and binding obligation of, and is legally enforceable in accordance with its terms against, the parties thereto. There are no leases that affect any of the Assets.

(j) Financial Statements. Seller has delivered to Purchaser true and complete copies of the income tax returns of Seller relating to the operation of the Business consisting of tax returns as of December 31, of the three (3) most recent years, and the related statements of income and cash flows since such dates (the "Recent Balance Sheet"). All of such financial statements (including all notes and schedules contained therein or annexed thereto) are true, complete and accurate, have been prepared in accordance with Seller's historical practices applied on a consistent basis, have been prepared in accordance with the books and records of Seller, and fairly present, in accordance with Seller's historical practices, the assets, liabilities and financial position, the results of operations and cash flows of Seller as of the dates and for the years and periods indicated. Seller shall prepare his 20 Form 1040 Schedule "C" and any interim statements in accordance with his historical practice and shall deliver the same to Purchaser immediately upon completion.

(k) Accounts Payable. There are no accounts payable of the Seller regarding the Business.

(l) Client Relations. There exists no condition or state of facts or circumstances involving the Seller's clients that Seller can reasonably foresee could adversely affect the Business after the Closing Date. To Seller's knowledge, the Business may be maintained after the date hereof in the same manner in all respects (financial and otherwise) as at the time of _ 's death.

(m) Absence of Certain Changes. Since [date], Seller has operated the business in the ordinary course consistent with historical practice.

(n) Absence of Undisclosed Liabilities. Except as and to the extent specifically disclosed in the Recent Balance Sheet, Seller does not have any liabilities relating to the operation of the Business.

(o) General Representation and Warranty. Neither this Agreement nor any other document furnished by Seller in connection with this Agreement contains any untrue statement of a material fact or omits to state any material fact necessary to make the statements contained herein or therein not misleading in any material respect. There is no fact or circumstance known to Seller which materially adversely affects, or in the future, as now reasonably foreseeable, is likely to materially adversely affect the condition (financial or otherwise), properties, assets, liabilities, business, operations or prospects of the Business which has not been set forth in this Agreement or the schedules hereto.

(p) Disclosure. No representation or warranty by Seller in this Agreement, nor any statement, certificate, schedule, document or exhibit hereto furnished or to be furnished by or on behalf of Seller pursuant to this Agreement or in connection with the transactions contemplated hereby, contains or shall contain any untrue statement of material fact or omits or shall omit a material fact necessary to make the statements contained therein not misleading.

11. Representations, Warranties and Covenants of Purchaser. Purchaser does hereby represent and warrant that:

(a) Organization of Purchaser. Purchaser is duly organized, validly existing, and in good standing under the laws of the State of New York. Purchaser has full power and authority to own its assets and to carry on its business as presently conducted.

(b) Authority to Purchase. Purchaser has all necessary right, authority and power to execute and deliver this Agreement and to consummate the transaction contemplated hereunder. The execution and delivery of this Agreement and the performance by Purchaser of its obligations hereunder (i) have been duly and validly authorized by the shareholders and directors of Purchaser and no other corporate or other approvals are required and (ii) to Purchaser's knowledge, will not materially violate any provision of law and will not conflict with, result in a breach of any of the terms, conditions or provisions of, or constitute a default (or an event which with the giving of notice or the lapse of time or both would constitute a default) under or pursuant to any corporate charter, bylaw, indenture, note, mortgage, lease, license, permit, agreement or other instrument to which Purchaser is a party. When executed and delivered by Purchaser, this Agreement is a legal, valid and binding obligation of Purchaser, enforceable in accordance with its terms.

(c) Litigation. There is no litigation pending or threatened against Purchaser.

(d) Accuracy of Representations and Warranties on the Closing Date. Each of the representations and warranties set forth in this Paragraph 11 shall be true and correct as of the Closing Date with the same force and effect as though made at and as of the Closing Date.

12. Rights of Indemnification.

(a) Survival of Covenants, Warranties and Representations. All covenants, agreements, representations and warranties of the parties under this Agreement, in any Schedule or certificate or other document delivered pursuant hereto, shall remain effective through and shall survive the Closing Date as provided for herein regardless of any investigation at any

time made by or on behalf of Purchaser or of any information Purchaser may have with respect thereof.

(b) Indemnification of Purchaser. Seller shall defend, indemnify and hold Purchaser harmless from and against (1) any and all claims, liabilities and obligations of every kind and description, contingent or otherwise, arising from or relative to (A) the operation or ownership of the Business or the Assets prior to or on the Closing Date, irrespective of when asserted and (B) a breach of any of Seller's representations, warranties or covenants hereunder, and (2) any and all actions, suits, proceedings, damages, assessments, judgments, costs and expenses (including reasonable attorneys' fees) incident to any of the foregoing.

(c) Indemnification of Seller. Purchaser shall defend, indemnify and hold Seller harmless from and against (1) any and all claims, liabilities and obligations of every kind and description, contingent or otherwise, arising from or relative to (A) the operation or ownership of the Business or the Assets on and after the Closing Date and (B) a breach of any of Purchaser's representations and warranties hereunder, and (2) any and all actions, suits, proceedings, damages, assessments, judgments, costs and expenses (including reasonable attorneys' fees) incident to any of the foregoing.

(d) Summary of Obligations. The obligations and rights of the parties under this Paragraph 12 shall survive the Closing Date and shall be binding upon and inure to the benefit of their respective successors and assigns.

13. Additional Agreements of Seller.

(a) Conduct of Business Pending the Closing Date. Seller shall use its best efforts to preserve for Purchaser its present relationships with clients and others having business relationships with Seller that pertain to the Business. Seller will immediately notify Purchaser if there is the loss or expected loss or other disruption of any relationship between Seller and a vendor, customer or employee.

(b) No Material Contracts. Seller shall not enter into any contract or commitment pertaining to the Business, except contracts or commitments which are in the ordinary course of business and consistent with past practice and are not material to the Business (individually or in the aggregate).

(c) Maintenance of Insurance. Seller shall maintain all of the insurance related to the Business and the Assets in effect as of the date hereof and shall procure such additional insurance as shall be reasonably requested by Purchaser.

(d) Maintenance of Property. Seller shall use, operate, maintain and repair all assets of Seller which are defined herein as Assets in a normal business manner.

(e) No Negotiations. Seller shall not directly or indirectly (through a representative or otherwise) solicit or furnish any information to any prospective buyer, commence, or conduct presently ongoing, negotiations or discussions with any other party or enter into any agreement with any other party concerning the sale of the Business or the Assets or any part

thereof, and Seller shall immediately advise Purchaser of the receipt of any such acquisition proposal.

(f) Disclosure. Seller shall have a continuing obligation to promptly notify Purchaser in writing with respect to any matter hereafter arising or discovered which, if existing or known at the date of this Agreement, would have been required to be set forth or described in the disclosure schedules, but no such disclosure shall cure any breach of any representation or warranty which is inaccurate. In the event that Seller discovers a breach and notifies Purchaser pursuant to this Paragraph 13(f), Seller shall have three (3) days to cure such breach.

(g) Open Matters. The client files and matters described on **Schedule 13(g)** shall be considered ongoing matters for which was providing services at the time of his death. Such matters and the clients (and client records) for whom such matters were being performed shall be included in the terms of this Agreement. Subject to Purchaser's right to exclude any clients hereunder and the client's right to obtain other counsel, Purchaser agrees to cooperate with Seller and the professional staff of in bringing such matters to a conclusion. Seller and Purchaser shall cooperate in notifying such clients that Seller has transferred his Business to Purchaser and shall advise such clients in the same manner as the notice to be delivered pursuant to Paragraph 21 below. For services rendered for such Open Matters, Purchaser shall charge an hourly rate of _____ and 00/100 Dollars ($___.00) for attorney services and _____ and 00/100 Dollars ($_.00) for paralegal services. In the event that Seller has been previously paid by such clients, the amount of any services shall be offset against the Purchase Price set forth hereunder. In such an event Purchaser shall provide Seller with an itemization of the services provided, the time incurred on such matters and the cost of such time. In the event such matter shall include additional services outside the scope of the client's agreement with the Seller, the Purchaser shall negotiate a separate fee arrangement with the client.

(h) Seller's Independent Contractor. Except in the case of death or disability, for a period of not less than ____ (___) months, _____ shall provide services to Purchaser in the same manner and to the same extent as provided to _____ prior to the date of his death, in order to assist Purchaser in the acquisition of assets hereunder and the transition of _____'s practice to Purchaser. Purchaser shall be responsible for the compensation of _____ during this ____ (___) month period with respect to such services.

14. Conditions Precedent to Purchaser's Obligations. The obligation of Purchaser to consummate the transactions contemplated hereunder is subject to the satisfaction at or prior to the Closing of the following (unless waived in writing by Seller):

(a) Representations, Warranties and Covenants. The representations, warranties and covenants of Seller contained in this Agreement shall be true and correct in all material respects at and as of the Closing Date as though made at and as of the Closing Date, except for changes contemplated by this Agreement.

(b) Performance. Seller shall have complied with all agreements, obligations, covenants and conditions required by this Agreement to be met, performed or complied with by it prior to or at the Closing.

(c) Absence of Litigation. No litigation shall have been commenced or threatened, and no investigation by any government entity shall have been commenced against Purchaser or Seller or any of the affiliates, officers or directors of any of them, with respect to the transactions contemplated hereby.

(d) Satisfactory Due Diligence Review. Purchaser shall have completed by the Closing Date a due diligence review satisfactory to Purchaser with respect to, among other matters, the business, operations, assets, contracts, legal compliance and future prospects of the Business, all of which shall be confidential and not disclosed to any third party by Purchaser.

15. Conditions Precedent to Seller's Obligations. The obligation of Seller to consummate the transactions contemplated hereunder are subject to satisfaction at or prior to the Closing of the following (unless waived in writing by Purchaser):

(a) Representations, Warranties and Covenants. The representations, warranties and covenants of Purchaser contained in this Agreement shall be true and correct in all material respects at and as of the Closing Date as though such representations, warranties and covenants were made at and as of such time.

(b) Performance. Purchaser shall in all material respects have complied with all agreements, obligations and conditions required by this Agreement to be met, performed or complied with by it prior to or at the Closing.

(c) Delivery of Purchase Price. Purchaser shall have delivered to Seller the Note.

(d) Litigation. No Litigation shall have been commenced or threatened, and no investigation by any Government Entity shall have been commenced, against Purchaser or Seller with respect to the transactions contemplated hereby; provided that the obligations of Seller shall not be affected unless there is a reasonable likelihood determined by Purchaser that as a result of such action, suit, proceeding or investigation, Seller will be unable to transfer the Assets in accordance with the terms set forth herein.

16. Endorsement Reporting Coverage. Seller agrees to maintain, at its expense, professional liability insurance coverage or reporting endorsement coverage of insurance for the term commencing on the date of Closing and continuing thereafter for a period of time not less than the applicable statute of limitations for any legal services provided by Seller pursuant to Section 214(6) of the New York State Civil Practice Rules and Procedures, prior to or following closing.

17. Expenses. Whether or not the transaction contemplated herein is consummated, each party hereto shall bear all costs and expenses incurred by it in connection with this Agreement and the transactions contemplated hereby.

18. Notices. Any notice or other communication required or permitted hereunder shall be sufficiently given if labeled conspicuously in bold letters "PERSONAL AND CONFIDENTIAL," and mailed personally or sent by registered or certified mail, postage prepaid, or by facsimile transmission or telex immediately confirmed in writing sent by registered mail or certified mail, postage prepaid, addressed, in the case of the Seller to:

PERSONAL AND CONFIDENTIAL

Estate of _____, Esq.

c/o _____

_____

or in the case of the Purchaser to:

_____

_____

or to such other person or address as shall be furnished in writing by any party to the others prior to the giving of the applicable notice of communication, and such notice or communication shall be deemed to have been given as of the date so delivered or sent.

19. Employees. Purchaser shall not be required to employ any employees of Seller and Seller shall be responsible for the termination of any employees it does not desire to retain following Closing. To the extent Purchaser desires, it shall have the opportunity to interview any of Seller's employees or independent contractors, including _____, for possible employment by Purchaser upon such terms and conditions as Purchaser determines. Such interviews shall take place prior to Closing with the consent of Seller, which shall not be unreasonably withheld.

20. Right of Set-Off. In the event Purchaser suffers any loss for which Seller is obligated to indemnify Purchaser hereunder, and Seller for any reason fails or refuses to pay the same, Purchaser shall have as the means of recovery for any loss (in addition to any other remedies at law or in equity), the right to set-off against any sums due to Seller pursuant to this Agreement. Purchaser's right of set-off shall not be subject to any order of priority, and shall be exercisable in such amounts (not to exceed the amounts of any such loss) and in such manner as Purchaser in its reasonable discretion may determine.

21. Client Letter. Upon execution of this Agreement, Purchaser and Seller, in accordance with Rule 1.17, shall provide written notice to Seller's clients, in form and substance of **Exhibit B**, attached hereto and made a part hereof, at Purchaser's expense, of Purchaser's acquisition of Seller's practice of law. Such written notice shall include information regarding:

(a) The client's right to retain other counsel, or to take possession of the file;

(b) The fact that the client's consent to the transfer of the client's file or matter to the Purchaser will be presumed if the client does not take any action or otherwise object

within ninety (90) days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(c) The fact that agreements between the Seller and the Seller's clients as to fees will be honored by the Purchaser;

(d) Proposed fee increases, if any; and

(e) The identity and background of the Purchaser and Purchaser's employees, including principal office address, bar admissions, number of years in practice in the state, whether Purchaser, or any employee of Purchaser, has ever been disciplined for professional misconduct or convicted of a crime, and whether Purchaser currently intends to re-sell the practice.

22. Entire Agreement. It is understood and agreed that all understandings and agreements heretofore made between the parties hereto are merged in this Agreement which alone fully and completely expresses the agreement between the parties hereto and that this Agreement has been entered after full investigation, neither party relying upon any statement or representation which is not herein contained. This Agreement may not be changed or terminated orally.

23. Governing Law. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of New York.

24. Binding Provisions. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, assigns and all other successors-in-interest.

25. Sales Tax. Purchaser shall pay any sales tax due and payable by reason of the consummation of the transaction herein contemplated. Payment for the taxes shall be made by Purchaser to Seller who shall remit such sales tax to the appropriate taxing authority. Purchaser shall indemnify Seller for any and all sales taxes paid by Seller by reason of consummating this transaction.

26. Headings. The paragraph and clause headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

27. Miscellaneous.

(a) Waiver of Conditions. Any party may, at the party's option, waive in writing any or all of the conditions herein contained to which the party's obligations hereunder are subject.

(b) Variation and Amendment. This Agreement may be varied or amended at any time by joint action of the Seller and Purchaser.

(c) Assignment. This Agreement may not be assigned by Seller or Purchaser without the prior written consent of the other party, which consent shall not be unreasonably withheld.

IN WITNESS WHEREOF, the parties hereto have subscribed their names and seals the date and year first above written.

PURCHASER:

_____

By:
_____, Vice President

SELLER:

ESTATE OF_____, ESQ.

By:

_____, Surviving Spouse and Executor-Nominee

EXHIBIT A
PROMISSORY NOTE

$_____ _____, New York

_____ __, 20__

FOR VALUE RECEIVED, _____, a New York professional corporation, its successors and assigns ("Maker"), hereby promises to pay to the order of _____, as surviving spouse of _____**, ESQ.** and Executrix-Nominee of the **ESTATE OF** _____**, ESQ.**, his heirs, representatives, successors and assigns ("Holder"), in immediately available funds, the sum of _____ and 00/100 Dollars ($_____), plus interest, payable in _____ (___) equal monthly installments commencing on the ____ (___) day of _____ 200__of _____ and 00/100 Dollars ($_____) each and a final payment on the _____ (____) day of _____ 200__ of _____ and 00/100 Dollars ($_____). Interest shall be computed on the outstanding principal balance at _____ percent (__%) per annum. Installments under this Note shall be made in accordance with the amortization schedule attached hereto as **Schedule 1**, and made a part hereof.

1. **Acceleration Upon Default.** At the option of the Holder, this Note shall become immediately due and payable upon the occurrence of any of the following events of default:

(a) The failure of Maker to make payment of the principal or interest due under this Note within ten (10) days after receipt by Maker of written notice from Holder that an installment is past due;

(b) The insolvency of Maker, the appointment of a receiver of its assets, or the institution of any involuntary proceeding under any bankruptcy or insolvency law relating to the relief of debtor for the readjustment or relief of any indebtedness of Maker, whether as a reorganization, composition, extension or otherwise, which involuntary proceeding is not terminated, dismissed or concluded in a manner not adverse to Maker within ninety (90) days of the commencement of such proceeding; or

(c) The filing by Maker of an application or an assignment for the benefit of creditors or for taking advantage of the same under any bankruptcy or insolvency law.

2. **Prepayment.** Maker shall have the right to prepay all or any portion of the principal balance due under this Note at any time without premium or penalty. Except as set forth above, Holder shall not have any the right to require prepayment of the principal balance due under this Note.

3. **Waiver.** No delay or omission on the part of Holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this Note. A waiver of any right or remedy on one occasion shall not be construed as a waiver of any right or remedy on any future occasion.

4. **Attorneys' Fees.** The Holder shall be entitled to collect all costs and reasonable attorneys' fees incurred by Holder in enforcing his rights under this Note.

5. **Notice.** All notices, demands and requests given or required to be given by any party hereto to the other party shall be made in writing and shall be deemed to have been properly given, made or served only if sent by registered or certified mail, postage prepaid, addressed to the other party his or its last known address, or such other address as the parties shall give prior notice.

6. **Negotiability.** This Note is fully negotiable and may be assigned, transferred or set over by Holder or Maker.

7. **Reference.** Any reference herein to the Holder shall be deemed to include and apply to any subsequent holder of this Note. Any reference herein to the Maker shall be deemed to include and apply to every person now or hereafter liable upon this Note.

8. **Jurisdiction.** This Note shall be deemed to have been made under and shall be governed by the laws of the State of New York in all respects, including matters of construction, validity and performance and none of its terms or provisions may be waived, altered, modified or amended except as Holder may consent thereto in writing duly signed for and on his behalf.

9. **Right of Setoff.** Maker shall be entitled to the right of setoff against any or part of any installment due Holder hereunder for any sums owing or hereafter becoming payable to Maker from or by Holder for any reason whatsoever in accordance with the Asset Purchase Agreement by and between Maker and Holder dated January , 20 .

MAKER

By:_____

_____, Vice President

Attach as Schedule 1 amortization schedule

EXHIBIT B
CLIENT LETTER

CLIENT LETTER advising that Selling Attorney's practice has been transferred to Buyer Re: [Name of Case]

Dear [Name]:

As you aware from my previous correspondence to you, I have arranged to transfer ownership of my practice to [*Name of Buyer*]. That transaction [was completed] [will be completed] on [date of conveyance]. His office address and his phone, fax and e-mail addresses are [state addresses separately].

In accordance with the provisions of the New York Rules of Professional Conduct, please be assured that both I and [Name of Buyer] have carefully maintained whatever confidences and secrets you have imparted to me and that he and I shall continue to do so as long as he continues to represent you, and permanently thereafter should you decide at any time to select another attorney to represent you in this matter.

Please also be assured that those terms of fee payment that you and I agreed upon at the time of my original retention, or that may thereafter have been agreed upon between us, shall continue to be honored by the [Buyer] and cannot be increased by reason of the transfer of your file unless specifically otherwise permitted within the terms of our retainer agreement with you or as otherwise specifically agreed to between you and [the Buyer].

I am certain that [the Buyer] will continue to serve you professionally and well and that your file will continue to be in good hands. Please feel free to communicate with him/her just as you have with me. Thank you for allowing me to be of service to you.

Very truly yours,

[If the client, having previously been notified of the selling attorney's intent to transfer the client's file or matter to the Buyer, has not responded to the Seller's request to provide his or her consent, or lack of it, this letter should include the following:

> Although I previously notified you of my intent to transfer your file to (the Buyer) and asked that you provide me with your written consent or disapproval, I have not received your written response. Accordingly, pursuant to the provisions of the New York Rules of Professional Conduct, I presume that you consent to the transfer.]

I have read this letter and agree in all respects to be bound by its terms.

_____

[Buyer]

SCHEDULE 2(a)

ASSETS

The following Assets shall be included in the sale from Seller to Purchaser:

1. Seller's goodwill

2. Seller's Active Files (see attached list)

    a. Corporate

    b. General Partnerships

    c. Limited Liability Companies

    d. Limited Partnerships

    e. Real Estate Matters

    f. Estate Administration Files

    g. Will Files

3. Seller's Special Holdings (see attached list)

    a. Client's original wills retained by seller for safekeeping

    b. Client's Corporate Minute Books and Limited Liability Company Minute Books retained by seller for seller for safekeeping

    c. Miscellaneous records

SCHEDULE 3(b)

ALLOCATION OF PURCHASE PRICE

Client Records, Intangibles and Goodwill

$_____

SCHEDULE 7

IOLA ACCOUNT DETAIL

Attach Bank Account Information (accounts, locations, signators, balances, list of clients and allocation of funds among designated clients).

SCHEDULE 13(g)

OPEN MATTERS

See attached.

Set forth all client matters which are considered open and ongoing by Selling Attorney

§ 2.4
Confidentiality and Non-Disclosure Agreement
(For Use in Prospective Sale or Transfer of a Law Practice)

The undersigned for and on behalf of itself, its affiliates, subsidiaries and agents, including without limitation, _____, [an attorney engaged in the practice of law in the state of New York] [a New York professional corporation engaged in the practice of law], (the "Disclosing Party") has developed certain confidential and proprietary information in both written form and oral form ("Confidential Information"), which has been and is being disclosed to the undersigned for the sole purpose of entering into discussions regarding possible future business and professional relationships.

In consideration of the Disclosing Party's disclosure of the Confidential Information to the undersigned, its officers and directors and all affiliates (hereinafter "Recipient") the undersigned agrees as follows:

1. **Disclosure of Confidential Information.**

(a) The Recipient hereby acknowledges that all documents and information owned or developed by the Disclosing Party or pertaining to the Disclosing Party which has or will come into Recipient's possession or knowledge, unless Recipient provides the Disclosing Party with independent verification to the contrary within fifteen (15) days of the original receipt of such information, is Confidential Information and therefore:

(i) is proprietary to the Disclosing Party having been designed, developed and accumulated at great expense over lengthy periods of time; and

(ii) is secret, confidential and unique, and constitutes the exclusive property of the Disclosing Party.

(b) Excluded from the Confidential Information is any submission or disclosure:

(i) that can be demonstrated by documentation to have been public information or generally available to the public prior to Recipient's receipt of such Confidential Information from the Disclosing Party;

(ii) that can be demonstrated by documentation to have been in Recipient's possession prior to receipt thereof from the Disclosing Party; and

(iii) that becomes part of the public information or generally available to the public such as by publication or otherwise, other than as a result of a disclosure by Recipient in breach of this Agreement.

2. **Use of Confidential Information**.

(a) Recipient shall not use any of the Confidential Information for any purpose other than for the exclusive purpose set forth above. Recipient agrees that the Confidential

Information will not be used in any way detrimental to the Disclosing Party and that such information will be kept confidential by Recipient and its agents; provided, however, that (i) any of such information may be disclosed to such representatives of Recipient who need to know such information for the specific purposes set forth above (it being understood that Recipient's directors, officers, employees, affiliated entities, accountants, legal counsel and representatives shall be informed by Recipient of the confidential nature of such information and shall agree to treat such information confidentially in accordance with the terms set forth herein) and (ii) except as otherwise provided in this Agreement (including Paragraph "3" below), no disclosure of such information may be made by Recipient or its representatives to any other person or entity without the prior written consent of the Disclosing Party.

[(b) Any of Recipient's employees, officers, directors, agents and/or representatives granted access to any Confidential Information provided by the Disclosing Party will each be required to agree to the provisions of, and shall sign a copy of, this Agreement.]

3. **Required Disclosure.** In the event Recipient should be requested or required (by oral questions, interrogations, requests for information or documents, subpoena, civil investigative demand or similar process or as otherwise required by law ("demands") to disclose Confidential Information supplied to it in the course of Recipient's dealing with the Disclosing Party, the Recipient will provide the Disclosing Party with prompt notice of such requests so that the Disclosing Party may, at its own cost and expense, seek an appropriate protective order; in the event no such protective order is timely obtained, Recipient is permitted to comply with such demands.

4. **Indemnification and Injunctive Relief.** Recipient agrees to indemnify the Disclosing Party against all losses, damages, claims or expenses incurred or suffered by the Disclosing Party as a result of Recipient's breach of this Agreement. Recipient acknowledges that the Confidential Information it will obtain is unique and of a confidential and proprietary nature and that a breach of the terms of this Agreement will be wrongful and may cause irreparable injury to the Disclosing Party. Therefore, in addition to all remedies of law or equity, the Disclosing Party shall be entitled, as a matter of right, to injunctive relief enjoining and restraining Recipient and each and every other person or entity concerned thereby from continuing to act (or failing to act) in violation of the terms hereof. Recipient shall be liable for any and all damages (whether direct, indirect, consequential or otherwise) resulting from any breach of this Agreement.

5. **Return of Information.** Immediately upon the request of the Disclosing Party, all documentation and records of any nature and kind delivered to Recipient, its directors, officers, employees, accountants, legal counsel, representatives and affiliates shall be promptly returned and all copies of all such documentation, records, etc., made by any person or entity shall be promptly destroyed.

6. **Publicity.** Without the prior written consent of the Disclosing Party, the Recipient will not disclose to any person (a) that the Recipient has entered into discussions regarding possible future business and professional relationships with the Disclosing Party, (b) that the Recipient has received Confidential Information from the Disclosing Party, or (c) any of the terms, conditions or other facts with respect to any such possible transaction, including the status thereof.

7. **Acknowledgments of Recipient.** Recipient acknowledges that the Disclosing Party is not making any representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information or any other information concerning the Disclosing Party provided or

prepared by or for the Dis-closing Party and neither the Disclosing Party nor any of its officers, directors, employees, stockholders, owners, affiliates or agents, will have any liability to the Recipient resulting from the Recipient's use of the Confidential Information.

8. **Termination.** This Agreement shall expire six (6) months from the date hereof ("Term"). Upon expiration of the Term of this Agreement:

(a) all Confidential Information previously received by Recipient, and not previously returned, shall be promptly returned to the Disclosing Party in accordance with Paragraph "5" above; and

(b) all of the terms and conditions of this Agreement pertaining to the disclosure of Confidential Information shall remain in full force and effect in accordance with this Agreement.

9. **Waiver.** It is further understood and agreed that no failure or delay by the Disclosing Party in exercising any right, power or privilege hereunder will operate as a waiver thereof, not will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

10. **Governing Law.** This Agreement shall be interpreted and governed under the laws of the State of New York and each party hereby irrevocably and unconditionally consents to the exclusive jurisdiction of the courts of the State of New York for any action, suit or proceeding arising out of or relating to this Agreement and the transactions contemplated hereby.

11. **Notices.** All notices or documents required pursuant to this Agreement shall be effective if forwarded by certified or registered mail, return receipt requested addressed to the principal office of the party to such parties last know mailing address.

12. **Entire Agreement/Modification.** This Agreement represents the entire agreement between the parties hereto with respect to its subject matter and specifically supersedes any oral or written agreements heretofore entered into by the parties respecting the same. This Agreement may not be altered or modified without the express written consent of the parties.

IN WITNESS WHEREOF, the undersigned have executed this Confidentiality and Non-Disclosure Agreement the ____ day of _____, 20__.

RECIPIENT:

(signing individually and on behalf of any entity)

By:

Name:

Title:

DISCLOSING PARTY:

_____

§ 2.5
Checklist of Concerns When Assuming Responsibility for Another Attorney's Practice (Purchase or Acquisition)

The term "Acquiring Attorney" refers to the attorney purchasing or acquiring the law practice. "Selling Attorney" refers to the attorney selling, transferring or otherwise terminating the practice. Make sure you are familiar with RPC 1.17.

1. Status of Files. If possible, the Acquiring Attorney and the Selling Attorney should discuss the status of open files – what has been completed, what has not, what has been billed, what has been paid, etc.

2. Consider the overhead costs involved in acquiring a practice or the responsibility for a practice for an interim period.

3. Where the Acquiring Attorney does not have the expertise in one or more of the areas in which the Selling Attorney practiced, the Acquiring Attorney may refer such matters to other practitioners.

4. Immediately determine responsibility or the lack of responsibility for the IOLA and attorney escrow accounts. Rights and obligations of the Acquiring Attorney must be known – potential liability is significant.

5. Consider and recognize the personalities and practice habits of the Selling Attorney and Acquiring Attorney. For example, if the Selling Attorney met with clients in their homes or places of business, or if the staff was actively involved in the Selling Attorney's client relations, etc., the Acquiring Attorney should consider continuing in this same manner or advising the clients of the Acquiring Attorney's practices.

6. Consider whether to maintain the same fee policy as the Selling Attorney. If possible, determine in advance whether hourly rates or set fees will be used, and at what amounts, and whether to use retainer agreements. Disclosure of these items is required under the rules governing the sale of a law practice (RPC 1.17).

7. If time and the Selling Attorney's condition allow, that attorney should introduce the Acquiring Attorney to nonlawyer staff members, and referral sources such as insurance agents, bankers, realtors, accountants with whom the Selling Attorney worked. If the Selling Attorney is not available to assist in this capacity, the Acquiring Attorney should make immediate contact with those individuals, not only for purposes of preserving client relations, but to determine location of any missing clients, history of clients, etc. Many clients work with a team of advisors, and with the client's consent, the Acquiring Attorney should have discussions with each of these other professionals.

8. Review and analyze the Selling Attorney's technology systems for compatibility with Acquiring Attorney's systems. Because of the constant change in technology, the Selling Attorney or his or her staff should not only participate in transferring current technology in use, but also provide access to systems that historically have been used by the Selling Attorney but which

are not kept current. There is a significant amount of client information in the old files and systems.

9. If the practice is being sold, whether by the Selling Attorney or his or her estate, RPC 1.17 must be fully reviewed and understood. There are critical notice and time requirements which must be followed.

10. Immediately notify the Selling Attorney's accountant and/or bookkeeper and schedule a meeting in order to fully understand the financial reporting policy and habits of the Selling Attorney. If the Selling Attorney did his or her own accounting and tax preparation, the Acquiring Attorney's accountant should be given immediate access to those books and records that may be available to determine tax and financial liabilities of the Selling Attorney and the Acquiring Attorney.

11. Contact firms or practices with which the Selling Attorney was associated to determine whether any files remain with those practices. This will save the Acquiring Attorney a significant amount of time "searching" for files demanded by clients for past representation by the Selling Attorney. Also determine who bears the cost and the responsibility for acquiring or copying those files: the Acquiring Attorney or the Selling Attorney.

12. Consider file storage. The older the practice, the more time and expense will be involved in file review and management. This can be an expensive and cumbersome long-term solution. Bear in mind that, eventually, someone will have to review stored files and make sure they are returned to clients or disposed of in a manner that protects client confidentiality.

13. Determine whether "closed" files contain valuable or original documents such as wills, agreements, etc. Practices differ: one attorney's "closed" files may be considered another attorney's "open and continuing" files. For example, an attorney may habitually notify clients following every service that the representation has ceased and close a file. Others may never take this step and always assume that the client may be coming back for further representation.

14. In returning files, ensure that you are returning files to the "client." Obtain appropriate written consents from the clients or an authorized personal representative before returning files to a client's spouse, or family members.

15. Review "vendor" relationships with the Selling Attorney's vendors to determine whether prepayments were made for services or products that are not going to be used and whether bills are due for storage of files, stationery, supplies, etc.

16. In open estate files, determine whether the Selling Attorney's practices are consistent with the Acquiring Attorney's practices with respect to what services are covered on a quoted fee. For example, is a fee for probate limited to just the probate of the will or does it cover estate tax return preparation, will contests, etc.? Carefully review retainer letters and send modifications if necessary. Note that the RPC 1.17 requires notice as to whether the Acquiring Attorney is going to honor the Selling Attorney's retainer/ engagement agreements and arrangements. Arrangements differ. As the Acquiring Attorney, make sure you know what you are agreeing to before stating that you are honoring "all" the arrangements with all the clients.

17. Review accounts receivable when you are purchasing an attorney's practice. You may need to take steps with clients who have a poor payment history.

18. Consider referring a client to another attorney. Know your limitations, both with time and expertise. You need not assume all clients as an Acquiring Attorney.

19. When returning files to clients who have requested them, make a decision as to what you are returning. Will it be everything in the file? Are you responsible for anything in the file for which you will want to retain copies for your own liability protection? Are there documents that, under the rules, can and should be retained? Clients are entitled to original copies of their files (assuming they have paid their bills), but copies of the files may be retained for the benefit of the Selling Attorney so that the attorney or his or her estate could defend any claims against them. Proceed with caution.

20. Continuing liability insurance. If the attorney has died or has retired from practice, reporting endorsement coverage or "tail coverage" should be obtained. In the event of death, the policy may provide reporting endorsement coverage for a period of time at no additional cost (§ 5.11).

CHAPTER THREE

CLOSING ANOTHER LAWYER'S PRACTICE

INTRODUCTION

An attorney faced with the task of closing another attorney's law practice, whether the closure was due to planned or sudden circumstances, has several professional responsibility issues to address. Some of the issues may be ministerial such as sending letters to the landlord and vendors. However, and most notably, the attorney has fiduciary obligations which may not be obvious. Nonetheless, the practice must ensure that the clients' interests are protected and addressed no matter who is tasked with closing the practice ("the Responsible Attorney").

As an initial matter, the Responsible Attorney must think in terms of "triage," with the most pressing needs being addressed first. A review of files, calendars, diaries and even the desks of the attorney as well as their employees will allow the Responsible Attorney to make lists and to communicate with the closing practice's clients. The Responsible Attorney must immediately notify the closing practice's clients that the practice is closing. A review should result in a list documenting upcoming deadlines and determining the client files that need to be transferred to ensure that ongoing transactions and court dates are covered. The Responsible Attorney also needs to notify courts, administrative agencies and counsel of the closure of the practice.

Among other obligations, the Responsible Attorney must address return of fees and escrow balances, maintaining and closing files and referral of matters to new counsel. If the practice only had one attorney as a signatory on the escrow account(s), a successor signatory attorney needs to be appointed (only attorneys can be signatories on the escrow account(s)). Arrangements need to be made to collect fees and accounts receivable, as well as to return client funds and prepare an accounting of client escrow accounts. Where clients or third parties who own the funds cannot be located or the funds owners can't be identified, the attorney closing the practice may need to file a motion in the county where the lawyer's office is located to deposit the remaining amounts with the New York Lawyer's Fund for Client Protection.[1]

Thereafter, a review of closed files should be conducted to determine whether portions of the file or the whole file should be returned to the client (or third parties) and which files should be stored and for how long the file contents should be stored.

Importantly, a malpractice policy that includes extended reporting period ("tail") coverage should be purchased to protect the closing law firm and lawyer against any potential errors and omissions claims.

This chapter provides a Checklist for Closing Another Attorney's Office. The *Planning Ahead Guide* also provides sample forms as well as a list of relevant bar association ethics opinions to assist the Responsible Lawyer with closing their own practice or another lawyer's practice. We encourage all lawyers to review this information and to proactively plan ahead to ensure that the manner in which they close their practice goes smoothly. Doing so is likely to ensure that the reputation of the lawyer and the goodwill associated with their practice is maintained long after their practice is closed.

1 http://www.nylawfund.org/.

CONTENTS

§ 3.1
What If? Answers to Frequently Asked Questions About Closing a Law Practice on a Temporary or Permanent Basis

If you are planning to close your office or if you are considering helping a friend or colleague close their practice, there are numerous issues to resolve. How you structure your agreement will determine what the Responsible Attorney must do if the Responsible Attorney finds (1) errors in the files, such as missed time limitations; (2) errors in the Planning Attorney's trust account; or (3) defalcations of client funds.

Discussing these issues at the beginning of the relationship with your friend or colleague will help to avoid misunderstandings later when the Responsible Attorney interacts with the Planning Attorney's former clients. If these issues are not discussed, the Planning Attorney and the Responsible Attorney may be surprised to find that the Responsible Attorney (1) has an obligation to inform the Planning Attorney's clients about a potential malpractice claim or (2) that the Responsible Attorney may be required to report the Planning Attorney to the Disciplinary Committee.[2]

The best way to avoid these problems is for the Planning Attorney and the Responsible Attorney to have a written agreement, and, when applicable, for the Responsible Attorney to have a written agreement with the Planning Attorney's former clients. If there is no written agreement clarifying the obligations and relationships or plainly limiting the scope of the Responsible Attorney's role, the Responsible Attorney may find that the Planning Attorney believes that the Responsible Attorney is representing the Planning Attorney's interests. At the same time, the former clients of the Planning Attorney may also believe that the Responsible Attorney is representing their interests. It is important to keep in mind that an attorney-client relationship can sometimes be established by the reasonable belief of a would-be client.[3]

This section reviews some of these issues and the various arrangements that the Planning Attorney and the Responsible Attorney can make. Most of these frequently asked questions are presented as if the Responsible Attorney is posing the questions.

Q. ***Must I notify the former clients of the Planning Attorney if I discover a potential malpractice claim against the Planning Attorney?***

The answer is largely determined by the agreement that you have with the Planning Attorney and the Planning Attorney's former clients. If you do not have an attorney-client relationship with the Planning Attorney, *and* you are the new lawyer for the Planning Attorney's former clients, you must inform *your* client (the Planning Attorney's former client) of the error, and advise the client of the option of submitting a claim to the professional malpractice insurance carrier of the Planning Attorney, unless the scope of your representation of the client excludes actions against the Planning Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

2 RPC 8.3, https://nysba.org/attorney-resources/professional-standards/; See also NYSBA Ethics Opinions 531, 734, 854, https://nysba.org/news-center/?show_category=ethics-opinions.

3 RPC 1.7, 1.8 and 1.9.

If you are the Planning Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Planning Attorney and advise the Planning Attorney of the obligation to inform the client of the error.[4] If you are the attorney for the Planning Attorney, you would not be obligated to inform the Planning Attorney's client of the error. You would, however, want to be careful not to make any misrepresentations.[5] For example, if the Planning Attorney had previously told the client a complaint had been filed, and the complaint had *not* been filed, you should not reaffirm the misrepresentation and you might well have a duty to correct it under some circumstances. In any case, you or the Planning Attorney should notify the Planning Attorney's malpractice insurance carrier as soon as you become aware of any circumstance, error, or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to the "late notice" provision.

If you are the Planning Attorney's lawyer, an alternative arrangement that you can make with the Planning Attorney is to agree that you may inform the Planning Attorney's former clients of any malpractice errors.This would not be permission to represent the former clients on malpractice actions against the Planning Attorney. It would authorize you to inform the Planning Attorney's former clients that a potential error exists and that they should seek independent counsel.

Q. ***I know sensitive information about the Planning Attorney. The Planning Attorney's former client is asking questions. What information can I give the Planning Attorney's former client?***

Again, the answer is based on your relationship with the Planning Attorney and the Planning Attorney's clients. If you are the Planning Attorney's lawyer, you would be limited to disclosing any information that the Planning Attorney wished you to disclose. You would, however, want to make clear to the Planning Attorney's clients that you do not represent them and that they should seek independent counsel, as well as that you are not able or permitted to answer all of their questions. If the Planning Attorney suffered from a condition of a sensitive nature and did not want you to disclose this information to the client, you could not do so.

Q. ***Since the Planning Attorney is no longer practicing law, does the Planning Attorney have malpractice coverage?***

This depends on the Planning Attorney's professional liability insurance coverage. As a result, as a general rule, if the policy period has terminated, there is no coverage. However, most malpractice policies include a short automatic extended reporting period of usually 60 days after the termination date of the policy. This provides the opportunity to report known or potential malpractice claims when a policy ends and will not be renewed. In addition, most malpractice policies provide options to purchase an extended reporting period endorsement for longer periods of time. These extended reporting period endorsements do not provide ongoing coverage for new errors, but they do provide the opportunity to lock in coverage under the expiring policy for errors that surface after the end of the policy, but within the extended reporting endorsement time frame (§ 5.11).

4 RPC 1.4(a).

5 RPC 4.1, 8.4(c).

Q. ***What protection will I have under the Planning Attorney's malpractice insurance coverage, if I participate in the closing or sale of the office?***

You must check the definition of "Insured" in the malpractice policy form. Most policies define "Insured" as both the firm and the individual lawyers employed by or affiliated with the firm. This typically is broadened to include past employees and "of counsel" attorneys. In addition, most lawyers' professional liability policies specifically provide coverage for the "estate, heirs, executors, trustees in bankruptcy and legal representatives" of the Insured, as additional insureds under the policy.

Q. ***In addition to transferring files and helping to close the Planning Attorney's practice, I want to represent the Planning Attorney's former clients. Am I permitted to do so?***

Whether you are permitted to represent the former clients of the Planning Attorney depends on (1) whether the clients want you to represent them; and (2) whom else you represent.

If you are representing the Planning Attorney, you are unable to represent the Planning Attorney's former clients on any matter against the Planning Attorney. This would include representing the Planning Attorney's former client on a malpractice claim, ethics complaint, or fee claim against the Planning Attorney. If you do not represent the Planning Attorney, you are limited by conflicts arising from your other cases and clients. You must check your client list for possible client conflicts before undergoing representation or reviewing confidential information of a former client of the Planning Attorney.[6]

Even if a conflict check reveals that you are permitted to represent the client, you may prefer to refer the case. A referral is advisable if the matter is outside your area of expertise, or if you do not have adequate time or staff to handle the case. If you intend to participate in a referral fee, the requirements of RPC 1.5(g) must be met. In addition, if the Planning Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her may make you vulnerable to the allegation that you didn't completely advocate on behalf of your new client. To avoid this potential exposure, you should provide the client with names of other attorneys, or refer the client to the New York State Bar Association's Lawyer Referral Service[7] or other appropriate lawyer referral service.

Q. ***What procedures should I follow for distributing the funds that are in the Planning Attorney's escrow account?***

If your review of the Planning Attorney's escrow account indicates that there may be conflicting claims to the funds in the account, you should initiate a procedure for distributing the existing funds, such as a court-directed interpleader, pursuant to CPLR 1006.

If the client cannot be located, a judicial order may be sought seeking to fix the Planning Attorney's fee and disbursements, and deposit the missing client's share with the Lawyer's Fund for Client Protection.[8] As a matter of public policy, the Lawyer's Fund will accept deposits in sums of less than $1,000, without a formal application and court order.

6 RPC 1.7, 1.8 and 1.9.

7 https://nysba.org/new-york-state-bar-association-lawyer-referral-service/.

8 RPC 1.15(f).

Q. ***If there was a serious ethical violation, must I tell the Planning Attorney's former clients?***

The answer depends on the relationships. The answer is (A) no, if you are the Planning Attorney's lawyer; (B) maybe, if you are not representing the Planning Attorney or the Planning Attorney's former clients; and (C) maybe, if you are the attorney for the Planning Attorney's former clients.

(A) If you are the Planning Attorney's lawyer, you are not obligated to inform the Planning Attorney's former clients of any ethical violations or report any of the Planning Attorney's ethical violations to the disciplinary committee if your knowledge of the misconduct is a confidence or secret of your client, (the Planning Attorney).[9] Although you may have no duty to report, you may have other responsibilities. For example, if you discover that some of the client funds are not in the Planning Attorney's escrow account as they should be, you, as the attorney for the Planning Attorney, should discuss this matter with the Planning Attorney, and encourage the Planning Attorney to correct the shortfall.

If you are the attorney for the Planning Attorney, and the Planning Attorney is deceased, you should contact the personal representative of the estate. Remember that your confidentiality obligations continue even though your client is deceased. If the Planning Attorney is alive but unable to function, you may notify the Planning Attorney's clients of the Planning Attorney's situation and suggest that they seek independent legal advice.

If you are the Planning Attorney's lawyer, you should make certain that clients of the Planning Attorney do not perceive you as their attorney. This should include informing them in writing that you do not represent them.

(B) If you are not the attorney for the Planning Attorney, and you are not representing any of the former clients of the Planning Attorney, you may still have a fiduciary obligation (as an authorized signer on the escrow account) to notify the clients of the shortfall, and you may have an obligation under RPC 8.3 to report the Planning Attorney to the Disciplinary Committee. You should also report any notice of a potential claim to the Planning Attorney's malpractice insurance carrier in order to preserve coverage under the Planning Attorney's malpractice insurance policy.

If you are the attorney for a former client of the Planning Attorney, you have an obligation to inform the client about the shortfall and advise the client of available remedies such as pursuing the Planning Attorney for the shortfall and filing claims or complaints with the Lawyers' Fund for Client Protection,[10] the malpractice insurance carrier, and the Disciplinary or Grievance Committee. If you are a friend of the Planning Attorney, this is a particularly important issue. You should determine *ahead of time* whether you are prepared to assume the obligation to inform the Planning Attorney's former clients of the Planning Attorney's ethical violations. If you do not want to inform your clients about possible ethics violations, you must explain to your clients (the former clients of Planning Attorney) that you are not providing the clients with any advice about ethics violations of the Planning Attorney. You should advise the clients in writing to seek independent representation on these issues. Limiting the scope of your representation, however, does not eliminate your duty to report pursuant to RPC 8.3.

9 RPC 8.3, 1.6.

10 http://www.nylawfund.org/.

As a general rule, whether you have an obligation to disclose a mistake to a client will depend on the nature of the Planning Attorney's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm from the possible error or omission, and the likelihood that the Planning Attorney's conduct would be deemed so deficient as to give rise to a malpractice claim. Ordinarily, since lawyers have an obligation to keep their clients informed and to provide information that their clients need to make decisions relating to the representation, you would have an obligation to disclose to the client the possibility that the Planning Attorney has made a significant error or omission.

Q. ***If the Planning Attorney stole client funds, do I have exposure to an ethics complaint against me?***

You do not have exposure to an ethics complaint for stealing the money, unless in some way you aided or abetted the Planning Attorney in the unethical conduct. Whether you have an obligation to inform the Planning Attorney's former clients of the defalcation depends on your relationship with the Planning Attorney and with the Planning Attorney's former clients.

If you are the new attorney for a former client of the Planning Attorney, and you fail to advise the client of the Planning Attorney's ethical violations, you may be exposed to the allegation that you have violated your ethical responsibilities to your new client.

Q. ***What are the pros and cons of allowing someone to have access to my escrow account? How do I make arrangements to give the Responsible Attorney access?***

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you suddenly become unavailable or unable to continue your practice, the Responsible Attorney is able to transfer money from your trust account to pay appropriate fees, disbursements and costs, to provide your clients with settlement checks, and to refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account, until a court allows access. This court order may be through a guardianship proceeding, or an order for a court-directed interpleader, pursuant to CPLR 1006. This delay may leave your clients at a disadvantage, since settlement funds, or unearned fees held in trust, may be needed by them to hire a new lawyer.

On the other hand, the most important "con" of authorizing access is your inability to control the personwho has been granted access. Since serving as an authorized signer gives the Responsible Attorney the ability to write trust account checks, withdraw funds, or close the account, he or she can do so at any time, even if you are not disabled, incapacitated, or for some other reason unable to conduct your business affairs, or dead. It is very important to carefully choose the person you authorize as a signer, and when possible, to continue monitoring your accounts.

If you decide to allow the Responsible Attorney to be an authorized signer, you must decide if you want to give the Responsible Attorney (1) access only during a specific time period or when a specific event occurs (e.g., incapacity) or (2) access all the time.

Q. ***The Planning Attorney wants to authorize me as an escrow account signer. Am I permitted also to be the attorney for the Planning Attorney?***

Not if there is a conflict of interest. As an authorized signer on the Planning Attorney's escrow account, you would have a duty to properly account for the funds belonging to the former clients of the Planning Attorney. This duty could conflict with your duty to the Planning Attorney if (1) you were hired to represent him or her on issues related to the closure of their law practice and (2) there were defalcations in the escrow account. Because of this potential conflict, it is probably best to choose to be an authorized signer OR to represent the Planning Attorney on issues related to the closure of his or her practice, but not both.

§ 3.2
Checklist for Closing Another Attorney's Office

This is a checklist for an attorney who is closing another attorney's practice. The reason that the attorney is closing their practice will affect how you proceed. For example, if the attorney is disabled or deceased, you may need to make decisions without the attorney's assistance. To the extent that the attorney and the law firm staff are available, you should make every effort to seek their assistance. If you are closing an attorney's practice and selling it to another attorney, please refer to § 2.5.

Costs involved in closing for another attorney's practice can be significant. Be prepared and be careful about who is responsible for these expenses.

The term "Planning Attorney" refers to the attorney whose office is being closed and whose practice is being terminated. The "Responsible Attorney" refers to the attorney who is closing the Planning Attorney's practice.

1. Check the calendar and active files to determine which items are urgent. If possible, discuss with the Planning Attorney the status of open files. If the attorney has died or is otherwise unavailable, contact the secretary, paralegal or other assistants who worked with the Planning Attorney. Staff members often have relationships with the clients and a great deal of helpful information. If possible, retain and compensate the staff while you are closing the Planning Attorney's practice.

2. On cases in suit, expect a full and active litigation calendar awaiting compliance. Immediately review upcoming trial dates and note of issue filing deadlines, scheduled court dates, appearances, depositions, motion return dates and filing dates for briefs, pleadings and discovery responses. Obtain a run of the calendar for the next six months. Expect that some active and upcoming dates may not be docketed on the calendar. Discover these by reviewing each case file, and communicating with opposing counsel or the court. In civil litigation, many cases are governed by a judicial preliminary conference order which directs that each phase of a case occur by a certain date. Check the preliminary conference order in every case. If extensions are needed on the preliminary conference scheduling order, seek extensions in writing well before close of the discovery period. Determine what can be adjourned and what needs to be dealt with. Courts and opposing counsel are generally cooperative about adjourning matters when disability strikes, but need as much advance notice as possible.

3. Contact clients for matters that are urgent or immediately scheduled for hearing or court appearances, or discovery. Obtain permission to postpone or reschedule.[11] Talk to clients about retaining new counsel to take over responsibility for their matters.

4. Contact courts and opposing counsel about files that require immediate discovery or court appearances. Reschedule hearings or obtain extensions where necessary. Confirm extensions and adjournments in writing.

11 *See* CPLR 321(c).

5. For transactional matters, check the underlying contract for deadlines in which to send notices, to take actions or to close the transaction and identify funds that are held in escrow. Confirm material terms with clients and, if prudence requires, with the counter-party's attorney.

6. Immediately determine who is responsible for the IOLA and attorney escrow accounts. If there is another signatory on the account, contact that attorney immediately. Obtain written instructions from clients and third parties concerning funds in the IOLA and trust accounts. If the escrow accounts do not appear to be in order, you may need to arrange for an audit of the accounts to determine whether there are adequate funds to meet escrow obligations before disbursing the funds on deposit in the accounts.

7. Promptly address open litigation matters. Check the applicable statutes of limitations and procedural deadlines in each file. Statutes of limitations range from ninety-day notice of claim periods to six or nine months to three years for tort actions, and beyond. There are mandatory deadlines for perfecting appeals, filing tax forms, commencing Article 78 proceedings, seeking review of property tax assessments and nearly every judicial or administrative challenge. With respect to matters not within your areas of expertise, consult with other lawyers to determine the timeliness of issues referred to in the Planning Attorney's files.

8. Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate file.

9. Contact clients with active files and explain that the Planning Attorney's law office is being closed and that you are handling the closing. Confirm this in writing. (See sample letters in § 3.5). Advise the clients to promptly retain new counsel and make arrangements to have their files returned to them or transferred to new counsel. Provide clients with a date by which they should pick up their files or send instructions to deliver the file to another attorney and describe the consequences of their failure to do so.

   You may recommend successor counsel to the client, including yourself. Transfers of files and changes of counsel often raise issues of fees owed to the Planning Attorney and must be dealt with at the time of transfer. For example, if a matter was being handled on a contingency fee basis, attempt to negotiate the Planning Attorney's share of such fee with the attorney who is taking over the representation, before the file is transferred or the new attorney substituted as counsel. Similarly, if a matter was being handled on an hourly basis and there are outstanding fees owed to the Planning Attorney, payment should be obtained or secured, if possible, before the file is delivered to the client or transferred to new counsel. If satisfactory arrangements or agreement is not possible, you may need to file an application with a court. Charging and retaining liens may be asserted in appropriate cases, with some limitations.

10. For each case pending in court or before an administrative body, make sure that a Substitution of Counsel is served on the parties and filed with the court. If there is no Substitution of Counsel, you may have to make a motion to have the Planning Attorney relieved of representation of the client.[12]

12 See RPC 1.16.

11. Notify the Planning Attorney's accountant of your involvement in closing the Planning Attorney's practice and seek assistance in reviewing financial records, including IOLA and escrow accounts. If the Planning Attorney acted as his or her own accountant and tax preparer, the Responsible Attorney should retain an accountant to determine the financial status and tax liabilities of the Planning Attorney. The Responsible Attorney should decide how financial accounting will be carried out during the period in which the Planning Attorney's practice is being closed.

12. The general rule is that files belong to clients, not their attorneys. The exceptions to that rule are that lawyers' notes are generally not the property of the client and a client whose bill is unpaid does not necessarily have a right to the file. If a client wants an original file, you should prepare and obtain a signed receipt for it. Review the content of each file before returning it to the client who has requested it. Decide whether you need to retain a copy of all or some portion of the file. Consider retaining documents for the benefit of the Planning Attorney so that the attorney or the estate can defend claims if necessary. Return all closed files to clients. Closed files that cannot be returned may be destroyed (*i.e.*, shredded) if there are no original client documents or property contained in such files and efforts to reach the clients are unsuccessful and if the rules requiring retention of such files are complied with. Files that must be maintained because they cannot be returned or destroyed should be preserved and an authorized custodian should assume responsibility for such files.

    Original wills and other original documents must be returned to clients and may not be destroyed or otherwise disposed of. In the case of original wills, if you are unable to locate the clients after a diligent search, you may file such wills with the Surrogate's Court (be aware of filing fees) or deposit them with an appropriate depository (*e.g.,* the appropriate county bar association) and notify the clients in writing, addressed to their last known address. Do NOT destroy them.[13]

    When returning files, make sure that you are returning them to the proper client. If a husband and wife executed wills years ago and the wife responds to your client inquiry letter by asking for the file, do not send back the husband's will without his written authorization. The same rule applies to corporations, shareholders, business partners, etc. Seek court or ethics committee guidance where appropriate.

13. To locate clients for whom there are no current addresses, contact the postal service and other sources of information. If necessary, consider publication to advertise that the firm has closed. Be careful not to disclose confidential client information, including the existence of the attorney/client relationship, to third parties.

14. If the Planning Attorney whose practice is being closed was a sole practitioner, arrange for calls to his or her phone number to be forwarded to a new number. This eliminates the problem created when clients call the Planning Attorney's phone number, get a recording stating that the number is disconnected and do not know where to turn for information. Even if the Responsible Attorney has not agreed to take on this responsibility, there is often no other alternative available.

13 See FAQs Re Document Destruction and Preservation, § 5.12.

15. Prepare a final billing statement showing any outstanding fees due. Remit money received from clients for services rendered by the Planning Attorney to his or her estate or as directed by the Planning Attorney or personal representative. Review applicable retainer agreements and engagement letters. If there are fee disputes with clients, you may have to negotiate and settle outstanding fees owed to the Planning Attorney. Notify the Planning Attorney's accountant to obtain a full understanding of the Planning Attorney's accounting procedures.

16. If authorized, pay business expenses and liquidate or sell the practice. If the Planning Attorney has died, work with his or her fiduciary to resolve these matters.

17. Make arrangements through the Planning Attorney or his or her fiduciary to obtain reporting endorsement coverage on professional liability insurance for continuing professional liability coverage. Review other business insurance policies and determine which may be canceled and whether there is coverage in the event of the Planning Attorney's disability or death.

18. Begin terminating all vendor and other contractual obligations of Planning Attorney, including lease obligations.

§ 3.3
Checklist of Concerns When Assuming Temporary Responsibility for Another Attorney's Practice (Disability or Suspension)

The term "Responsible Attorney" refers to the attorney who is assuming temporary responsibility for another attorney's practice. The term "Planning" refers to the attorney who is disabled, temporarily or permanently, or who has been suspended, resigned or disbarred. If you are purchasing the Planning Attorney's practice, please refer to § 2.5 and RPC 1.17. The "Responsible Attorney" and the "Planning Attorney" should determine, in advance, whether the Planning Attorney's law practice can or should be sold, either to the Responsible Attorney or to another attorney or law firm, and on what terms. While many law practices do not have a realizable value, some do and the Planning Attorney may be entitled to realize that value.

1. If possible, discuss with the Planning Attorney the status of open files—what has been completed, what has not, what has been billed, etc. The Planning Attorney may or may not be available to discuss individual matters. Often the Planning Attorney will know what matters require the most immediate attention, and will be able to prioritize his or her caseload to assist you in your caretaker responsibilities.

2. Consider who will be responsible for the overhead costs involved in managing the practice for the interim period. Address compensation of the Responsible Attorney.

3. Where the Responsible Attorney does not have the expertise in one or more of the areas in which the Planning Attorney practiced, the Responsible Attorney should enlist the assistance of other practitioners. The Responsible Attorney may seek such assistance through the court (if court-appointed) or through the bar association referral service.

4. Immediately determine who is responsible for and who is a signatory on the Planning Attorney's IOLA and attorney escrow accounts. If there is a second signatory on the account, contact that attorney immediately. If there is no second signatory, you may assume responsibility for the accounts if they are in order. If the recordkeeping for the IOLA or escrow account is not adequate to determine who is entitled to the funds on deposit in such accounts or whether the accounts are fully funded, you may need to arrange for an audit of the accounts to determine whether there are adequate funds in the accounts for the clients and third parties entitled to receive such funds. You may consider alternatives to becoming a signatory on an account that is not fully reconciled and adequately funded. Seek ethics advice if necessary.

5. In assuming temporary responsibility for the Planning Attorney's practice, consider and recognize the Planning Attorney's "practice habits." For example, if the attorney met with clients in their homes or places of business, or if the staff was actively involved in the attorney's client relations, consider continuing in this same manner or advising the clients of your practices. Clearly advise clients of their right to seek new counsel of their own choosing. Give as much information as possible to clients as to the expected return of the Planning Attorney to active practice, if that is likely. Take great care to properly advise the clients in this regard. Inaccurate information given to the client may have an adverse impact on the client or the client's case, as well as an adverse impact on the practice.

6. Consider whether to maintain the same fee arrangements if the Responsible Attorney is to render legal services to the Planning Attorney's clients. If possible, determine in advance whether hourly rates or flat or staged fees will be used, and at what amounts. You may need new retainer agreements confirming the new arrangements, even if temporary. Disclosure of fee arrangements is required under RPC 1.5 and perhaps advisable under the spirit of RPC 1.17, governing the sale of a law practice, although there is little direction in the Rules as to how fees are to be handled in these circumstances. If time and the Planning Attorney's condition allow, the attorney should introduce the Responsible Attorney to non-lawyer staff members, referral sources such as insurance agents, bankers, realtors, and accountants with whom the attorney worked. If the Planning Attorney is not available to assist in this capacity, the Responsible Attorney may contact these people, not only for purposes of preserving client relations, but also to determine the location of any missing clients and, if needed, to facilitate the temporary operation of the Planning Attorney's practice. Many clients work with a team of advisors and, with the client's consent, the Responsible Attorney may have discussions with these other professionals.

7. Notify the Planning Attorney's accountant. If the Planning Attorney did his or her own accounting and tax preparation, the Responsible Attorney's accountant, with authorization, may assist in determining the tax and financial liabilities of the Planning Attorney. The Responsible Attorney should decide how financial records will be maintained during this temporary management of the practice of the Planning Attorney.

8. Review "vendor" relationships with the Planning Attorney's vendors. Determine whether prepayments have been made for services and products that will not be used, and whether bills for storage of files, stationery, supplies, etc. must be paid.

9. Immediately address open litigation matters. Check the statute of limitations on each file. There are numerous litigation-related statutes of limitations, ranging from a ninety-day notice of claim to perfecting an appeal in six or nine months, to three years in filing various tort actions. In other practice areas, tax forms, Article 78 proceedings, administrative appeals, construction liens, and grievances to real property tax assessments, all must be filed or served by specific dates. Recognize, understand and comply with time limitations on each file.

   On cases in suit, expect a full and active litigation calendar awaiting compliance. Immediately review upcoming trial dates, expert disclosure and note of issue filing deadlines, court dates, appearances, depositions, motion return dates, and brief, pleading, and discovery document filing dates. Ask for a run of the calendar for the next six months. Also, expect that some active and upcoming dates may not be docketed on the calendar. Discover these by reviewing each case file, and communicating with opposing counsel or the court. In civil litigation, many cases are run by judicial preliminary conference scheduling order, which directs that each phase of the case occur by a certain date. Check these immediately in every case. If extensions are needed on the preliminary conference scheduling order, issue letters to this effect well before the close of the discovery period. Determine what can be adjourned, and what needs to be dealt with. Courts and opposing counsel are generally cooperative about adjourning matters when disability strikes, but need as much advance notice as possible.

10. Reassure the existing clients that their cases are being handled properly, and that the Planning Attorney will return to the practice soon, if that is the case. Consider meeting the clients personally to reassure them and answer their questions. After taking care of the immediate concerns, review each file in detail. If the Planning Attorney will be out for a significant length of time but will return at some point, and the clients have not engaged other counsel, as the Responsible Attorney one of your concerns will be to maintain the revenue stream to keep the practice financially healthy. Consider drafting an internal case management plan for each file. This should move the files ahead in an orderly and sequenced fashion and flag relevant compliance dates.

§ 3.4
Checklist for the Fiduciary of a Solo Practitioner

If you have been appointed as the Executor or Administrator of the estate of an attorney who is practicing as a solo practitioner at the time of his or her death, it is important to quickly address many issues that are unique to the deceased practitioner's practice. This is especially true if the death of the solo practitioner was sudden and unexpected.

If a solo practitioner has died, his or her clients for whom services were being performed at the time of death must be advised immediately. In addition, steps must be taken to ensure that those clients are properly advised as to the status of their matter and how they may retain substitute counsel. This must be done in a manner that will preserve the attorney-client privilege. This checklist is intended to address those matters that are unique to being the executor of an attorney's estate. It is not, however, an exhaustive list of all matters that are to be handled by an executor of an estate. The estate's legal counsel should be consulted to ensure that your duties are properly carried out during the administration of the estate.

As stated below, all of these issues should be addressed while the attorney is alive and well. Many matters involving an attorney's practice are time sensitive and, if not handled properly in the event of death, the estate may find itself faced with unnecessary liability. Hopefully, this checklist can act as a planning tool as well as a tool to be used in a time of crisis upon an attorney's death.

1. **Retain legal counsel immediately.** Legal counsel should be retained immediately to review the open matters that were being handled by the deceased attorney. If the attorney has designated an attorney to handle the closing of his or her office that attorney should be contacted immediately. The attorney's will and other estate planning documents including trusts or written instructions should be reviewed.

   A designated attorney can ensure that the attorney-client privilege is maintained for the protection of the client. Hopefully, he or she has also had conversations with the Planning Attorney so that new counsel is aware of what needs to be done with respect to closing or transferring the practice.

2. **The Advisory Team.** There will, of course, be many matters that must be handled during the administration of an estate. The items listed above are only a few of the many matters that must be addressed. However, a solo practitioner's practice is unique in that it cannot continue to operate during the administration of an estate without a licensed and qualified attorney in place to take care of clients' matters. Because it may not be possible for someone to immediately step in and take over a practice, it is extremely important that a team of qualified advisors be quickly assembled to ensure that the practice and its clients are protected.

3. **Work with staff.** If the attorney had a secretary or assistants working with him or her at the time of death, contact them and determine what emergencies must be attended to and what needs to be done to begin the closing process.

   If possible, retain and compensate staff during the closing phase of the practice. In many cases, staff members have a relationship with the clients of the practice and a great deal of knowledge that will be helpful to you as executor and to the advisors for the estate.

4. **Preservation of the practice.** It may be important to the attorney's estate to ensure that the value of the practice is maintained in order to allow the estate to sell the practice to another attorney or law firm. If a Responsible Attorney has been designated as described above, he or she may be the intended transferee. Consult with legal counsel for the estate to be certain that the proper steps are being taken to maintain the value of the practice within the estate.

5. **Contact accountant.** Contact the deceased attorney's bookkeeper and accountant immediately to ensure that work in process is properly billed, that receivables are collected and that all financial matters involving the practice are properly taken care of as soon as possible. All trust accounts should be carefully reviewed by estate counsel and the accountant for the firm to ensure that funds are properly handled during the administration of the estate.

6. **Office matters.** Contact the landlord and, if necessary, desirable and appropriate, arrange for the assignment of the lease to the Responsible Attorney, the termination of the lease or the subletting of the lease to another party.

   Contact all vendors and stop services as soon as possible. Cancel all subscriptions and electronic or online legal research services.

   Contact equipment leasing companies (including vehicle leasing companies) as soon as possible. In some cases, vehicle lease arrangements will provide for a termination of the lease in the event of death. This should be investigated. If leases cannot be terminated without penalty, subleasing should be considered. Otherwise, it will be necessary to set aside enough funds in order to pay the leasing fees for the duration of the lease terms.

   Notify utility companies of the change in the customer. During the administration of the estate, it may be necessary to have the estate as the customer.

   Contact all associations with which the attorney had memberships and terminate the memberships. This would include the New York, American and any local or specialty bar associations. Office staff should be helpful in determining what memberships are in effect.

   Continue malpractice insurance if necessary. Most policies will provide that the insured must be insured at the time a claim is made against the attorney. Therefore, obtain "Reporting Endorsement Coverage" that will provide protection to the attorney's estate until all applicable statutes of limitations expire. The carrier may provide such coverage at no cost in the event of death. This should be determined immediately.

7. **Plan Ahead.** A practice and its value can quickly disappear without proper administration at the time of death. In addition there can be significant liability for the estate if the practice is not properly taken care of in such a time of crisis. If a solo practitioner has requested that you act as the executor or trustee for his or her estate, you should address all of these items with the attorney during the estate planning stages. None of these matters should be left until the time of death to address.

§ 3.5
Letter from Planning Attorney Advising That Lawyer Is Closing Law Office

Re: [Name of File, Case or Matter]

Dear [Client Name]:

Please be advised that as of *[date],* I will be closing my law practice due to *[provide reason, if possible, such as health, disability, retirement, or other reason].* I will be unable, therefore, to continue to represent you in your legal matter(s). It is your responsibility to immediately retain new counsel of your choice to handle your matter(s). You may select any attorney you wish, or upon request I can provide you with a list of local attorneys who practice in the area of law relevant to your legal needs to the extent that I can. Also, our local bar association [phone number] and the New York State Bar Association [phone number] provide lawyer referral services that you may choose to utilize.

Failure to select and retain new counsel promptly may be detrimental to you and result in adverse consequences. When you have selected your new attorney, please provide me with written authorization to transfer your file(s) to [him/her]. If you prefer, you may come to my office and retrieve [a copy/copies] of your file(s), and deliver [it/them] to your new attorney. In either case, it is imperative that you obtain a new attorney as soon as possible, and in no event later than [date], so that your legal rights may be preserved. *[Insert appropriate language regarding time limitations or other critical timelines of which the client should be made aware.]*

I *[or: insert name of the attorney who will store files]* will continue to maintain my copy of your closed file(s) for seven years. After that time, I [or, insert name of other attorney if relevant] may destroy my [copy/copies] unless you notify me immediately in writing that you do not want me to do so. [If relevant, add: If you object to (insert name of attorney who will be storing files) storing my [copy/copies] of your closed file(s), please let me know immediately and I will accommodate you by making alternative arrangements.]

If you or your new attorney desire [a copy/copies] of your closed file(s), please promptly contact me to make suitable arrangements.

Within the next [fill in number] weeks, I will provide you with a full accounting of your funds in my trust account, if any, and any fees you currently owe for services rendered.

You will be able to reach me at the address and phone number listed indicated in this letter until [date]. After that time, you or your new attorney may reach me at the following phone number and address: [Name] [Address] [Phone]

I appreciate the opportunity of having represented you. Please contact me if you have any questions or concerns.

Thank you.

Sincerely,
[Attorney] [Firm]

§ 3.6
Letter from the Responsible Attorney Advising that Lawyer Is Unable to Continue Law Practice

Re: [Name of File, Case or Matter]

Dear [Client Name]:

Due to _____ (provide reason for inability *to practice*, such as health, disability, retirement, death, discipline, or other), [*Planning Attorney*] is no longer able to continue the practice of law. You will need, therefore, to retain the services of another attorney to represent you in your legal matter(s), and I encourage you to do so immediately to protect your legal interests and avoid adverse consequences or action against you. I will assist [*Planning Attorney*] in closing [his/her] practice.

You will need [a copy/copies] of your file(s). Accordingly, enclosed please find a proposed written authorization for your file(s) to be released directly to your new attorney. When you or your new attorney returns this signed authorization, I (we) will release your file(s) as instructed. If you prefer, you may come to *[address of office or location for file pick-up]* and retrieve [it/them] so that you may deliver [it/them] to your new attorney. In either case, it is imperative that you act promptly, and in no event later than [provide date] so that your legal rights may be preserved.

Your closed file(s), if any, will be stored at *[location].* If you need a closed file, you may contact me at the following address and phone number until [date]:
[Name] [Address] [Phone]

After that time, you may contact [*Attorney in charge of closed files*] for your closed file(s) at the following address and phone number:
[Name] [Address] [Phone]

You will shortly receive a final accounting from *[Planning Attorney],* which will include any legal fees you currently owe [him/her], and an accounting of any funds in your client trust account.

On behalf of *[Planning Attorney],* I would like to thank you for affording *[him/her]* the opportunity to provide you with legal services. If you have any additional concerns or questions, please contact me at the address and phone number indicated in this letter.

Thank you.

Sincerely,
[Responsible Attorney] [Firm]

§ 3.7
Letter from Firm Offering to Continue Representation

Re: [Name of File, Case or Matter]

Dear [Client Name]:

Due to _____ (provide reason for inability to practice, such as, ill health, disability, retirement, suspension, death, other) [*Planning Attorney*] is no longer able to continue representing you in your legal matter(s).

A member of this firm, [name], is available to continue handling your matter(s) if you wish. You have the right, however, to select any attorney of your choice to represent you. If you wish this firm to continue handling your matter(s), please sign the authorization at the end of this letter and return it to us.

If you wish to retain another attorney, however, please provide us with written authority to release your file(s) directly to [him/her]. If you prefer, you may come to our office and pick up [a copy/copies] of your file(s) and deliver [it/them] to your new attorney. We have enclosed these authorizations for your convenience.

Since time deadlines may be involved in your case, it is imperative that you act immediately. Please provide a written authorization for us either to represent you or to transfer your file(s) to your new counsel by [date].

We wish to make this transition as easy as possible for you. Please feel free to contact me with any questions you may have.

Thank you.

Sincerely,
[*Responsible Attorney*]

Enclosures

I want a member of the firm of [insert law firm's name] to handle my matter(s) in place of [*insert Planning Attorney's name*]

_____ _____

[Client] [Date]

§ 3.8
Authorization for Transfer of Client File

I hereby authorize the law office of [Firm/Attorney's Name] to deliver a [copy/copies] of my file(s) to my new attorney(s) at the following address:

_____

_____

_____

_____ _____

[Client] [Date]

§ 3.9
Request for File

I hereby request that [Firm/Attorney's Name] provide me with [a copy/copies] of my file(s). Please send the file(s) to the following address:

_____

_____

_____

_____ _____

[Client] [Date]

§ 3.10
Acknowledgment of Receipt of File

I hereby acknowledge that I have received [a copy/copies] of my file(s) from the law office of [name].

_____ _____

[Client] [Date]

§ 3.11
What Happens When a Sole Signatory Dies?

The Supreme Court has authority to appoint a successor signatory for the attorney trust account. The procedures are set forth in court rules in RPC 1.15 (g)). The application shall be made in the judicial district in which the deceased lawyer maintained a law office.[14]

Only members of the New York Bar can be signatories on the bank account. If you take on the responsibility as a successor signatory on an Attorney Trust Escrow Account there are a number of things to be aware of if the escrow records are not clear as to which client the funds belong.

In certain instances, a lawyer may allow a paralegal to use the lawyer's signature stamp to execute escrow checks from a client trust account so long as the lawyer supervises the delegated work closely. The lawyer though remains completely responsible for any misuse of funds. If the attorney has done this the paralegal may be helpful in determining who the trust funds belong to.

Only personal funds of the lawyer which are reasonably sufficient to maintain the account may be deposited into the attorney trust account as there may be unforeseen bank service charges. Determine the amount deposited and any bank charges that were not repaid or deducted from the specific client funds.

The presumption in New York State is that an advance legal fee becomes the lawyer's property when it is paid by the client unless the retainer agreement provides otherwise. As such, the fee should be deposited in the business account, and not in the attorney trust account. But many attorneys are not aware of this and will deposit advance legal fees in a trust account.

In personal injury cases a settlement payment is generally composed of client funds and attorney legal fees and disbursements in a single check which then must be deposited in a trust account. Frequently the attorney pays the client but retains the legal fee and/or disbursements in the trust account. The same is true of a real estate downpayment which is frequently used to pay the attorney fees at or after closing as well as the balance payment to the client-seller.

If a lawyer cannot locate a client or another person who is owed funds from the attorney trust account, the lawyer is required to seek a judicial order to fix the lawyer's fees and disbursements, and to deposit the client's share with the Lawyers' Fund for Client Protection[15]. To preserve client funds, the Lawyers' Fund will accept deposits under $1,000 without a court order. Lawyers must comply with the records retention requirements of RPC 1.15(d)—7 years.[16]

14 *See* RPC 1.15 (§ 3.12) and Sample Forms § 3.13, 3.14, 3.15 and 3.16.

15 http://www.nylawfund.org/.

§ 3.12
Rule 1.15 (Eff. April 1, 2009; amended, eff. April 1, 2021)

PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check and overdraft reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained. No special account or trust account aforementioned may have overdraft protection.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

16 *See also* RPC 1.15(i).

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) opies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special

account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

§ 3.13
Application Escrow Accounts—For Access to and Appointment of a Successor Signatory to Close Account

SUPREME COURT: STATE OF NEW YORK:

COUNTY OF _____

----------X

In the Matter of the Application of

_____

for Access to and Appointment of a Successor Signatory to Close the Accounts of

_____

Attorney Trust/IOLA,
a Deceased Attorney.

----------X

Index No. _____

APPLICATION
ESCROW ACCOUNTS

THIS IS AN EX PARTE APPLICATION

_____, an attorney duly admitted to practice law in the State of New York affirms the following under the penalties of perjury:

1. I am a member of the firm of _____, and have been retained by _____, (Wife, Executor, Administrator, Guardian) of Mr./Ms. _____, an attorney who was duly admitted to practice in NY but is now deceased (Decedent), to help close Decedent's law office. OR I am a member of the Lawyer's Assistance Program of the _____ County Bar Association. OR DESCRIBE WHO YOU ARE IN RELATIONS TO DECEASED ATTORNEY in that capacity make this application for the Appointment of myself OR _____ OR Court to Appoint _____ to access all the bank accounts, including all escrow and operating accounts, of Decedent. [This is being done *"Pro Bono"*.]

2. Decedent was an attorney duly admitted practice in the State of New York who practiced in _____ County and died on _____, 20____. Annexed is a copy of the death certificate. [There has been no Executor or Administrator appointed for the estate.] OR [The Executor or Administrator appointed for the estate is _____ who is not an attorney] and only an attorney can sign on Attorney Trust/Escrow Accounts.

3. In the course of closing the Decedent's law practice, it was discovered that there are still funds in the attorney escrow account under a Client Funds Management/or Trust/IOLA Account #_____ at _____ Bank. This account also has sub-accounts for various clients.

4. There is also an Attorney Trust/IOLA account under the title of _____-* at _____ Bank under Account #_____. There may also be other accounts in Decedent's name but there are no current bank statements. On information and belief, no one other than Decedent can sign on the accounts and the Bank will not release any information about the accounts or the balances to anyone.

4. Although I have conducted a thorough review of the escrow account and have concluded that there are the funds belong to the clients, I cannot complete the review without determining whether certain funds were paid and cleared the accounts.

5. Therefore, request is made for an Order allowing me to have access to all the bank records of Decedent at _____ Bank. [Once I have access to the accounts, I can then determine which client is to receive funds from which account and apply to the Court for appointment of a Successor Signature on the accounts.] OR ADD [and request is made for an Order appointing (name attorney or leave a blank for court appointment) _____ an attorney to become the signatory on the account and to disburse the funds in the IOLA Account to _____(client)_____ or to those clients it is then determined are entitled to the funds (set forth the manner of disbursement) and to then close the account.

AFFIRMED _____, 20___

_____
ATTORNEY

§ 3.14
Access Order for an Appointment of a Successor Signatory to Close Account

SUPREME COURT: STATE OF NEW YORK

COUNTY OF _____

----------X

In the Matter of the Application of

_____ Index No. _____

for an Appointment of a Successor Signatory to Close the Accounts of

EX PARTE ORDER

_____,

a deceased attorney.

----------X

Upon reading and filing the annexed Affirmation of _____, Esq., dated _____, the Affidavit of _____ (Executor/Administrator-non-attorney relative), dated _____ and the exhibits annexed thereto, for an Order allowing access to the bank accounts of _____, a deceased lawyer, for the purpose of determining who is entitled to the funds in those accounts, it is hereby

ORDERED, that _____, Esq. is hereby authorized to access all the bank accounts of _____ at _____ Bank(s), including but not limited to, Account # _____ and all sub-accounts and Account #_____ and it is further

ORDERED, that, in the event any other accounts of Decedent, as attorney, are discovered at any Bank, _____ is hereby authorized to access such accounts, and it is further

ORDERED, that no funds are to be disbursed until further order of this Court.

ENTER:

_____

J.S.C.

§ 3.15
Sample Application – For Appointment of a Successor Signatory to Close Escrow Account

SUPREME COURT: STATE OF NEW YORK

COUNTY OF _____

----------X

In the Matter of the Application of

_____

Index No.:_____

for Appointment of a Successor Signatory to Close (pay clients due funds from) an Escrow Account of

APPLICATION
ATTORNEY
ESCROW ACCOUNT

_____,

a Deceased Attorney.

----------X

THIS IS AN EX PARTE APPLICATION

_____, an attorney duly admitted to practice law in the State of New York, affirms the following under the penalties of perjury:

1. Describe who you are in relations to deceased attorney (Decedent) and why make this application for (Appointment of a Successor Signatory to Close (pay clients due funds from) an Escrow Account of _____ (state the relief requested) on the Escrow Account of _____ at _____ Bank, N.A. under Account No.: _____. Such as YOU REPRESENT X TO COMPLETE THE REAL ESTATE TRANSACTION.

2. _____ was an attorney duly admitted practice in the State of New York who practiced in_____ County and died on _____ OR (seriously ill & can no longer practice.) Annexed is a copy of the Decedent's death certificate. There has been no Executor or Administrator appointed for the estate. Even if one were appointed, such as the spouse, only an attorney can sign on escrow accounts. OR

In the course of (completing the real estate transaction) (closing the Decedent's law practice,) it was discovered that there were still funds in the Decedent's attorney escrow account at _____ Bank, N.A. under Account No.: _____ in the amount of $_____ which belongs to _____ OR under a Client Funds Management Account #_____ at _____ Bank. This account also has sub-accounts for various clients. Presently, this

account has $_____. (IOLA interest is paid out) YOU SHOULD EXPLAIN THE SITUATION.

[Add information regarding an Operating account if one exists with funds and no signator and Bank will NOT release to Executor or Administrator [but they should].]

3. I have conducted a thorough review of the escrow account and have concluded that the sum of $_____ of the funds at _____ Bank, N.A. under Account No.: _____ belong to __(_client)_____ of _____(address)_____. There was no other client claiming these funds. OR

4. Although I have conducted a thorough review of the escrow account and although I have concluded that there are funds belong to the clients, I cannot complete the review without determining whether certain funds were paid and cleared the accounts.

5. Therefore, request is made for an Order allowing me to have access to all the bank records of Decedent. at _____ Bank. Once I have access to the accounts, I can then determine which client is to receive funds from which account [and apply to the Court for appointment of a Successor Signature on the accounts.]

IF YOU KNOW WHO THE FUNDS BELONG TO YOU SHOULD ASK THAT AN ORDER BE ISSUED TO THE BANK TO ISSUE A CERTIFIED/BANK CHECK DIRECTLY TO CLIENT

4. There is also an IOLA account under the title of IOLA-_____at _____ Bank under Account #_____. There may also be other accounts in the Decedent's name but there are no current bank statements. On information and belief, no one other than the Decedent can sign on the accounts and the Bank will not release any information about the accounts or the balances to anyone.

4. Annexed is a statement from the _____ Bank from _____, 20___ showing a balance of $_____.

Therefore, I request that AN ORDER BE ISSUED TO THE BANK TO ISSUE A CERTIFIED/BANK CHECK DIRECTLY TO CLIENT IN THE AMOUNT OF $_____. OR ADD and further request is made for an Order appointing (name attorney or leave a blank for court appointment) _____an attorney to become the signatory on the account and to disburse the funds in the IOLA Account to _____(client)_____ or to those clients it is then determined are entitled to the funds (set forth the manner of disbursement) and to then close the account.

Dated: _____, 20___

_____
Name of Attorney
Address/phone number/email

§ 3.16
Pay and Sign Order for Appointment of a Successor Signatory to Close Account

SUPREME COURT: STATE OF NEW YORK:

COUNTY OF _____

----------X
In the Matter of the Application of

_____ Index No. _____

for a Appointment of a Successor Signatory to Close the Accounts of

EX PARTE ORDER

_____,

a deceased attorney.
----------X

Upon reading and filing the annexed Affirmation of _____ Esq., dated _____, and the exhibit annexed thereto, for an Order appointing him/her as a successor signatory on the _____ Bank IOLA Escrow account #_____ of _____, a deceased lawyer, to allow payment therefrom to those entitled to the funds, it is hereby

ORDERED, that _____, Esq. is hereby appointed successor signatory and is authorized to pay from the _____ Bank IOLA Escrow account #____ of _____, a deceased attorney, the sum of $_____ to _____ of _____; the sum of $_____ to _____ of _____: REPEAT AS NEEDED and the balance in the account, $_____, to _____ the Executor/Administrator of _____ the deceased attorney representing the amount deposited in the account in order to keep the account open and pay fees (or the amount earned as his fee to be paid from the recovery (PI Actions).

ENTER:

_____
J.S.C.

CHAPTER FOUR

ISSUES OF IMPAIRMENT

INTRODUCTION

Substance use and mental health disorders are issues faced by everyone, including those in the legal profession. And although substance use and mental health issues are significant factors regarding lawyer impairment, there are other factors that can impair an attorney. Physical disabilities, emotional strife, and aging are all other forms of possible impairment.

Knowing that there are several reasons which can lead to impairment and how frequently these issues impact people in general, there may come a time when your firm will be faced with decisions regarding how to adequately manage an impaired attorney and handle the interruption of work that results from their impairment.

In this section attorneys, partners, and concerned colleagues will find useful information regarding support services for attorneys who are dealing with an impairment, an in-depth walk through of a firm's obligations and requirements regarding an impaired attorney, the NYSBA Model Policy for Law Firms/Legal Departments Addressing Impairment, and additional information regarding the New York Human Rights Law. Taken in total, this information will guide you through this difficult, but manageable, period with competence and professionalism, as well as with care and compassion for the struggling attorney.

CONTENTS

§ 4.1
Interruption of a Practice Due to a Lawyer's Substance Abuse or Mental Health Issue

The professional continuity of a law practice, whether it is the practice of a sole practitioner or a law partnership, can be interrupted by an attorney's alcoholism or drug addiction and/or subsequent treatment for the same. Anecdotal evidence suggests that perhaps as high as eighteen percent of lawyers may find themselves faced with personal issues of alcoholism or drug abuse sometime during their careers and that more than fifty percent of serious cases of attorney misconduct have alcoholism or drug addiction at their root.

In 1977, the New York State Bar Association formed the Lawyer Assistance Committee in an effort to address this serious problem head on. Since that time, eleven local bar association committees have been formed to assist statewide efforts in the identification and treatment of members of the bar so afflicted.

In 1990, the New York State Bar Association established the Lawyer Assistance Program[1]. Since its inception, LAP has provided confidential help to hundreds of lawyers and judges each year.

In 1992, the New York State Legislature passed Section 499 of the Judiciary Law which provides that the relations and communication between a member or authorized agent of a Lawyer Assistance Committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents, shall be deemed to be privileged on the same basis as those provided by law between an attorney and client, and that such privilege may be waived only by the person, firm or corporation which has furnished information to the committee. In addition, the law provides that any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of a Lawyer Assistance Committee shall be immune from civil liability that might otherwise result by reason of such conduct.

Related to the provisions of Judiciary Law § 499 is RPC 8.3(a). RPC 8.3(a) provides: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." RPC 8.3(c) provides: "This Rule does not require disclosure of . . . information gained by a lawyer or judge while participating in a bona fide lawyer assistance program."

Thus, the statute and the Rules of Professional Conduct provide members and agents of Lawyer Assistance Committees with highly valuable tools in assisting persons who contact the committees either on their own or on behalf of another person. Any referring person knows that unless he or she agrees, the matters discussed with committee representatives may not be disclosed to anyone who is not a committee member or one of its agents and are privileged on the same basis as those provided by law between attorney and client.

Concern about alcoholism or other drug addiction within a law firm creates a tension between the responsibility to protect clients' rights, the firm's reputation and a lawyer's wellness on the one

1 https://nysba.org/lawyer-assistance-program/.

hand and the fear of violating a colleague's rights under the Americans with Disabilities Act, standards relating to confidentiality and fear of destruction of personal relationships on the other.

In order to address the obligations of law firms in dealing with an impaired associate or partner, the New York State Bar Association promulgated the Law Office Model Policy (§ 4.4 infra) which serves as template for law firms throughout the state.

§ 4.2
Impaired Attorneys: The Firm as Employer

Paula A. Barran*

INTRODUCTION

Dealing with the disease is hard enough, but law firms confronting professional impairment have additional problems. Practice within a firm is carried out in the context of loosely structured professional relationships with ill-defined hierarchies, and except in their early years of practice, lawyers work with little or no supervision. There are few objective measures of work product; "good" is subjective. Firms are structured with a lot of thought to the professional and economic parts of life—defining what kind of practice (full-service boutique, something else), size (small, medium, supersized), and how to pay the partners. But little thought is given to establishing disciplinary procedures. There may not even be someone in charge with authority to discipline.

Toss in the idea of collegiality, which is one of those important rules of the road that help organizations endure. But collegiality, so important when you're having a fight about money, is a barrier to the kind of confrontation that impairment may require. It isn't my job, my role, or even my right to challenge my colleague about the problem. Professional lives are stressful enough. It is not difficult to find excuses for inappropriate conduct or lawyer negligence. There but for fortune . . . And if I do, am I possibly pushing the firm into the murky area of professional liability for malpractice. It isn't surprising that lawyers circle their wagons.

All of these behaviors can be downright enabling.

The consequences of ignoring impairment include malpractice, loss of client confidence, and even the departures of qualified staff and colleagues. These can be dire. But there are equally dire consequences to blundering into a problem, ignoring laws and violating confidences and privacy. There are some rules.

DEFINING THE RELATIONSHIP

You cannot make proper decisions about how to confront and manage impairment until you understand the nature of the relationship between the lawyer and the organization (which, for want of a better term, is probably "the firm"). If the relationship is employer-employee, there will be extensive regulation to worry about. If the relationship is that of independent contractor, there will be little regulation. If the relationship is that of partner to the firm, or partner to other partners, the principal concerns will be fiduciary duty and the partnership agreement. All that means a necessary first task is to define the relationship, because the nature of the relationship sets the rules.

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Defining the relationship used to be easy. There were employees, and there were partners. In an unusual case there might be a sole proprietor or an independent contractor. Today there are new organizational forms, and lawyers generally make their selection of firm structure for tax advantages. Whether or not the form might require partners to become employees is rarely an important consideration, except where mandatory retirement rules are big issues (and then, employer-employee form is a real problem). Whether the organizational form requires something more than pro forma shareholder meetings is also rarely a consideration. A law firm now can be a general partnership, a limited partnership, a limited liability partnership, a limited liability corporation, and the people who work in the firm can be general partners, limited partners, shareholders, employees, employers, and can have a bewildering combination of attributes that defies pigeonholing.

On April 22, 2003, the U.S. Supreme Court issued its decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 123 S.Ct. 1673 (2003). The opinion outlines the mode of analyzing a lawyer's relationship to the firm to decide an important question or two. Employer or employee? Owner or worker? Partner? Knowing the status of the lawyer is critical for application of a host of federal and state labor and employment laws, so *Clackamas Gastroenterology* provides important advice. At issue in the case was whether the medical clinic, which was set up as a professional corporation, was covered by the federal Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. That law is inapplicable to very small businesses; it does not cover an employer unless the employer's workforce includes 15 or more employees over certain defined times.

The question arose because this clinic had four employee physicians who were actively engaged in the medical practice as shareholders and directors. Because the clinic was set up as a professional corporation, the physicians were formally shareholders who had employment contracts with the clinic and so were nominally employees. That very status made an easy and attractive argument for the terminated employee who wished to sue under federal law. She contended that the physicians could not have it both ways, that they could not establish a corporate status to reap tax advantages and limit civil liability, and yet at the same time claim the physician shareholders were partners for purposes of employment law. If the court counted the shareholders as employees, the clinic met the threshold for application of federal law.

The Supreme Court recognized that "we are dealing with a new type of business entity that has no exact precedent in the common law" with state statutes permitting incorporation for the purpose of practicing a profession. In the past the learned professions were not permitted to organize as corporate entities. Since professional corporations are "relatively young participants in the market" with features that vary from state to state, there had been little, if any, true guidance on just how to define and evaluate the relationship of professionals to the organization. That is what the court set out to do in *Clackamas Gastroenterology*, noting that the resolution of any legal issue depends upon understanding whether the professional is an employee or an owner. That analysis, in turn, requires a thorough understanding of the details of how the professional interacts with the organization. Here are the necessary questions:

- Can the organization hire or fire the individual or set rules and regulations for the individual's work?

- Does the organization supervise the individual's work, and to what extent?

- Does the individual report to someone higher in the organization?
- To what extent is the individual able to influence the activities of the organization? Act like a boss? An owner?
- What is the nature of the parties' agreement as to status?
- Does the individual share in the profits, losses and liabilities of the organization?

An employer is the person or group of persons who owns and manages the enterprise, can hire and fire, can assign tasks and supervise performance and decide how the profits and losses of the business are to be distributed. The fact that such a person has a title (even shareholder or employee) does not determine whether that person is an employee or a proprietor. The Court emphasized that no one factor is controlling, that even the existence of a document called "employment agreement" does not lead inexorably to the conclusion that a party is an employee, and that the answer to the question of status "depends on all of the incidents of the relationship with no one factor being decisive." The test is all about the substance of the relationship, not what it looks like on its surface.

That means that if the lawyer in a professional corporation has a status functionally equivalent to partnership, the form of the organization does not control. In such a case, partnership law applies. If the lawyer has a status within the firm that permits him or her to influence decision-making and keep a share in profits, losses and liabilities, those factors point to something akin to a partner and partnership law applies. If, in contrast, the lawyer can be terminated or disciplined, works under set rules and regulations, reports to and is supervised by the firm, employment law probably applies because those factors point to employee status.

PARTNERSHIP

If the relationship is not employer-employee but a partnership relationship, the statutory protections do not apply but activities will be governed by the murkier provisions of the common law, including the fiduciary duties extended within partnerships, as well as common law privacy protections.

Theories arising out of the breach of fiduciary duty can be asserted if a partner is disciplined or expelled. Because most of the reported case law turns on the laws of individual states and the provisions of the partnership agreement, they are somewhat limited in precedential value. See, for example, *Cadwalader, Wickersham & Taft v. Beasley*, 728 So.2d 253 (1998) (applying New York partnership law that partners have no common law or statutory right to expel or dismiss another partner, but may provide in the partnership agreement for expulsion under prescribed conditions "which must be strictly applied"); *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (1998) (applying Texas law, holding that the relationship between partners is fiduciary in character and imposes an obligation of loyalty and utmost good faith, fairness and honesty, but concluding "a partnership exists solely because the partners choose to place personal confidence and trust in one another"); and see, *Heller v. Pillsbury, Madison & Sutro*, 50 Cal.App.4th 1367 (1996) (finding no breach of fiduciary duty in expulsion by executive committee of partner who behaved inappropriately where partnership agreement authorized executive committee to do so).

PRINCIPAL EMPLOYMENT LAWS

Assuming the impaired lawyer holds employee status (as compared to partnership status or something else), two sets of statutes are most important in that they regulate and define the manner in which the organization can confront and address the impaired lawyer.

The federal Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq*., prohibits discrimination on the basis of disability, which is broadly defined to include a mental or physical condition which substantially limits a major life activity, the existence of a record of a disability, or the perception of a disability. The law also sets certain confidentiality standards and requires accommodation of protected disabilities, but also provides some level of freedom in addressing drug-related dependency. Alcohol-related dependencies fall into a different category altogether, something that firms must always remember in addressing issues under this law.

In addition to the federal law, virtually every state has a separate state statute providing similar, although not necessarily identical, protections. The potential for supplemental state regulation was recognized under federal law. 42 U.S.C. § 12201 provides: "Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." In other words, federal and state law both apply and an employee is entitled to the benefit of the law which offers the greatest protection.

The second group of statutes that are important in addressing impairment of employees are those laws providing protected leave for serious health conditions. The federal law is the Family Medical Leave Act, 29 U.S.C. §§ 2601 *et seq*. This statute requires employers (those who employ 50 or more employees) to grant 12 weeks leave during any 12-month period for a variety of conditions, including the employee's own "serious health condition." This is another of those federal laws that establishes a level of protection as a floor, but permits greater protection in individual states. 29 U.S.C. § 2651 provides: "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."

As is the case with disability protections, a number of states have passed their own laws establishing various periods of protected leave for a variety of conditions, and often applying the requirements to smaller employers. Once again, the leave laws must be evaluated on both a federal and state basis to determine what protection, if any, the employee is entitled to. The leave laws can be important for two reasons. First, they guarantee a protected leave from work for a set period of time. Second, they provide for some level of reinstatement or reemployment. The most protective of the laws require an employee to be returned after leave to the same position of employment with the same benefits, the same responsibilities, the same duties, and perhaps even the same client base.

DISABILITY PROTECTIONS

Title I of the ADA governs employment, regulates the conduct of employers, and places some limits on what employers can do in the employment, management, and terms and conditions of employment for employees who have disabilities. Because the definition of disability is so broad (any

physical or mental condition which substantially limits a major life activity), substance abuse impairments meet, at least, the statutory definition. The potential protection of drug-related misconduct was a controversial issue during the debates over ADA; as a consequence, the statute provides only limited protections for drug-related activity.

The statute prohibits employers from making certain disability-related inquiries until there has been a conditional offer of employment. If you ask an applicant how much he or she drinks, you may be asking a medical question because the answer may be diagnostic. Ask whether the applicant has ever been treated for drug addiction and you may end up in ADA-land.[2]

Once a conditional offer of employment has been made, you are free to make those inquiries, and to make them as broadly as you like (provided they are made for every employee being considered for the same class of jobs). Once the employee is hired, however, the window of opportunity slams shut.

After employment has started, only limited disability-related inquiries may be made and they must be "consistent with business necessity." The restriction on disability-related inquiries during employment (where they are limited to inquiries consistent with business necessity) also limits the ability of employers to inquire into potential substance abuse problems. Before asking, you will always need to test yourself: is this an inquiry that is "consistent with business necessity." Is it an inquiry that can be justified because the answer matters to the firm?

Because drug abuse (as compared to alcohol abuse) typically implicates illegal activity, the statute draws a marked distinction between abuse of drugs and abuse of alcohol.

"Drugs" are defined as controlled substances, with reference to the Federal Controlled Substances Act. The "illegal use of drugs" is unprotected; if use of drugs would be illegal under the Controlled Substances Act, it remains unprotected under the Americans with Disabilities Act. An exception exists under the law for drugs which are used under the supervision of a healthcare professional or as otherwise authorized by federal law.

There is an uneasy treatment of marijuana, which is authorized under the laws of some states for certain medical conditions, but remains illegal under federal law. Employers are generally free to follow the mandates of federal law; most state laws relating to the medical use of marijuana are limited in what they permit and generally excuse users from state criminal laws. Some employers want to ban it entirely. Other employers want to permit marijuana for recognized therapeutic purposes. Those are permissible legal choices up to a point; most firms don't particularly want to be seen as flouting federal law, so an uncomfortable "don't ask don't tell" attitude might be the result.

An employee who is "currently engaging in the illegal use of drugs" has no protection under federal law, as long as the employer acts on the basis of the illegal drug use. At issue, however, is whether the employee's drug use is "current." There is some circularity in the legal definition of "current" drug use. Current drug use is drug use that is current. It is a fact-based inquiry. An individual's drug use is "current" if the facts suggest that ongoing drug use may continue to be a problem, even

2 The EEOC has helpful guidance on permissible pre-employment inquiries at https://www.eeoc.gov.

though the employee is not actively using, and even though the employee may not have drugs in his/her system at the time of the employer's disciplinary decision.

The structure of the statute is intended to encourage rehabilitation. Employees who have used or are using illegal drugs can regain the protection of the statute through rehabilitation. The successful completion of a supervised rehabilitation program, together with ceasing the illegal use of drugs, restores the protection of the law. Employees can achieve rehabilitation in other ways, including participating in a supervised rehabilitation program (as compared to completing the program) so long as the illegal use of drugs stops. The law also recognizes "being otherwise" rehabilitated. That can include, for example, participation in a 12-step program or voluntary activities, so long as the illegal use of drugs ceases and so long as there have been sufficient rehabilitative activities to make it reasonable to conclude that the illegal drug use has stopped.

Under the ADA, employers have a statutory right to control employee drug use including prohibiting the illegal use of drugs in the workplace, requiring employees to remain in compliance with other statutes such as the Drug Fee Workplace Act, holding employees to the same qualification standards as non-users, complying with administrative requirements which may mandate drug testing in certain occupations, and requiring employees to submit to drug tests.

Some state statutes place limits on employer rights to conduct drug testing. Federal law is generally silent (except for those situations in which testing is mandatory—drivers, pipeline workers, train operators, coast guard, defense contractors).

Employers also have the right to prohibit alcohol use *at the workplace*, to require employees not to be under the influence of alcohol in connection with their work, to require employees to meet job and behavior standards regardless of alcoholism or alcohol-related conditions and to require compliance with federal standards such as Department of Transportation testing regulations.

The disparity in treatment between alcohol and illegal drugs creates employment-related issues. Although an employer can, in most circumstances, prohibit the illegal use of drugs even if off work (as long as there is some job-related connection), the same is not true with the use of alcohol.

Employers may require employees to submit to drug testing. It is not a medical examination according to federal law, and therefore can be administered without "cause" or suspicion of drug-related impairment. Alcohol tests are different and employers do not have the same right to test for alcohol. Any alcohol-related testing must be preceded by cause or suspicion of alcohol-related impairment. In the language of drug and alcohol testing, drug tests can be administered on a random basis under federal law; alcohol tests cannot be administered on a random basis.

SIGNS OF SUBSTANCE-RELATED IMPAIRMENT

Substance abuse leads to behavior problems, performance problems, or both. However, all employers need to proceed cautiously because a performance problem or a behavioral problem is not necessarily linked to a drug-related dependency or alcohol problem. Other concerns, some of them protected disabilities, could also be the cause. For example, a performance problem could be caused by personal problems at home, concerns about serious health conditions of family members, mental impairments, clinical depression, stress, fatigue, burnout, or overwork, and a host of conditions or cir-

cumstances. Many of these are protected by various state and federal laws and it is far too easy for an employer to blunder in a situation and mishandle it by making assumptions about the cause of the problem.

A cautious approach would include some, perhaps all, of the following steps:

- Establish and maintain institutional standards so that behavioral and performance problems are identified at an early opportunity.
- Identify specific performance or behavioral problems such as erratic work hours, substandard performance, observations of intoxication or impairment, unacceptable or unprofessional behavior.
- Confront the lawyer with factual information and observations, and provide an opportunity for explanation or a request for assistance.
- If appropriate, request an evaluation by a healthcare professional to determine whether there is a medical problem and, if so, what course of treatment is recommended.
- Impose appropriate requirements, including a "last chance" or "return to work" agreement.

OBTAINING AND PROTECTING MEDICAL INFORMATION

Any time a firm requires a lawyer, employee or otherwise, to participate in a medical evaluation, any communication between the firm and the healthcare professional should be preceded by a specific written authorization. The law on the content of such an authorization varies from state to state, but typically an authorization should include the description of information which is to be used or disclosed, authorization to the healthcare professional, identification of the person to whom disclosure may be made, a description of the purpose for which disclosure is authorized, some expiration date, and obviously the lawyer/patient's signature and date of authorization. It bears emphasis that any communication with a healthcare provider should remain strictly within the boundaries of the authorization. Repeat after me: I will not talk to doctors without a written authorization. (See HIPAA release form at § 23).

Regardless of whether the individual lawyer is an employee covered by the ADA or has a different status, any medical information should be retained in strictest confidence. The ADA requires medical records to be stored in separate locked cabinets, separated from personnel records and limits the persons who may have access to those records. Even if that law does not apply, however, most states recognize a right of privacy to confidential medical information. That means, at a minimum, that the persons within the firm who are aware of the medical information or medical records must restrict dissemination absent the consent of the lawyer.

COVERING THE WORK

Client needs don't stop when a lawyer's practice is interrupted for treatment, and somebody needs to take care of those needs if there are to be any clients to come back to. Managing re-entry to the practice starts with planning to cover client needs during treatment. You may be doing this in crisis mode, but some time to plan will pay dividends.

- **What's pending?** Have somebody go through all pending matters and sort out the work so that you can identify immediate needs, near-term problems, and those matters that can wait. How you accomplish this will depend on what sort of system the lawyer uses. Check calendars, look through files, check documents on computers, and talk to clerical staff. Maybe the lawyer can prepare a list to start with, and if you're really lucky you may be able to get a briefing memo on major matters. And don't forget the invaluable assistance of the secretary or assistant who has been keeping the practice running. While you're at it, you might have some great ideas about reorganizing your own calendaring system; that can probably wait a few days, but don't lose track of the thought.

- **Who's going to do it?** Once you have a list, get matters reassigned as quickly as possible. Obvious deadline work is the place to start, but don't forget that large, complicated matters need some advance warning too. It might be practical to get everything passed out in one awful meeting. Then everybody in the firm can feel terrible for an afternoon before they get down to work. While you're pondering reassignments, consider whether you may be able to reassign work in a way that will protect the practice for the lawyer. That maybe particularly important in organizations with a high degree of internal competition.

- **Should I get extensions?** Getting extensions sounds like it might solve some of the interim problems, but delaying the work may be a bad move. A month's worth of mail stacked up, clients clamoring for attention, and major messes to clean up aren't good for anybody. See if you can get the most critical work covered in the lawyer's absence.

- **What do I tell the clients?** In general, clients do not belong to that class of people who have a need or a right to know the nature of the problem. They do, however, have a right to know that their lawyer is not going to be around for a while and not going to be handling a particular matter, and they might have strong feelings about reassignment. Before you say anything to clients, see what the lawyer wants you to say. You might be able to agree on wording that communicates the need for the absence, without damaging the lawyer's client relationships in the bargain. If you can't reach some agreement, you still have to tell the clients something. Consider explaining that the lawyer is on leave or on medical leave. It is very good form to ask a client whether a particular reassignment is acceptable.

CONFIDENTIALITY

The staff may know a lot more than you want, but you still need to think about what you are going to announce internally. There isn't an easy answer for all categories, but there are some guidelines that can help work through the gray area between confidentiality and notice.

Philosophically, honesty is great. But substance abuse treatment is a confidential matter. Information about treatment should be shared only with consent or on a need to know basis. If there is an employment relationship, it may be the type of medical information protected by the law. Outside of an employment relationship, there may be civil privacy protections prohibiting the disclosure of private facts.

The first place to look for a resolution is the lawyer. Ask for input. You may be able to work out an acceptable internal statement, and you'll never know unless you ask. It may be, however, that

the lawyer does not want to start treatment with a fanfare. If you can't agree on a statement, you may still need to notify personnel. If that happens to you, separate people into categories. You will have some who have a clear right to know (partners, for example). You will have others who have little or no right to know. And you will have others somewhere in between (the receptionist, the librarian, the mail room). Tailor your announcements accordingly, but remember to caution them not to gossip or contribute to the rumor mill. That is particularly important with the group that may be getting some detailed information. You don't want them spreading it around after you took such pains to tailor your own announcements. You might want to avoid notifying people in writing, unless you are using a prepared statement. Memos have a way of missing the shredder and finding the light of day someplace you didn't want them to be.

A caution is probably in order here. Lawyers entering treatment often do so having skated the surface of malpractice. As you assign out work, you may want to suggest the file be reviewed for errors or problems. That suggestion might require a bit of explanation. That category of person probably falls neatly into the "need to know" category, so don't worry too much about explaining what the problem is, as long as you follow up with the threat that they will get warts all over their bodies if they breach confidentiality. It usually works (the threats, not the warts). The final caution, to the extent that any notification is made, consider whether you want to make it orally rather than in writing. Confidential memoranda often are not, and may find their way into the hands of people who will spread the news.

WHO PAYS FOR ALL THIS?

The cost of treatment is normally the lawyer's responsibility, regardless of status. That does not mean that you are prohibited from contributing, paying the bill, or loaning money for treatment. Keep a few guidelines in mind as you consider expense issues, however.

- If you are going to pay this time, consider whether you are setting a precedent that you might feel compelled to follow with others. Would you have to? Perhaps, particularly if you are dealing with employees. If you pay a male's treatment costs, you should think twice before deciding not to pay a female's treatment costs. If you pay this year, how will you explain next year's decision not to pay?

- It is permissible to contribute to the cost of treatment in different ways depending on status. For example, you could choose to have the firm pay for a partner but not an employee.

- It is probably more common to loan money for treatment, and set up some repayment plan. If you elect to do so, you should consider having the lawyer sign a repayment agreement and a promissory note. Most states have laws about payroll deductions, so check your state before you draft an unenforceable payroll deduction agreement.

CAN WE VISIT OR SEND CARDS AND LETTERS?

Sure, unless the lawyer does not want to hear from you. Or unless you don't have authorization to share any information. Don't assume that well-intentioned contacts will be appreciated.

IS OUTPLACEMENT BETTER THAN REENTRY?

Don't automatically assume that reentry to the same practice is the best thing to do. It may not be. There may be situations in which the relationship is so fractured that treatment should be followed by outplacement into another job or career. That may be particularly appropriate if there is no work to return to.

Keep this in mind, however, when you are dealing with the lawyer who is an employee. If the organization is large enough to fall under the federal Family and Medical Leave Act, substance abuse treatment is medical care for a serious health condition, and employers are required to hold the job open. Your state may have equivalent state laws.

Partnership and shareholder agreements may also determine whether outplacement is a choice that can be imposed on the lawyer. If outplacement seems like a better idea, you might do well to involve the treatment counselors. You may unwittingly interfere with the treatment program by making a sudden unexpected change like telling the lawyer there may be no job to return to.

LAST CHANCE AGREEMENTS

In business, employers generally require employees returning from treatment to execute a "last chance agreement" or "return to work agreement." These agreements can be a constructive part of recovery. They provide job-related motivation and outline job-related responsibilities which relate to treatment and recovery. Although they vary from workplace to workplace, most include the following elements:

- Verification that the employee is participating in a treatment program (be careful not to require too much information);
- A commitment to remain drug and alcohol[3] free;
- An acknowledgement that the lawyer is committed to adhere to requisite standards of behavior;
- Drug or alcohol testing if appropriate (be careful to avoid random alcohol testing for employees);
- A commitment to participate fully in recommended aftercare, 12-step meetings, or other therapy recommended by treatment counselors;
- An acknowledgement that a violation of the agreement, or its incorporated standards, will result in immediate termination; and

3 Before requiring a commitment to remain alcohol free, check with developing interpretations of the Americans with Disabilities Act. While current use of illegal drugs is not protected under the law, alcoholism is as long as it does not have a negative effect on the business operations. That may lead to a tension between the need to abstain from alcohol for purposes of treatment and recovery, and the employer's insufficient interest in monitoring off-the-job drinking habits. We don't yet know where the line lies.

- Authorization to talk to treatment counselors to obtain information about compliance with treatment requirements, aftercare conditions, and to get advice about the return to work, all limited to a need-to-know basis and carefully drafted to protect medical privacy.

"Last chance" or "return to work" agreements are appropriate for the lawyer too; however the type of agreement might vary with the lawyer's status. Partners and shareholders who have ownership interests may work under agreements that spell out rights and responsibilities that leave little room for a mandatory extra agreement such as a last chance agreement. That may leave the firm with little leverage beyond a motion to expel the lawyer or break up the firm. But don't overlook the value of negotiation too. You may be able to work out a perfectly satisfactory return to work agreement which protects organizational interests and, in exchange, offers practice-related assistance upon return.

THE WELCOME HOME

It is a good idea to designate a single person or a small group to be the lawyer's designated contacts during treatment. That will ensure a more consistent flow of information about progress, prognosis, return dates and similar details. It will also help avoid a minor catastrophe upon return: the lawyer walks in, wholly unexpected, to find someone working at his/her desk, secretary reassigned, no clients, no work, and no friends. That doesn't have to happen; the contact person can be responsible to see it doesn't.

Organizations must give some thought to the lawyer's return to the office:

- Check out the physical space and make sure you return it to pre-treatment condition (but ditch the bottles!).[4]

- Some kind of welcoming activity is appropriate, but take personalities and desires into account. Maybe a brief acknowledgement at a breakfast meeting is in order, maybe a card, or some other recognition. Treatment counselors are often very good sources to tap if you're concerned about what's appropriate.

- At least a week before the lawyer's scheduled return, two work related things should be happening. First, the lawyers who were assigned the pending matters should prepare brief status reports on what was done in the lawyer's absence. Second, the appropriate person (practice chair, managing partner, and supervisor) must give some thought to the work the lawyer will be doing upon return. Employees need assignments; partners or shareholders may need guidance. A visit with treatment counselors may help out here provided you have consent.

- Don't neglect the other lawyers in the practice. Some of them will have a right and a need to have some information about the return. You will also need to manage their expectations about the return. Maybe the lawyer will return gung-ho, ready to dive into an intense three month project. More likely he/she will return to a wounded practice and some resentful colleagues.

4 Actually, if the organization's culture respects the privacy of desks and offices, don't go searching for bottles or drug paraphernalia. Let the lawyer or a sponsor take that project on.

BASIC LAWYER SKILLS

There may be a lot of surprises upon the lawyer's return. Alcohol or drug use can mask many other problems, and may have contributed to a false impression of the lawyer's skills. The lawyer may have forgotten—or never learned—good skills. That may include work skills—effective research, analysis, advocacy, effective oral and written presentation skills—and it may include "office" skills—billing practices, client relationships, office relationships. Be on the lookout for this problem. It can be corrected, but not if you don't know about it.

WHAT HAPPENED TO THE PRACTICE?

You can bet the rent on this: you are welcoming back a lawyer with a sick practice. If you want reentry to work, you have to work on the practice. Every sick practice is sick in its own way, and there are no universal solutions.

- The returning lawyer is probably not able to do much alone. More likely he/she will be at a loss to know what happened to the practice, let alone how to fix it.
- Controlled assignments or responsibilities for six to twelve months may be needed, first to provide some work, then later to fill in gaps as the practice rebuilds.
- Most lawyers returning from treatment will benefit from practice building advice and some wise counsel – from a department head, knowledgeable peer, or even an outside consultant.
- Don't underestimate the value of jump starting. Early successes are very important motivators.
- Have a short-term and near-term practice development plan; give some thought to it before the lawyer returns, and make it a key point of discussion the first few days back on the job.
- Monitor progress against the plan, particularly during the first six months.

All this takes commitment, which raises another concern. Sick practices don't get that way overnight.

More likely, others have carried their impaired colleague just a little too long.

RESENTMENT, MISTRUST AND THE OTHER UNHOLY EMOTIONS

Most lawyers do not analyze their own practices, but they often can't stop themselves from analyzing the practice of their colleague who has just returned from treatment. It isn't difficult to understand why the dominant emotion is resentment. One of their own has failed them. They may be cleaning up, mending shattered client relationships, worrying about staff complaints and rebuilding a tarnished firm reputation. They may be the ones giving up vacations and weekends to get the work done in the lawyer's absence. They may even be paying for treatment, in one way or another. They may be struggling with their own practices, but not getting the same care and attention the returning Prodigal Son is getting. They may be looking for a reason to believe the lawyer should go someplace else to make a fresh start.

Reentry to the same firm is not always the best choice, although it may sometimes be required because of a controlling statute. If you are looking for the greatest good for the greatest number of people, an honorable goal, you will understand that the interests of the group are at least as important as those of the returning lawyer (and there are usually more of them). Give this some time. The tension may fade, but it is unlikely you'll be able to predict whether it will. But don't count on time alone to make this work. The lawyer in an average organization knows very little about the complexities of drug and alcohol abuse. If you sense tension, it might be helpful to provide some education to the lawyers in the organization so they can understand more about addiction, and maybe learn something about repairing relationships themselves.

Regaining credibility is a critical task for the impaired lawyer. Remember that a part of credibility is what others see. If the senior or "important" lawyers in the firm wash their hands of the returning lawyer, everybody else will too. On the other hand, a little public attention from the right people can make the difference.

SAMPLE: TREATMENT AND RETURN TO WORK AGREEMENT

By signing this agreement I accept and agree to the following terms and conditions which will govern my continued employment with and my return to work with [firm].

I. TREATMENT

1. I acknowledge that my work performance and/or behavior have resulted in the need for intervention and have provided a basis for the termination of my employment (or: define nature of relationship) with the firm. As a consequence, and in order to avoid the termination of my employment (expulsion from the firm), I voluntarily accept the terms of this agreement.

2. I agree to submit to an immediate evaluation by a health care professional of the firm's selection.

3. I will follow all treatment recommendations of that professional including without limitation entry into a residential treatment program.

4. I understand that I am responsible for all costs associated with the treatment program to the extent they are not covered by insurance.

5. I will authorize regular progress reports to be made to the firm during treatment (tailor to specific consent).

II. RETURN TO WORK

1. Upon completion of the recommended treatment program I understand that the firm will return me to employment.

2. Upon my return, I will review all aftercare requirements and recommendations with my supervisor (on a need-to-know basis).

3. I understand and acknowledge that my return to work will be conditioned upon my strict compliance with the following:

(a) Strict compliance with the treatment recommendations made by the treatment professionals with whom I have been working. Upon completion of my treatment program, a summary of those recommendations will be prepared and attached as Exhibit A to this agreement, and I will re-execute it at that time (tailor consistent with medical authorization);

(b) Complete abstention from all mood-altering substances except in strict accordance with the written authorization of a licensed physician who has been advised in advance of my treatment for substance abuse and who has reviewed any such prescription in advance with my substance abuse counselors (tailor to address off-duty alcohol use);

(c) Regular attendance at required or recommended 12-step programs.

4. For a period of two years from the date of my return to work, I agree to submit to testing to detect the presence or use of drugs (or alcohol if appropriate), on any basis including random or unannounced, and at the times and on the terms that are communicated to me by [insert authorized person or entity]. I understand that at the conclusion of the two-year period the company, in its sole discretion, may extend the period during which I will submit to drug testing for an additional year. (Use caution in defining alcohol testing to avoid ADA problems)

5. I understand and acknowledge that I continue to be bound by and must adhere to all standards of professionalism, behavior and performance that are required of attorneys with the firm as they may exist from time to time, including but not limited to those set out in the firm's policy and procedure manual.

6. This agreement does not guarantee my employment or compensation for any period of time, nor does it in any way alter my status [as an at will employee]. I understand and acknowledge that strict adherence to these terms and conditions is a requirement of my continued employment with the firm and that any violation of the terms of this agreement (including its incorporated standards) will result in my immediate termination.

By my signature below I confirm that I have reviewed and considered these terms and accept them voluntarily as a constructive part of my recovery. I also acknowledge that these terms are being provided to me as an alternate to the termination of my employment. I understand that I may withdraw my consent at any time during the term of this agreement, but acknowledge that withdrawing my consent is a voluntary termination of my employment (consent to my expulsion from the firm).

Signature # 1 (at the time of intervention):

Signature # 2 (upon return to work, and incorporating aftercare recommendation):

§ 4.3
New York Human Rights Law

The New York Human Rights Law prohibits employment discrimination based on disability.[5] Alcohol use disorder is considered a protected disability, so an individual with alcohol use disorder cannot be discriminated against solely because of their condition. The current use of illegal drugs by an individual is not a protected disability and is not protected by this law. However, an individual who is in recovery from substance use disorder is protected against employment discrimination based on that status. Mental illness, psychiatric conditions, and psychological conditions are considered disabilities as well and are also covered under the law.

Even though alcohol use disorder is a protected disability, an employer is not prohibited from taking action against an employee if their condition affects job performance. An employer is permitted to discipline or terminate an employee whose alcohol use disorder results in poor attendance or inability to perform job duties. It is proper for the employer to hold the employee with an alcohol use disorder, the employee who is in recovery from a substance use disorder, or the employee with a mental health condition to the same performance and behavior standards as other employees, even though they are in a protected class.

For example, a hospital prevailed in a disability discrimination action brought by its former chief of internal medicine who was terminated because his alcohol use disorder prevented him from performing his duties in a reasonable manner.[6] The Court observed that it was proper for the hospital to hold him to the same performance and behavior standards as other employees, even though he was disabled.

The Human Rights Law generally requires employers to provide reasonable accommodation for a disabled employee.[7] Accommodations should be made with the following considerations: are they needed for the employee to effectively do their job; if needed, are they effective; and if effective, do the accommodations impose undue hardship on the employer. Some accommodations to consider for an employee in recovery from a substance use disorder or with a mental health condition are providing adjustments to the work schedule, allowances to utilize sick time as needed, work place policy changes, modifications in the employee's work space, or a change in supervisory practices. Accommodations are not absolute requirements to be put in place by the employer, but the employer is required to engage in an "interactive process" with the employee to arrive at a reasonable accommodation.

Regulations adopted by the Division of Human Rights require an employer consider providing adjustments to the work schedule to allow for ongoing treatment for a recovered/recovering alcoholic or drug addict.[8] This particular accommodation is not an absolute requirement, but should be considered by an employer.

5 New York Executive Law § 296(1)(a).

6 *Altman v. New York City Health & Hospitals Corp.*, 100 F.3d 1054 (2d Cir. 1996).

7 New York Executive Law § 296.

8 9 N.Y.C.R.R. § 466.11(h)(2).

§ 4.4
New York State Bar Association Lawyer Assistance Committee Model Policy

PREAMBLE

The New York State Bar Association is committed to assisting individuals in the legal profession who are dealing with impairment issues that affect performance on the job, whether caused by alcohol, drugs, other addictive behaviors, depression or other mental health conditions.

The NYSBA Lawyer Assistance Committee has drafted the following Model Policy for adoption by law firms/legal departments throughout New York State, with the following assumptions: that early intervention and treatment are fundamental goals, and that adoption of the policy will help to maintain the integrity of the legal profession and the viability of the [law firm/legal department], while protecting clients.

Each law firm/legal department may tailor the policy for its purposes, taking into consideration such factors as size, resources and practice setting. The policy is best used to augment broader policies that cover work conduct, disciplinary procedures, paid leave and health insurance benefits. It should be adopted subject to the regulations of the Family Medical Leave Act, ABA, New York State Human Rights Law, and applicable collective bargaining agreements.

MODEL POLICY FOR LAW FIRMS/LEGAL DEPARTMENTS ADDRESSING IMPAIRMENT

I. DEFINING THE PROBLEM

Impairment of a legal professional adversely affects not only that individual's well-being, but also directly and adversely affects the [law firm's/legal department's] ability to provide the highest quality legal services to its clients and may lead to professional liability, violations of ethical obligations, professional discipline, a loss of public reputation and criminal prosecution. The chief contributors to impairment of legal professionals are clinical depression and other mental health conditions, dependency on drugs and alcohol, and other addictive behaviors.

II. POLICY STATEMENT

It is the policy of this [firm/legal department] that impairment of [law firm/legal department] legal professionals is inconsistent with its mission.

Further, it is the policy of this [law firm/legal department] that impaired legal professionals are in need of assistance and treatment, and that early identification and intervention will provide the greatest hope of overcoming such impairment. This [law firm/legal department] recognizes that impairment is not a moral failing.

The purpose of this policy is to encourage self-identification, self-referral, referral, treatment and recovery. The [law firm/legal department], consistent with applicable law and the Rules of Professional Conduct, will not tolerate unlawful discrimination against a legal professional who has availed himself or herself of the [law firm's/legal department's] resources, as further set forth in this policy.

The [law firm/legal department] shall provide a copy of this policy to all employees and legal professionals.

III. WHO IS COVERED

This policy applies to all [law firm/legal department] legal professionals, including, but not limited to, partners and managing attorneys, associates, and paralegals, subject to any applicable collective bargaining agreement.

The [law firm/legal department] will assist and support legal professionals who voluntarily seek help for impairment or who are directed, as a result of a work performance evaluation, to seek help for impairment. The [law firm/legal department] will permit impaired legal professionals to use paid time off, be placed on a leave of absence, be referred for treatment or otherwise provide accommodations as required by law and permitted consistent with [law firm/legal department] leave policies.

IV. PROFESSIONAL RESPONSIBILITY

It is the responsibility of all legal professionals of this [law firm/legal department] to provide the highest quality legal services to its clients. Impairment due to the use of alcohol or drugs or due to mental health conditions can lead to potential incompetence and/or misconduct which compromises the [law firm/legal department]'s ability to service its clients in accordance with this responsibility.

Attendance and work performance of legal professionals of this [law firm/legal department] will be evaluated.

- Frequent lateness, absenteeism, failure to be on time for meetings and other attendance issues will not be tolerated.
- Failure to meet deadlines, failure to timely return phone calls will not be tolerated.
- Disrespect for, or mistreatment of, staff or colleagues will not be tolerated.

If attendance or work performance issues or behaviors are being caused by impairment, this [law firm/legal department] encourages self-referral or referral to its EAP (employee assistance program) or to the New York State Bar Association Lawyer Assistance Program (See, Article VII, below), as appropriate, prior to the initiation of [law firm/legal department] disciplinary action if possible and appropriate. Legal professionals of the [law firm/legal department] who fail or refuse to avail themselves of the opportunity to seek and follow through on treatment will be subject to internal discipline, up to and including possible termination.

While a legal professional may have a desire to assist another legal professional with an impairment avoid the consequences of his or her conduct, an attorney is nonetheless obligated under appropriate circumstances to report wrongful conduct of fellow attorneys pursuant to RPC 8.3 a portion of which is attached for reference.[9]

9 *See* NYSBA Ethics Op. 822.

V. CONFIDENTIALITY

To the extent possible, this [law firm/legal department] will endeavor to maintain the confidentiality of a legal professional who has self-referred, or who has been referred, to available resources for evaluation and treatment. Please be advised that certain matters may not remain confidential (*e.g.,* a threat to harm yourself or others, future criminal conduct, child abuse), but every attempt will be made to keep a legal professional's personal issues confidential.

The [law firm/legal department] will designate an appropriate person or persons to assist the impaired legal professional with issues of insurance coverage, payment for treatment and covering client matters during treatment, as necessary, and compliance with Return-to-Work agreements. (See, Article IX, below). Cooperation in all such matters is required, and failure to cooperate may result in [law firm/legal department] discipline, up to and including possible termination.

VI. EDUCATION

The [law firm/legal department] is dedicated to providing continuing education and training to all legal professionals in relation to implementation of this and all policies as well as education related to work/life balance, stress reduction and other such topics that can support outstanding work performance and continuing success of the [law firm/legal department]'s mission.

VII. AVAILABLE RESOURCES [LAW FIRM/LEGAL DEPARTMENT]

Contact: Call (e.g. NAME at x 6021) for information about this policy, its administration and for a confidential referral if appropriate.

Referral or Self-referral to Employee Assistance Program: if applicable, insert information about the [law firm/legal department]'s health insurance carrier's Employee Assistance Program—*e.g.*

> Our law firm health insurance policy includes access to an Employee Assistance Program for the purpose of self-referral or referral of individuals and their coworkers who are impaired and their families. We encourage you to contact the EAP. EAP is a confidential service provided at no cost to covered employees and others who are affected by impairment.

Referral or Self-referral to Lawyer Assistance Program: The New York State Bar Association maintains a statewide confidential Helpline at (877) 772-8835. The NYSBA LAP provides confidential assistance, including but not limited to, relevant information about impairment, identification of appropriate assessment providers, and assistance in intervention planning, assistance in identifying potential treatment providers and resources for impaired attorneys and CLE.

Confidential communications between a legal professional and a Lawyer Assistance Program are deemed privileged. Section 499 of the Judiciary Law (as amended by Chapter 327 of the Laws of 1993 and as amended thereafter) provides the following:

1. Confidential Information Privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its

members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation that has furnished the information to the committee.

2. Immunity from Liability. Any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of, any of the committees referred to in subdivision one of this section shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of any proceeding, the good faith of any such person, firm or corporation shall be presumed.

VIII. PROHIBITIONS/CONSEQUENCES

Legal professionals are prohibited from on-the-job impairment from alcohol or controlled substances. Any individual who distributes, sells, attempts to sell, transfer, possess or purchase any illegal substance while at work or while performing in a work-related capacity may be subjected to internal [law firm\legal department] disciplinary action including termination, and/or civil penalties and criminal penalties if appropriate.

[The law firm/legal department can add to this paragraph particular items relevant to the law firm/legal department]

IX. RETURN-TO-WORK AGREEMENTS

The [law firm/legal department] may require a legal professional (who has self-referred or who has been referred for treatment) to execute a Return-to-Work Agreement.

If a legal professional—prior to being subjected to professional disciplinary action or where internal disciplinary action has been held in abeyance during the pendency of treatment—engages in appropriate treatment, he or she may be required to execute a Return-to-Work Agreement prior to returning to work.

Such Return-to-Work Agreement will include:

- verification of the legal professional's participation in a treatment program,
- the legal professional's commitment to maintain the prescribed regimen for continued wellness, to adhere to the firm's code of conduct and professional responsibility, and to participate in aftercare,
- a commitment to undergo drug or alcohol testing if appropriate,
- authorization by the legal professional to appropriate firm representatives to discuss compliance with the foregoing requirement, but limited to a need-to-know basis [and] while maintaining privacy particularly with respect to medical records,
- an acknowledgement that a violation of the Return-to-Work Agreement will result in immediate sanctions.

(A sample agreement is attached).

§ A

22 NYCRR Part 1200 – NY Rules of Professional Conduct (Current through May 1, 2022)

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rules does not require disclosure of:

(1) Information otherwise protected by Rule 1.6; or

(2) Information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

Rule 8.4 Misconduct (Eff April 1, 2009; amend, eff June 1, 2018; amend eff June 10, 2022)

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) "Harassment" for purposes of this Rule, means physical contact, verbal conduct, and/or nonverbal conduct such as gestures or facial expressions that is:

a. "Harassment" for purposes of this Rule, means physical contact, verbal conduct, and/or nonverbal conduct such as gestures or facial expressions that is:

b. derogatory or demeaning.

Conduct that a reasonable person would consider as petty slights or trivial inconveniences does not rise to the level of harassment under this Rule.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules:

a. "Harassment" for purposes of this Rule, means physical contact, verbal conduct, and/or nonverbal conduct such as gestures or facial expressions that is:

b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or

c. provide advice, assistance, or advocacy to clients.

(5) "Conduct in the practice of law" includes:

a. representing clients;

b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law; and

c. operating or managing a law firm or law practice; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

§ B
SAMPLE: TREATMENT AND RETURN-TO-WORK AGREEMENT

By signing this agreement I accept and agree to the following terms and conditions which will govern my [continued employment with/association with] and my return to work with [law firm/law department].

TREATMENT

I acknowledge that my work performance and/or behavior have resulted in the need for intervention and have provided a basis for disciplinary action, up to and including the termination of my employment (or: define nature of relationship with the [law firm/legal department]. As a consequence, and in order to avoid the termination of my employment/expulsion from the [law firm/legal department]), I voluntarily accept the terms of this agreement.

1. I agree to submit to an immediate evaluation by a health care professional of the [law firm/legal department]'s selection or approval.

2. I agree to follow all treatment and aftercare recommendations by that health care professional or treatment program.

3. I understand that I am responsible for all costs associated with the treatment program to the extent they are not covered by insurance.

4. I will authorize regular progress reports to be made to the [law firm/legal department] during treatment (tailor to specific consent).

RETURN TO WORK

Clearance for my return to work will be determined by my health care provider and the employer.

Upon my return to work, I agree to abide by the [law firm/legal department]'s policy regarding attendance and work performance, and I agree that my failure to do so may result in disciplinary action up to and including termination/expulsion from the [law firm/legal department].

Upon my return to work, I agree to review treatment and/or aftercare requirements with the designated [law firm/legal department] representative [on a need-to-know basis], and I agree to strictly comply with such treatment and aftercare requirements. My failure to do so may result in disciplinary action up to and including termination/expulsion from the [law firm/legal department].

I will ensure that, within an established time frame, my health care provider will submit regular progress reports to the designated representative at [law firm/legal department] until my treatment is complete, upon which the health care provider will submit a summary report.

I agree to abide by all standards of professionalism, behavior and performance required of legal professionals at the [law firm/legal department], including but not limited to, those set out in its policy and procedure manual.

I agree that this agreement does not guarantee my employment, position or compensation for any period of time. I understand and acknowledge that strict adherence to these terms and conditions are a requirement of my continued work with the [law firm/legal department] and that any violation of the terms of this agreement (including its incorporated standards) may result in [law firm/legal department] disciplinary action, up to and including my immediate termination/expulsion.

By my signature below I confirm that I have reviewed and considered these terms and accept them voluntarily as a constructive part of my recovery. I also acknowledge that these terms are being provided to me as an alternate to the termination of my employment/affiliation. I understand that I may withdraw my consent at any time during the term of this agreement, but acknowledge that withdrawing my consent is a voluntary termination of my employment (consent to my expulsion from the firm).

Signature #1 (at the time of intervention):

Signature #2 (upon return to work, and incorporating aftercare recommendations)

§ 4.5
Lawyer Assistance Programs (LAP)

New York State Bar Association LAP Helpline: 877.772.8835 lap@nysba.org https://nysba.org/lawyer-assistance-program/ **For crisis calls 24/7 and to access the member benefit of referrals to counselors for up to four no-cost sessions.**

New York State Bar Association LAP Main Office: 518.487.5688 https://nysba.org/lawyer-assistance-program/ **For referrals, peer support services, and monitoring services.**

New York City Bar Association LAP Helpline: 212.302.5787
https://www.nycbar.org/serving-the-community/help-support-mental-health-and-wellbeing

Nassau County Bar Association LAP Helpline: 516.512.2618
https://www.nassaubar.org/lawyer-assistance-program-3/

Support Groups

Support groups are open to all in the profession, law students through retiree, currently practicing or not. State or local bar membership is not required to participate.

NCBA LAP Mindfulness Mondays

Meets second Monday of each month via Zoom at 6:00 pm
Register with the Nassau County LAP Director, Beth Eckhardt: eeckhardt@nassaubar.org

Mental Health Support Groups

Lawyers Depression Project: Go to the website to sign up for this confidential support group. https://www.lawyersdepressionproject.org/

Lawyers with Depression Support Group: Tuesday and Friday at 12:30 pm.
Contact anoble@eriebar.org **for the link.**

Lawyers Helping Lawyers General Support Groups

Capital District Lawyers Helping Lawyers | First Wednesdays each month at 12:30 pm
Third Fridays each month at 4:00 pm
Contact NYSBA LAP for Zoom link: lap@nysba.org

For more information about the CDLHL: LAP Capital District LHL

Lawyers Helping Lawyers Recovery Meetings

Central NY | Mondays at 12:00 pm https://zoom.us/j/8209358263

Erie County | Thursdays at 5:30 pm https://zoom.us/j/279958124?pwd=Y3NSZTBUcFFjOStZR3d0R0oxb3VaQT09 Password: 476374

Nassau County | First and Third Wednesday of the month at 12:30. Zoom link to join: Thomas Moore Recovery Meeting

NYC Bar| Lawyers AA meeting-Thursdays at 6:30 pm For Zoom link: contact Alan Gray alangrayjr@gmail.com

NYC Bar | Lawyers NA Meeting Wednesdays at 6:30 pm Contact Sschneidermanct@hotmail.com **for the Zoom link.**

Other Resources

International Lawyers in Alcoholic Anonymous (ILAA) Mondays 8:00 pm

https://us02web.zoom.us/j/87365736538

Online general AA meetings link: https://aa-intergroup.org/oiaa/meetings/

Online secular AA meetings: https://docs.google.com/spreadsheets/d/1AuWy7FKCG-R_pyRZzE-jFXkH-Rw_0VEzi/edit?pli=1#gid=104829153

AA Meetings (In Person): https://www.aa.org/pages/en_US/find-local-aa

Support for families and friends of those with substance use issues:
Al-Anon: https://al-anon.org/
NYS Office of Addiction Services and Supports Hopeline: 1-877-8-HOPENY
Recovery Research Institute: https://www.recoveryanswers.org/resource/guide-family-members/

S**MART Recovery is an abstinence based facilitated group recovery program.** https://www.smart-recovery.org/
Refuge Recovery is a practice, process, and path to healing addiction. Based on teachings from Siddhartha Gautama. https://www.refugerecovery.org/

New York Council on Problem Gambling provides resources and live assistance to help people begin to address problem gambling issues. Stronger Than You Think NY

CHAPTER FIVE

ADDITIONAL RESOURCES AND REFERENCES

INTRODUCTION

In this chapter, we provide additional reference material that may be helpful for any plans involving your disability, retirement or death. Here, you will find checklists and reference guides for disaster planning and recovery, social media/digital asset management, and other state guides and handbooks; a HIPAA authorization form; excerpts from relevant laws and regulations; and answers to frequently asked questions concerning extended reporting coverage and document destruction and preservation.

Please be sure you confirm that you are using the latest HIPAA form before completing the document.[1] For any social media platforms, please consult the most recent terms and conditions on the applicable website as they may have changed since the publication of this guide.

CONTENTS

1 NYS Unified Court System, Authorization for Release of Health Information Pursuant to HIPAA, see https://www.nycourts.gov/forms/Hipaa_fillable.pdf.

REFERENCE GUIDES AND CHECKLISTS

§ 5.1
Lawyers' Business Disaster Planning And Recovery Checklist

Imagine yourself as a lawyer whose offices have just been closed as a result of a "disaster," whether it is a fire, flood, windstorm, terrorist attack or the product of some other natural or man-made event. Building management has notified you that, in all likelihood, you will not be permitted to re-enter the building for at least a week or maybe longer. To heighten the sense of urgency, assume you or your firm have no disaster recovery plan to which you can refer and thus no step-by-step approach to handling the situation. This is not an event anyone expects, but it is a risk faced by every lawyer, regardless of practice setting or locale.

After you kick yourself for not having a disaster plan, what are your first moves? The best answers are likely to be found as you explore these three questions: How do we contact, reassure and communicate with our employees? How do we notify and communicate with our clients? What must be done to put the firm "back in business"?

In order to protect your practice against many of the adverse effects of a catastrophic event, you or your firm should have a business continuity plan in place. It is important that the plan be available in all events. Post it on the firm's computer server; file it with the firm's remotely stored back-up files; send it to every lawyer in the firm and every key administrator and assistant. Implementation of such a plan following the occurrence of a catastrophic event impacting your practice can help put you on a path to disaster recovery. The following outlines a methodology for developing a business continuity plan for catastrophic events and related considerations.

A. *Impact Analysis*

1. Perform an impact study of catastrophic events to identify functions and services the firm considers critical (i.e., for which continuity is required at all times).
    a. Include specific disaster scenarios causing different levels of disruption
    b. Examine alternative methods for conducting the firm's business, depending on the degree of disruption
    c. Examine methods for uninterrupted provision of critical services
    d. Examine recovery time frames for all functions and services
    e. Examine methods of dealing with individual/personal disasters (e.g., sudden death or disability of a partner)

B. *Plan Preparation*

1. Identify the location of at least the following:
    a. List of all clients and client matters
    b. Contact lists; in the case of all contacts which would need to be made, be sure to have specific names, addresses and telephone numbers
    c. Client files

i. Physical

ii. Electronic

d. Calendar and docket for all client matters

e. Billing records

f. Financial records

i. Firm operating records

ii. Client funds

2. Write a business continuity plan (the "Plan") in case of a catastrophic event; identify who in your firm will be responsible for each task set forth in the Plan.

a. Contact law firm members and all staff

i. The first concern after any disaster should be to locate and ensure the safety of the firm's members, including all staff. Next, families should be advised that staff members are safe. This will be an easier process if telephone lists or directories with home and mobile numbers are routinely distributed (and mailed to all personnel).

ii. Consider using a conferencing service provider, which will enable conference calls among all practice and administrative groups. There are some free alternatives available.

b. Contact clients

i. Once you have contacted all staff and ensured their safety, the next step is to contact clients to assure them that the firm is in a position to continue to represent them and to notify them of any interim or new contact information.

ii. To assist in this process, consider the following:

(A) Establish a small command center immediately. Equip the site with at least five or six telephones, four to five personal computers and up to ten local telephone lines. This center will become home to your disaster team and, during the first several days, the focal point of all staff and clients. You may be able to have calls to the firm's main number or DID lines transferred to the command center. For smaller firms or solo practitioners, make arrangements to use your home, a local hotel or motel or another lawyer's office (perhaps by making advance reciprocal arrangements with that lawyer).

(B) As client contact is made, the command center should be notified, and the client's name and contact numbers centrally recorded. Do not alarm clients by repeatedly contacting them to assure them that your firm is "okay."

c. Contact courts

Repeated and haphazard contact will send a different message, one that says all is not well and that you have no plan.

i. If you have cases pending, you will need to contact the courts to determine if their facilities were affected by the disaster and, if so, what plan of action they have devised. The courts are also a good source for obtaining records that have been lost or destroyed.

ii. Have "at the ready" a master application form to go to the administrative judge(s) requesting case adjournment(s) and designate a responsible attorney (e.g., head of litigation or deputy) to act on it when necessary.

d. Contact others

i. Contact banks for replacement checks and bank records

ii. Contact payroll service

e. Office space/furnishings

i. Identify/communicate alternative work locations

It may be only a tent or other temporary shelter, but you need a temporary office during the time that your office is being repaired. You will want it to be as close to your office as possible. Whatever situation you arrange, assure that there is some private area in which you can converse with clients. Post a sign where your office was, directing visitors to your temporary quarters.

Some firms have identified other firms similar to them – "twins," if you will – and made arrangements with their twin(s) for the firms to accommodate each other in case of a catastrophic event. Consider identifying a "twin" for your firm and establishing mutually cooperative contingency plans. Your firm's "twin" might not even be another law firm (e.g., consider accounting firms, brokerage firms, etc.). This is obviously intended as a possible temporary solution. Be *very* aware of the need to address conflict of interest and confidentiality issues in this context.

ii. Other suggestions

(A) Call local realtor to find office space

(B) Share space with others temporarily (lawyers, accountants)

(C) Obtain (rent, borrow or purchase) furnishings (desks, chairs, lamps, filing cabinets, bookshelves, etc.)

(D) Contact vendors concerning temporary location

(E) Contact Post Office and other delivery services to stop delivery to damaged location and re-route to temporary location

f. Telephone and Internet service

i. Arrange to have telephone calls forwarded to new number or arrange for a telephone answering service with prepared message until new system in place

ii. Arrange temporary service with a local telephone company at a temporary location

iii. Phones, Internet connections, mobile phones

g. Equipment

i. Contact equipment vendors regarding existing leases/contracts and your/their performance obligations under the terms of lease or contract

ii. Types of equipment needed

(A) Computers, servers and network capabilities

(B) Printers; scanners; copiers; fax machines

iii. Identify laptops and other equipment owned by the firm that might be pulled back from home use during recovery period

h. Office supplies

i. Contact supply vendor to obtain necessary supplies

ii. Contact printer to print stationery, business cards, etc.

iii. Contact forms vendors (billing forms, other forms)

i. Library

i. Establish link with providers, such as LexisNexis®, Westlaw of Fastcase at your new office location

ii. If necessary, evaluate possibility/cost of repairing books and identify subscriptions/volumes to be replaced immediately

j. Documents and records

i. Client documents and records (opposing counsel/clients/Secretary of State's Office/court clerks may be able to assist with copies and reconstruction of events, dates, deadlines, etc.)

(A) Leases

(B) Wills

(C) Agreements

(D) Settlements

(E) Corporate records

(F) Docket and calendar records

(G) Pleading files and court papers

(H) Client billing information

(I) Current address of client's counsel and contacts

(J) Billable time and receivables information

(K) Correspondence

ii. Firm documents and records

(A) Leases/subleases (landlord, leasing companies may have copies)

(B) Agreements (other parties may have copies)

(C) Client list of names, addresses, phone numbers

(D) Client files and billing records (opposing counsel/clients may be able to provide copies)

(E) Accounts receivable information

(F) "Work-in-process" information/status reports

(G) Financial records (CPA may be able to provide copies)

(H) Insurance policies, broker information (insurance company has policy)

(I) Inventory of physical assets

(J) Payroll and employee records (payroll service, employees may be able to provide information to reconstruct)

iii. Solo practitioners and small firm attorneys should give serious consideration to off-site backup of computer files, to the extent you have not already done so. You may also wish to start a process of scanning or electronic imaging of key documents in your files, back-up copies of which should also be stored off-site.

k. Malpractice insurance issues

i. After a disaster, a law firm may be exposed to malpractice claims resulting from the difficult and time-consuming nature of recovering lost or destroyed records. Below are some of the issues that may arise.

(A) The most frequent source of claims is likely to be failure to take action within a specified time period. Usually, this is seen in the failure to file an action within the statutory period. Possibilities include lawyers sued for failure to file pleadings within the permissible time, failure to comply with orders for filing of any response or other document within a specified time and a host of other errors or omissions that all result from a failure to keep and adhere to a good calendar.

(B) Lack of confidentiality may arise as records that were blown about are recovered.

(C) Some clients may allege that their rights or positions were not prosecuted with sufficient zeal as available records and evidence were lost.

(D) New clients may be in dire straits and become unreasonable if their concerns cannot be addressed and resolved promptly. Unrealistic expectations often turn into claims against a lawyer when no one else can solve the problem or has sufficient assets to address the issues.

ii. If the disaster is widespread, the courts and government are likely to be sympathetic to the plight of those affected. For instance, as a result of the COVID-19 pandemic, then-Governor Cuomo signed several executive orders which tolled the statutes of limitations for certain actions. Chief Judge DiFiore also postponed hearing of non-essential matters and allowed virtual teleconferences for certain cases, motions and conferences. Attorneys should apprise themselves of any such actions on the part of the government.

iii. In any event, you should contact the courts and opposing counsel, notify them of your situation and new contact information, and request copies of documents for pending cases and time extensions where necessary. In addition, contact your professional liability carrier and obtain information and advice about how to avoid malpractice in event of missed deadlines and other potential errors or omissions resulting from the disaster.

§ 5.2
Social Media Digital Assets Guide

Having a social media platform has become a staple for many in the legal profession. Whether used for marketing, networking, or client engagement, lawyers have established a significant presence in social media. When preparing for retirement or transition, in addition to managing the disposition of physical assets, you should know (and do) certain things with respect to your social media presence. In the event of incapacitation or death – plan ahead. Make sure that you maintain a current list of social media sites on which you maintain a presence. That list should also include your username on the site (especially where it is a trade name) as well as administrative or log-in credentials. In the ordinary course, these should be kept in a secure location; however, they should be available to whomever will be handling your affairs. As identified below, not all social media platforms are created equal and the more information you can provide to your successor the easier the transition will be.

Below is a summary of information about, and actions required for, the top eight social media platforms used by lawyers. This is not an exhaustive list of social media websites on which you may have a presence. You should review all elements of your online marketing or networking during your transition and prepare the necessary documents in advance. You should also consult each application's current terms and conditions as the summary provided below may have been modified.

Facebook

Transfer upon Retirement/Transition

To assign or change a Page Owner:

1. From your News Feed, click Pages in the left menu.
2. Go to your Page.
3. Click Settings.
4. Click Page Transparency.
5. Below Assign Page Owner, click Assign.
6. Choose a verified Business Manager or disclaimer and click Assign.

Once you've assigned a Page Owner, a new section will appear in the Page Transparency section called Other Pages You Manage.

To assign Page Ownership to multiple Pages:

1. From your News Feed, click Pages in the left menu.
2. Go to a Page with an owner assigned to it.
3. Click Settings.
4. Click Page Transparency.
5. In the Other Pages You Manage section on Page Transparency Settings, Click Assign.
6. From the list, select Pages you want to assign ownership of.

7. Click Assign.

Note: To assign a Business Manager as a Page Owner, you will need to be both an admin of the Business Manager and an admin of the Page.

SPECIAL NOTE: You can only assign a Page Owner on a computer, *not* a smart device.

Administration Upon Death

You can choose to either appoint a legacy contact to look after your memorialized account or have your account permanently deleted from Facebook.

If you don't choose to have your account permanently deleted, it will be memorialized if Facebook becomes aware of your passing.

Memorialized Accounts

Memorialized accounts are a place for friends and family to gather and share memories after a person has passed away. Memorialized accounts have the following key features:

- The word Remembering will be shown next to the person's name on their profile.
- Depending on the privacy settings of the account, friends can share memories on the memorialized timeline.
- Content the person shared (example: photos, posts) stays on Facebook and is visible on Facebook to the audience it was shared with.
- Memorialized profiles don't appear in public spaces such as in suggestions for People You May Know, ads or birthday reminders.
- No one can log into a memorialized account.
- Memorialized accounts that don't have a legacy contact can't be changed.
- Pages with a sole admin whose account was memorialized will be removed from Facebook if we receive a valid memorialization request.

Deleting an Account (Self-Selection)

You can choose to have your account permanently deleted should you pass away. This means that when someone lets Facebook know that you've passed away, all of your messages, photos, posts, comments, reactions and info will be immediately and permanently removed from Facebook.

To request that your account be deleted:

1. From the top right of Facebook, click Down Arrow and select Settings.
2. Click Memorialization Settings.
3. Scroll down, click Request that your account be deleted after you pass away and click Delete After Death.

Deleting an Account (Family Member/Third Party)

The fastest way for Facebook to process your request is for you to provide a scan or photo of your loved one's death certificate.

If you don't have your loved one's death certificate, you'll need to provide proof of authority and proof that your loved one has passed away. Please see the documents that we accept below.

Submit one document to provide proof of authority:

- Power of attorney.
- Birth certificate.
- Last will and testament.
- Estate letter.

Submit one document to provide proof that your loved one has passed away:

- Obituary.
- Memorial card.

Instagram

Transfer upon Retirement/Transition

You can't attempt to buy, sell, or transfer any aspect of your account (including your username) or solicit, collect, or use login credentials or badges of other users.

There is no clear mechanism for obtaining approval for transferring an Instagram account.

Administration Upon Death

You can request that Instagram memorialize the account of someone who is deceased. If you're an immediate family member of the person, you can request that the account be removed from Instagram.

Memorialize the Account
Instagram will memorialize the Instagram account of a deceased person when it receives a ***valid*** request. Instagram tries to prevent references to memorialized accounts from appearing on Instagram in ways that may be upsetting to the person's friends and family, and it also takes measures to protect the privacy of the deceased person by securing the account.

To report an account to be memorialized, please contact Instagram (https://help.instagram.com/contact/452224988254813).

Instagram requires proof of death, such as a link to an obituary or news article, to memorialize an account.

Please keep in mind that Instagram can't provide login information for a memorialized account. It's always against its policies for someone to log into another person's account.

Deleting an Account

Verified ***immediate family members*** may request the removal of a loved one's account from Instagram. When you submit a request for removal, Instagram require proof that you are an immediate family member of the deceased person, such as:

- The deceased person's birth certificate.
- The deceased person's death certificate.
- Proof of authority under local law that you are the lawful representative of the deceased person, or his/her estate.

To request that an account be removed, please fill out this form located here (https://help.instagram.com/contact/1474899482730688).

LinkedIn

Transfer upon Retirement/Transition

Designated Admins of a LinkedIn Page can add or remove other Admins. Admins can be added (a) through your Admin View or (b) through an email notification process.

Add Admins through your Page Admin View

1. Access your Page Admin View.
2. Click the Admin tools dropdown at the top of the page and select Page Admins.
3. Complete one or both of the following sequence of steps.
    - **To add a new Admin**: Select the type of Admin you want to add on the left side of the Manage Admins window. Type the name of the *1st-degree connection* you'd like to add in the Add new Admin by name. Click Save changes.
    - **To approve an Admin request**: Select the Admin Requests tab from the left side of the Manage Admins window. Click Approve, then Save changes.

Add Admins to your Page by email

When a 1st-degree connection or advertiser requests to be added as an Admin of your Page, an email will be sent to the current Admin(s). As an Admin, you can click Deny or Grant access as a response directly from the email notification if you're logged into LinkedIn.com.

If you're not logged into LinkedIn.com, clicking Deny or Grant access will route you to the LinkedIn.com sign in page.

Remove Admins from your LinkedIn Page

NOTE: You can't remove your Page Admin access if you're the only Page Admin. If you'd like your Admin access removed, first add another Page Admin to manage the Page.

1. Access your Page Admin View.
2. Click on Admin tools at the top of the page and select Page Admins.

3. Select the type of Admin you want to remove on the left side of the Manage Admins window.
4. Locate the admin's name in the list and click Remove Admin.
5. Click Save changes.

Administration Upon Death

To remove the profile of a deceased LinkedIn member, you will need:

- The member's name
- The URL to their LinkedIn profile
- Your relationship to them
- Member's email address
- Date of their passing
- Link to obituary
- Most recent company of employment

To start the removal process, complete the removal form located here: https://www.linkedin.com/help/linkedin/ask/TS-RDMLP?lang=en.

Pinterest

Transfer upon Retirement/Transition

You can have only one permanent email associated with the business account at a time. You will need to change the email on account to that of your transferee.

At this time, there's no way to transfer or move multiple Pins between accounts. If you'd like to transfer Pins from one account to another, you can save each Pin from your original account to your new account.

Administration Upon Death

Pinterest can deactivate a deceased family member's account if you contact them here: https://help.pinterest.com/en/contact. Once Pinterest deactivates the account, it won't be accessible anymore.

Because Pinterest wants to respect the privacy of people on Pinterest, it can't give out any personal or login information.

For a business account, you must contact Pinterest at https://help.pinterest.com/en/contact.

Reddit

Transfer upon Retirement/Transition

Under the terms of Reddit User Agreement (last modified April 18, 2023), you may not license, transfer, sell, or assign your Account without Reddit's prior written approval.

Administration Upon Death

Upon a credible report of a moderator's death, the next steps will be dependent on the situation:

1. If the community has other moderators, they would continue their moderation duties.
    a. If the deceased was not the "top mod," the community's moderators may make the decision to leave him/her on the list of mods as a tribute but would likely at some point remove him/her from the list (which could be done by any other mod that was senior to him/her).
    b. If the deceased was the most senior, or "top mod," the remaining moderators would likely leverage a process known as "reddit request" to request that we remove him/her and assign the community to another moderator. This process requires that there be no on-site activity by an account for 60 days prior to the community being transferred.
2. If the community had no other moderators, the reddit request process described in 1b) above is preferred, however, in exigent circumstances (and with appropriate assurances that the redditor was in fact deceased), the community team would intervene to either temporarily control the subreddit ourselves until the reddit request process could be fulfilled or to replace the deceased more quickly, at reddit's discretion.
3. The account of the deceased will not be transferred. It will be blocked by the community team and will no longer allow login. Control of a reddit account cannot be transferred to another party.

Tumblr

Transfer upon Retirement/Transition

Export Your Blogs:
You can export all of the content you've created for your blog, and Tumblr will package it up into a convenient ZIP file for you to download.

To start the process, go to your account settings on the web:

1. Click "Settings" under the account menu at the top of the dashboard (the person silhouette).
2. Select the blog you'd like to export on the right side of the page.
3. Scroll down to the "Export" section and click the "Export [blog name]" button.
4. You'll see a message indicating that your backup is processing.

When your blog's content is finished collecting, the processing message will be replaced with a "Download backup" button. Click this button to download a ZIP file of your blog's exported contents.

If you want to export the contents of more than one of your blogs, you'll need to initiate this process separately for each blog.

Administration Upon Death

To delete a deceased person's Tumblr account and his/her blogs, the surviving relatives must submit a request via the online support form (https://www.tumblr.com/support).

The surviving relatives must submit the following information to have the account deleted:

1. A letter with a request for the account to be removed.
2. The username of the deceased user's account.
3. Proof showing that the requestor is authorized to represent and settle the deceased person's affairs.
4. A death certificate of the deceased user.

Twitter

Transfer upon Retirement/Transition

There is no formal transfer process available through Twitter, but an account can be effectively transferred through a password change.

1. Step 1: change the password to the account to something temporary and shareable with your transferee.
2. Step 2: change the email address associated with the account to that of your transferee.
3. Step 3: have the transferee of the account sign in to the account and change it to his/her own confidential password.

Administration Upon Death

In the event of the death of a Twitter user, Twitter can work with a person authorized to act on the behalf of the estate or with a verified immediate family member of the deceased to have an account deactivated.

To request the removal of a deceased user's account, complete this form online https://help.twitter.com/forms/privacy.

After you submit your request, Twitter will email you with instructions for providing more details, including information about the deceased, a copy of your ID, and a copy of the deceased's death certificate.

Please note that Twitter cannot provide account access to anyone regardless of his or her relationship to the deceased.

YouTube

Transfer upon Retirement/Transition

Only an owner of a Brand Account can remove owners or managers from a Brand Account's YouTube channel.

1. On YouTube, sign in as the owner of the Brand Account.
2. In the top right, click your account › Settings.

3. Under "Account," select Add or remove manager(s).
4. Click Manage permissions.
5. Enter your password and re-authenticate.
6. You'll see a list of people who can manage the account.
7. From here you can:
    - Change someone's role: Next to the person's name, select their current role, then choose a new role.
    - Remove someone: Next to the person's name, select Remove 
    - Confirm your choice if asked.
8. Select Done.

NOTE: You can remove yourself as an owner or manager. If you're the primary owner and want to leave the account, you first need to change another person's role to "Primary owner."

Administration Upon Death

To close the account of a deceased user, you must complete this online form http.*[^\.].

The form requires the following information:

- Name of the deceased
- Email address of the deceased
- Full name of relative/legal representative
- Email address of relative/legal representative
- Your relationship to the deceased
- County and zip code
- Date of death
- Which products should be deleted (Google and/or YouTube)
- Upload a scanned copy of:
    - your government-issued ID or driver's license,
    - the decedent's death certificate, and
    - any additional documents that may be relevant

§ 5.3
State Guides and Handbooks

Arizona
"Succession Planning: Preparing for the Unthinkable," (State Bar of Arizona Succession Planning Task Force, 2018), handbook, checklists and forms
https://www.azbar.org/for-lawyers/practice-tools-management/succession-planning/

California
"Attorney Surrogacy," with downloadable forms, "Sample Agreement to Close Law Practice in Future" and "Guidelines for Closing or Selling Law Practice," 2002
http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Senior-Lawyers-Resources/Attorney-Surrogacy

Colorado
Supreme Court, Office of Attorney Regulation Counsel, "Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death," 2019, handbook and forms
http://www.coloradosupremecourt.com/PDF/Regulation/Closing_Practice.PDF

Connecticut
"The Path Out: Succession Planning and Leaving the Practice of Law," handbook and forms contained in materials for 2019 CLE course
https://www.ctbar.org/docs/default-source/education/clc/2019-materials/session-b/b01-final-materials.pdf

Idaho
"Planning Ahead, A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death," handbook and forms, 2016
https://isb.idaho.gov/member-services/programs-resources/succession-planning/

Illinois
"The Basic Steps to Ethically Closing a Law Practice" (Mary F. Andreoni, Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, 2017), handbook with forms
https://www.iardc.org/Files/Closing_a_Law_Practice.pdf

Iowa
Judicial Branch webpage, "Succession Planning by Iowa Attorneys," extensive information and materials, including "Succession Planning Handbook for Iowa Lawyers," link to handbook, 2011
https://www.iowacourts.gov/static/media/cms/Succession09222011_C0DB22C0A1107.pdf

Maine
Board of Bar Overseers, "Maine Handbook for Withdrawal from the Practice of Law" 2009, with forms
https://mebaroverseers.org/docs/Practice%20Closing%20Guide%20-%2011.09.pdf

Michigan
"Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death," handbook and forms, (Practice Management Resource Center, 2014) (Michigan also has numerous resources, including checklists and forms: https://www.michbar.org/pmrc/successionplanning)
https://www.michbar.org/file/pmrc/articles/planningahead.pdf

Mississippi
"Planning Ahead: Protecting Your Client's Interest in The Event of Your Disability, Retirement Or Death," 2017 handbook and forms
https://www.msbar.org/media/3532/2017-ms-planning-ahead-manual.pdf

Missouri
Checklists and charts for succession planning (no date); member and non-member sign-in required
https://mobar.org/site/Lawyer_Resources/Practice-Management/Wind_Down_a_Practice/site/content/Lawyer-Resources/Law_Practice_Management/Wind_Down_a_Practice.aspx?hkey=1aa046f3-5cce-4d75-a95b-2f894b0328be

Nevada
"Succession Planning in Nevada," handbook and forms, 2017
https://www.nvbar.org/wp-content/uploads/Succession-Planning-in-Nevada-digital-edition.pdf

New Mexico
Succession Planning Resources
https://www.sbnm.org/Member-Services/Succession-Planning

New York
"NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death," handbook and forms (Third Edition, 2005-16)
https://nysba.org/attorney-resources/planning-ahead-guide/

New Hampshire
Handbook is available to bar association members only
https://www.nhbar.org/succession-planning-guide/

Oklahoma
"Planning Ahead Guide: Attorney Transition Planning in the Event of Death or Incapacity," handbook and forms, 2014
https://ams.okbar.org/eweb/content/pdf/transition_guide.pdf

Oregon
"Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death," handbook and forms (Barbara S. Fishleder, Oregon State Bar Professional Liability Fund, 2015)
https://www.osbplf.org/assets/Planning%20Ahead%20August%202015.pdf

Texas
"Closing a Law Practice" with links to several handbooks, including "How to Protect Your Clients and Your Firm in the Event of Your Death, Disability, Impairment, or Incapacity"
https://www.texasbar.com/AM/Template.cfm?Section=Closing_a_Law_Practice&Template=/CM/HTMLDisplay.cfm&ContentID=31886

Virginia
"Planning Ahead: Protecting Your Client's Interests in the Event of Your Disability or Death," 2019, with links to brochure and forms
https://www.vsb.org/Site/news/pubs/planning-ahead.aspx

Washington
"The Law Firm Guide to Disaster Planning and Recovery" Washington State Bar Association, 2020, handbook
https://www.wsba.org/for-legal-professionals/member-support/practice-management/guides/disaster-planning

West Virginia
Disciplinary Board, "Establishing a Succession Plan: A Guide to Protecting your Clients' Interests in the Event of Your Disability, Retirement, or Death," (2003), handbook and forms
https://wvbar.org/sucession-plan/

Wisconsin
"After All, You Are Only Human: The Solo Practitioner's Handbook for Disability and Death," (The Solo and Small Firm-General Practice Section of the State Bar of Wisconsin, 2013), handbook and forms
https://www.wisbar.org/formembers/practicemanagement/Documents/After%20All%2c%20You%20Are%20Only%20Human%20Version%20131028.pdf

Wyoming
"Planning Ahead: Succession Planning Guide," with links to handbook and forms
https://www.wyomingbar.org/for-lawyers/lawyer-resources/succession-planning/

Relevant Articles:

Delaware
Delaware Lawyer Assistance Program, "Law Office Management," with links to articles on succession planning
http://www.de-lap.org/law-office.htm

Georgia
"Aging Lawyers/Lawyers in Transition," with links to articles
https://www.gabar.org/wellness/mental/aging_lawyers.cfm

Hawaii
"Transitioning Lawyers Committee," with links to articles concerning succession planning
https://hsba.org/HSBA_2020/Membership/Lawyer_Resources/Transitioning_Lawyers.aspx

Indiana
"An Ethical Exit from the Practice of Law," by Donald R. Lundberg and Caitlin S. Schroeder, *Res Gestae*, November 2017
https://cdn.ymaws.com/www.inbar.org/resource/resmgr/res_gestae/ethics-curbstone/61resgestae36.pdf

Kentucky
"Succession Planning for Solo and Small Firms"
https://cdn.ymaws.com/www.kybar.org/resource/resmgr/sections/small_firm/20.21-22/succession_planning_for_solo.pdf

Louisiana
"Practice Aid Guide, Closing Your Practice"
https://www.lsba.org/PracticeAidGuide/PAG11.aspx

Nebraska
"Successful Succession: Make a Plan for Your Firm" (2023 CLE)
https://www.nebar.com/

New Jersey
"Lawyers Helping Lawyers," with links to helpful articles and resources
https://njsba.com/resources/lawyers-helping-lawyers/

North Carolina
"Succession Planning," with links to helpful articles
https://www.ncbar.org/members/communities/committees/transitioning-lawyers-commission/succession-planning/

South Carolina
"Succession Planning," (no date) with links to helpful forms and articles
https://www.scbar.org/lawyers/managing-your-law-practice/your-career-changes/closing-practice/succession-planning/

Vermont
"Succession Planning," with links to checklists and information sheets
https://www.vtbar.org/practice-resources/

§ 5.4
NYSBA Journal Attorney Professionalism Committee Forum

- *The Attorney Professionalism Forum: The ethical issues that lawyers face when they retire or decide to wind down a practice*| Reprinted with permission from New York State Bar Association Journal, Vol. 92, No. 1 | January/February 2020

Dear Forum:

I am a solo practitioner and planning to retire (or at least semi-retire) sometime next year. My plan has always been to sell my practice and ride off into the sunset. Now that the time to close shop is impending, however, I don't think I am quite ready to hang up my spurs altogether. I am planning to move to the south where I have a vacation home and am admitted to practice. I think I might do some part-time private practice work there or possibly even volunteer for some not-for-profit legal service groups.

Since my plans are changing from complete retirement to only partial retirement, I am trying to figure out how to navigate my ethical responsibilities to my current clients as well as my ethical obligations as a semi-retired member of the New York State bar. At the same time, however, I also want to make sure that I have enough in my retirement savings to be financially stable in the future. For example, I drafted hundreds of wills over the years and have a regular flow of estate matters as a result. Is selling my practice the only option I have if I am not completely retiring, or do I have other options? If I do continue part-time private practice work in the south, can I continue to list my New York admission in my advertising even though I am shutting down my New York office? Any advice on how to handle semi-retirement issues would be appreciated.

Sincerely,
Hopalong Semi-Retiree

Dear Hopalong Semi-Retiree:

Your inquiry is an interesting one and raises issues that we have discussed over the years. Whether you decide to formally retire or simply relocate, a number of ethical obligations under New York's Rules of Professional Conduct ("RPC") must be considered.

For starters, you should notify your clients that you intend to close your New York practice and relocate to the south. *See* Vincent J. Syracuse and Amy S. Beard, *Attorney Professionalism Forum*, N.Y. St. B.J., January 2012, Vol. 84, No. 1. You also need to consider formally terminating attorney-client relationships and your professional responsibilities regarding the disposition of the clients' files. We addressed this in our January 2017 *Forum*. *See* Vincent J. Syracuse, Maryann C. Stallone, & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., January 2017 Vol. 89, No. 1.

"Retirement" Options

Attorneys can take three paths when they decide to cease the active practice of law in New York. NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). The first option is for the attorney to continue their biennial registration ("continued registration") by filing the required form, paying the required fee, and completing the mandatory CLE requirement. *Id.* This option allows the attorney to continue to under-

take representation in New York, subject to additional ethical obligations discussed below. *Id.* A second option allows attorneys to change their registration status to "retired" under section 118.1(g) of the Rules of the Chief Administrative Judge, 22 N.Y.C.R.R. §118.1(g). *Id.* As stated in RPC 1.17(a), "[r]etirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted." An attorney choosing to retire as described in RPC 1.17(a) is exempt from payment of the biennial registration fee and from compliance with the mandatory CLE requirements, but is only permitted to render legal services in New York *pro bono*. *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). The third and most restrictive option is to voluntarily resign by filing an amendment to the attorney's registration form withdrawing the registration. *Id.* This option completely bars an attorney from practicing law in New York regardless of whether they receive compensation for their services. *Id.*

Selling Your Law Practice

Attorneys who decide to "retire" from active practice in New York and sell their practice must satisfy certain ethical obligations. The sale of a law practice in New York is governed by RPC 1.17, which provides that "[a] lawyer retiring from a private practice of law . . . may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice." *See* RPC 1.17(a). Rule 1.17 requires that the seller's entire practice be sold so as to protect clients "whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters." *See* RPC 1.17 Comment [6].

Moreover, depending on how you structure the purchase and sale agreement, selling your practice is often a good way to ensure that you will have enough retirement savings to be financially stable in the future. For example, an attorney selling a practice is permitted to make the sale contingent upon receiving a percentage of legal fees collected by the purchaser if the payment is in proportion to the services performed by the selling lawyer prior to the sale or if the payment fairly represents the value of the "goodwill" of the retiring lawyer. *See* NYSBA Comm. on Prof'l Ethics, Op. 961 (2013). "Goodwill" refers to the "going value of a law practice" that arises from the reputation of a business and its relations with its clients. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 870–71 (2019 ed.). In a law firm context, goodwill reflects, among other things, "the likelihood that satisfied existing clients will use the firm again when new matter arise" and "the likelihood that new clients will come to the lawyer or firm because of the firm's reputation." *Id.* at 870. The inclusion of "goodwill" in a sale of a law practice anticipates a likely income stream of future legal fees that the buyer is expecting to receive in the future. *Id.*

It is important to note that an attorney's duty to preserve confidential information remains in effect even after the representation concludes. *See* RPC 1.6. When engaging in preliminary negotiations regarding the sale of your practice, you should exercise caution to ensure that you do not violate attorney-client privilege. *Id*. RPC 1.17(b) (2), however, specifically allows a seller to provide a prospective buyer with information as to individual clients including the identity of the clients, the status and general nature of the matters, material available in public court files, and the financial terms and payment status of the clients' accounts. *See* RPC 1.17(b)(2). Absent the informed consent of the client, an attorney is prohibited from revealing any further confidential information that would violate the attorney-client privilege. *See* RPC 1.6, RPC 1.17(b)(1), (5).

One thing to consider in selling your law practice is that under RPC 1.17(a), the purchasing attorney may insist that you agree to a non-competition covenant thereby surrendering your ability to provide future legal services to your former clients. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 872 (2019 ed.). Rule 1.17(a) permits the purchasing attorney to negotiate "reasonable" restrictions on the selling attorney's ability to practice following the sale of the practice. *See* RPC 1.17(a). Based on the facts provided in your inquiry, a non-competition clause may not significantly affect your plans as such covenants are generally limited to restricting a lawyer's ability to service clients in the same geographic region as the practice to be sold. If the restrictive covenants are too broad in scope, however, they are less likely to be considered "reasonable." *Simon's New York Rules of Professional Conduct Annotated*, at 873 (2019 ed.). Moreover, RPC 1.17(a) governs an attorney's retirement from the private practice of law and does not apply where the attorney volunteers for a not-for-profit legal service group or obtains an in-house position. RPC 1.17 Comment [3].

Fee Sharing

Now we turn to the portion of your question regarding wills you previously drafted. If you do not wish to sell your entire practice, you have the option of asking another attorney whom you trust to maintain possession of your estate documents for the benefit of your clients so long as the client consents to such transfer or that the custodial attorney will only read the wills to the extent to notify the testators and ask for further instructions. *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), citing NYSBA Comm. on Prof'l Ethics, Op. 1035 (2014). Although the division of fees for legal services with another lawyer is generally prohibited under the RPC, Rule 1.5(g) offers an exception to the general prohibitions where: "(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive." *See* RPC 1.5(g).

In NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), the New York State Bar Association Committee on Professional Ethics considered Rule 1.5(g) and discussed the factual circumstances under which a "retiring lawyer" is empowered to ask for or accept a referral fee from the custodial attorney safeguarding wills if holding the wills results in a new representation for the custodial attorney. The Committee concluded that such a referral fee to the retiring lawyer is only appropriate where the retiring lawyer assumes joint responsibility for the representation within the meaning of Rule 1.5(g). *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). Comment [7] to RPC 1.5 provides: "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." *Id.*; *see also* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019).

As noted above, a lawyer whose registration status is "retired" or has voluntarily resigned from the practice of law in New York is prohibited from providing legal services to a client for compensation. *Id.* As such, in NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), the Committee opined that whether a retiring attorney could assume joint responsibility depended on whether the attorney maintained the ability to practice law for compensation. *Id*. Given that RPC 5.4(a) generally prohibits a lawyer from sharing legal fees with a non-lawyer, the Committee further opined that an attorney can assume joint responsibility for a representation *only* where the lawyer opts for continued registration upon retirement. *Id*., citing RPC 1.5(g), 5.4(a). Similarly, in NYSBA Comm. on Prof'l Ethics, Op. 1160 (2019), the Committee noted that it is improper for a New York attorney to share fees with a

lawyer who is not admitted to practice in New York if the sharing of fees as a matter of law would constitute the unauthorized practice of law. Accordingly, the Committee further opined that an attorney could satisfy the joint responsibility requirement of RPC 1.5(g)(1) if the attorney's status is "continued registration" at the time the custodial attorney provides services to the client. *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). Therefore, if you are going to consider a fee-sharing arrangement along these lines, you must continue to maintain your attorney registration.

New York Attorney Admission on Letterhead

A fundamental principle for all forms of attorney advertising and communications with the public is that they must not be "false, deceptive or misleading." RPC 7.1(a)(1). RPC 7.5(a) permits a lawyer to use letterhead and business cards so long as they "do not violate any statute or court rule and are in accordance with Rule 7.1." *See* RPC 7.5(a). In that respect, the NYSBA Committee on Professional Ethics opined that "a letterhead accurately stating that a lawyer is a 'Member of the Bars of [X State] and New York['] is not engaged in false, deceptive or misleading conduct." *See* NYSBA Comm. on Prof'l Ethics, Op. 1173 (2019). The Committee, however, opined that a lawyer listing admission in New York on letterhead, but lacking an office located in the state, "must explain to prospective and existing clients the limits that the absence of a New York office imposes on the lawyer to engage in practice in New York." *See* NYSBA Comm. on Prof'l Ethics, Op. 1173 (2019). Attorney advertising listing an office address where attorneys cannot actually meet with clients for appointments is likely to be considered deceptive and misleading to potential clients under RPC 7.1(a)(1). *Id.*

Judiciary Law § 470 requires that a lawyer practicing in New York must have a physical office located within the state and this requirement was upheld as constitutional by the Second Circuit Court of Appeals in *Schoenfeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016). Should you choose to continue practicing in New York in some form, as we discussed in a recent *Forum*, you may consider the option of operating your New York practice out of a "virtual law office" (VLO) if you want to relocate without selling your practice. *See* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., August 2019 Vol. 91, No. 6; *see also* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019). A VLO can be defined as "a facility that offers business services and meeting and work spaces to lawyers on an 'as needed' basis." *Id.*

Should you decide to continue your attorney registration in New York as part of the referral fee arrangement discussed above, you may be permitted to list the address of a VLO on your letterhead if the VLO qualifies as an "office" for the transaction of law business under the Judiciary Law § 470. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1501 (2019 ed.); *see also* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., August 2019 Vol. 91, No. 6; NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019). But since this is a rapidly evolving area of the law, you should make sure to stay current on this issue and ensure that any VLO you set up is in compliance with the law. *See Marina Dist. Dev. Co., LLC v. Toledano*, 174 A.D.3d 431, 432 (1st Dep't 2019) (Days after our August *Forum* went to press, the First Department held that an attorney did not sufficiently use a VLO program's services to meet the Judiciary Law § 470 requirement because there was no evidence that he used the physical New York office space and his letterhead directed replies to his Philadelphia office.)

Sincerely,
The Forum by

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- *The Attorney Professionalism Forum: Law Firm Document Retention Policies* | Reprinted with permission from New York State Bar Association Journal, Vol. 89, No. 2 | February 2017

Dear Forum:

I am the managing partner in a 50-plus attorney firm. We are in the process of re-evaluating our document retention policies for closed litigation and transactional files. While some attorneys at my firm retain their files indefinitely, others destroy their client files 30 days after the representation has concluded. We would like to develop a firm policy not only for consistency sake, but primarily to reduce the costs associated with the mounting volume of documents being stored in our records department, off-site and on our servers.

What are our ethical obligations to retain and preserve client files after the matter has concluded? After a litigation has been resolved, either through a settlement or judgment, must we continue to maintain the client's files, and if so, for how long? Are the rules the same for transactional matters? How long after a transaction has closed or been completed before we can destroy the client files for that representation?

I am also concerned about electronic files and emails, since I recently learned from one of my partners that he routinely deletes all emails after reading them and does not keep copies of "sent" emails. Do lawyers have an obligation to keep emails?

Does the firm have an obligation to notify our clients before destroying the files? One of our partners destroyed his copies of a client's transactional documents 30 days after the deal closed. The client called a year after that deal closed asking for the files and has threatened to sue the firm because those files were destroyed. The partner never contacted the client to tell them that he was disposing of the files. However, our engagement letter with that client expressly provides that we can dispose of the client's files upon the conclusion of the engagement. We understood that to be permissible but would appreciate your guidance.

Sincerely,
John Q. Manager

Dear John Q. Manager:

The sheer volume of documents, correspondence, drafts, and final work product generated by law firms in paper and electronic form can be staggering. While recent technology advances, such as cloud storage, can make it seem that file retention is easier and less expensive than traditional methods—such as warehouse storage—this is not always the case. The transfer of paper documents to electronic formats for digital storage can be time consuming and costly. It is vital that firms regularly update their document retention policies as technologies change, consult with their IT staff on the firm's ethical obligations to store data, and monitor their attorneys and staff to make sure that everyone complies with the firm's policies. Indeed, we recommend that every firm should have a formal document retention policy and that the policy is reevaluated yearly and disclosed to the firm's attorneys and staff. Otherwise, attorneys may believe that their computers, firm's network, and/or email systems are automatically backing up all their work in perpetuity when, in fact, automatic deletion policies are regularly deleting documents without the attorney's knowledge. Without a formal policy,

different attorneys will employ different practices, which can result in the problems mentioned in your letter. Therefore, your firm's plan to develop a firmwide retention policy is a prudent one and is something that your firm should develop and implement as soon as possible.

Despite the fact that all attorneys encounter the same question of what, if any, documents they must retain and for how long after their representation of a client has concluded, the New York Rules of Professional Conduct (RPC) offer little guidance to attorneys on these issues. Indeed, the New York City Bar Association Committee (NYCBA) on Professional and Judicial Ethics noted in Formal Opinion 2010-1 that there are very few provisions in the RPC that address document retention.

One rule that generally touches upon an attorney's document retention obligation is RPC 1.16(e), which provides that:

> [u]pon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid forseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, *delivering to the client all papers and property to which the client is entitled* . . . .

Id. (emphasis added). RPC 1.16(e), however, does not define how broadly "papers" or "property" should be construed. For example, do "papers" and "property" include the attorney's emails or work product or drafts that are relevant to the representation or do they simply include any "papers" and "property" provided by the client, deal documents or pleadings?

RPC 1.15(d) also gives us a list of bookkeeping records that a lawyer *must* retain for seven years including retainer agreements, bills rendered to clients, records of deposits and withdrawals, and bank statements. It is worth noting that RPC 1.15(d) distinguishes what items may be retained as copies (such as retainer agreements and bills) and what items must be retained in their original form (such as check stubs and bank statements). *See* RPC 1.15(d)(iii), (v), (viii); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 917 (2016 ed.); NYSBA Comm. on Prof'l Ethics, Op. 1077 (2015). Even upon dissolution of a firm, appropriate arrangements must be made for the maintenance of such original documents by either a successor firm or the attorneys personally. *See* RPC 1.15(h).

Moreover, under RPC 1.1, a lawyer has an obligation to represent a client competently, which implies a general duty to retain files as clients may reasonably expect to ask their attorney for copies of the work product for which they paid. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008) (noting that former New York Lawyer's Code of Professional Responsibility 6-101, which also included an obligation to represent a client competently, "implicitly impose[s] on lawyers an obligation to retain documents."). In addition, some local court rules require attorneys to keep copies of all files for seven years in personal injury, property damage, and wrongful death cases, such as pleadings, medical reports, repair bills, and correspondence concerning a claim or cause of action. *See*, *e.g.*, 22 N.Y.C.R.R. §§ 603.25(f) (First Judicial Department) and 691.20(f) (Second Judicial Department).

These rules do not address the overwhelming majority of documents and electronic data that law firms create on a regular basis during the course of a representation such as drafts of legal documents and yes, emails. Several ethics opinions and legal decisions addressing lawyers' obligations on document retention offer some help.

In 1986, the NYCBA Committee on Professional and Judicial Ethics issued an opinion on document retention and recommended that before destroying any documents that belong to the client, the lawyer should contact the client and ask whether the client wants delivery of those documents. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 1986-4 (1986). The committee further recommended that, "with respect to papers that belong to the lawyer, or papers as to which no clear ownership decision can be made, the answer to the questions whether and how long to retain such files is primarily *a matter of good judgment*, in the exercise of which the lawyer should bear in mind the possible need for the files in the future." *Id.* (emphasis added). This opinion cites to a number of ABA guidelines which are helpful in making such a determination including whether the lawyer knows or should know that the information "may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired" or is information that the client may need "which the client may reasonably expect will be preserved by the lawyer." *Id.*

In 2008, after 20 years of exponential growth in the creation of electronic files and email use, and new court decisions that addressed attorney file retention, the same committee revisited its 1986 opinion. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). The 2008 opinion, with a focus on the need to retain email and other electronic documents, essentially made the same recommendations as the earlier opinion because "many emails and other electronic documents now serve the same function that paper documents have served in the representation of a client." *Id.* Consistent with its earlier opinion, the committee opined that lawyers should use care not to destroy or discard documents such as "legal pleadings, transactional documents and substantive correspondence" while documents such as "draft memoranda or internal e-mails that do not address substantive issues" may be deleted. *Id.* We recommend reviewing both of these opinions when evaluating your document retention policies.

The decision of the N.Y. Court of Appeals in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30 (1997) also has provided guidance in addressing the issue of what categories of documents a firm must turn over to the client once its representation of that client has concluded. In that dispute, after a client obtained new counsel for a large and complex transactional matter, the client sought the entire file from its prior firm, including "internal legal memoranda, drafts of instruments, markups, notes on contracts . . . [and] firm correspondence with third parties." *Id.* at 33. The former counsel objected, arguing that those documents were unnecessary for the new counsel to advise the client on their continuing obligations from the transaction. *Id.* The Court held that "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," the client is "presumptively afford[ed] . . . full access" to the attorney's file on the matter. *Id.* at 34. The Court, however, specifically excluded two categories of documents from this requirement, including "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law" and "documents intended for internal law office review and use." *Id.* at 37. The Court noted that, for example, "tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation" would not need to be disclosed to the client by the former law firm. *Id.* at 37–38.

Consistent with this decision, the 2008 NYCBA formal opinion suggested that a client would not have a presumptive right to internal email communications between lawyers of the same firm that are

"intended for internal law office review and use" and are "unlikely to be of any significant usefulness to the client or to a successor attorney." *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). While *Sage Realty* addressed what retained documents must be turned over to a client, the Court specifically stated that its decision was "not to be construed as altering any existing standard of professional responsibility or generally accepted practice concerning a lawyer's duty to retain and safeguard all or portions of a client's file once a matter is concluded." *Id.* at 38. Rather, the decision just addressed a client's access to documents that had already been retained. *Id.*

Other than the time requirements for retaining certain files identified above, the RPC does not set forth a time-period requirement for file retention. Local bar associations such as the Nassau County Bar Association have recommended that lawyers preserve files for a seven-year period regardless of whether the attorney is required to do so. *See* Bar Ass'n of Nassau County Comm. on Prof Ethics Op. 2006-02 (2006).

Due to the limited number of bright-line rules indicating what documents should be retained, the form in which they should be stored, and the duration of such retention after a representation has concluded, these types of issues are a matter of business judgment that the law firms must make based on the type of legal representation and the client's possible need for the files in the future. Put another way, while your firm may not have an ethical or legal *obligation* to retain documents, such as casual correspondence, internal emails or draft memoranda, your firm may decide as a matter of smart business practice to retain documents (both paper and electronic) concerning a client's representation for a certain extended period after the representation concluded as protection, for example, in the event of a future a malpractice claim (i.e., for three years after the representation ended). *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). In fact, prior to making decisions about the time period for your firm's document retention policy, we recommend that you review the retention requirements imposed by your malpractice insurance carrier as its policy requirements may be broader than what is required under the law or the RPC. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2010-1, n. 2 (2010). Alternatively, if a law firm determines in its judgment that files should be destroyed in a shorter time frame than the applicable statute of limitations for any malpractice claim, we recommend that you communicate your document retention policy to the client both at the time of the engagement and at the conclusion of the representation.

We believe that a law firm's document retention policy is a subject that should be addressed in your firm's engagement letter, particularly if your firm chooses to implement a shorter period of retention. According to the NYCBA Committee on Professional and Judicial Ethics, an engagement letter can provide for the destruction of documents at the conclusion of the engagement if they "would furnish no useful purpose in serving the client's present needs for legal advice" or they are "intended for internal law office review and use" as defined in *Sage Realty*. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2010-1 (2010). "[D]ocuments with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments" must be preserved unless the client specifically directs otherwise. *Id.* With respect to the remaining documents, which may be deemed useful to the client, if the lawyer obtains the *informed consent* of the client pursuant to RPC 1.0(j), an engagement letter may authorize the attorney to review a closed file and make a determination—at her sole discretion—as to whether the documents should be retained or returned to the client. *Id.* You are advised, however, to consider the client's level of sophistication when obtaining the informed consent. *Id.*

Lawyers are individuals so we should not expect all attorneys in a practice to have the identical methods for handling their email volume. Just like a "clean" desk, some attorneys prefer to keep a "clean" inbox whereby they delete all email once it is read so important email that still requires attention is not buried. Other attorneys prefer to retain all of their email so they can easily search their inbox for a particular subject. There are also attorneys who prefer to create specific matter folders which are essentially desk top file cabinets for each case. Finally, there are those stalwarts who prefer to print important emails for the firm's physical file.

In NYCBA Committee on Professional and Judicial Ethics Opinion 2008-1 (2008), it was noted that while no particular method of electronic organization is required, the organization of emails by files devoted to specific representation was commendable. Even if you are unable to convince all of the attorneys in your firm to commit to such a system, it is advisable to ensure that their email habits do not result in the loss of documents that a client may need later on and reasonably expects the lawyer to preserve. *Id.* It is especially advisable to consult with your IT department to determine if your email system includes an automatic delete function, make sure that your entire firm is aware of that function, and have a protocol for how attorneys should preserve email that should be saved. *See id.* Hopefully, the partner in your firm who routinely deletes *all* emails at least prints out or copies the client on the correspondence that could be deemed useful to the client. If the partner is not making copies, you may suggest that the email retention policy be reconsidered firm-wide or if that attorney is simply not adhering to a policy already in place speak to the offending attorney about how his actions are opening himself and the firm to potential claims of malpractice.

With respect to your question about the wisdom of the destruction of an entire transactional file 30 days after that deal closed, a similar issue was addressed in Bar Association of Erie County Committee on Professional Ethics Opinion 10-06 (2010). In that opinion, the committee addressed an inquiry where, after the settlement of a personal injury claim, an attorney was interested in sending a notice to clients regarding the firm's file. The notice would indicate that if the client did not pick up the materials in connection with the case, or provide instructions regarding the disposition of those materials—within 30 days—the materials would be destroyed. *Id.* The committee opined that this notice would not conform to established ethical responsibilities because:

> (1) it does not take into account the requirements in the Rules of Professional Conduct or other rules governing the particular types of records described therein, (2) it does not require the client's informed consent before the destruction of other types of records, and (3) it contemplates the unilateral destruction of the entire file by the lawyer after a waiting period far shorter than the periods recommended in the ethics opinions that have addressed this subject.

Id. Your partner's situation is distinguishable from the Erie inquiry in that there was an engagement letter that provided for the destruction upon the conclusion of the engagement and there was no notice of the destruction after the matter concluded. To the extent that the destroyed file contained any of the documents that your firm was *required* to retain or return to the client under the RPC or local rules, such as the client's property, we are of the opinion that the destruction of the file was improper and you may have some exposure to a malpractice claim. With respect to the remaining documents in the file, destruction without further notice to the client would only have been permissible if you had obtained the *informed consent* of your client—preferably in writing—through the engagement letter. *Id.* As informed consent will depend on the sophistication of the party giving it, we would need more

information on the details about the client and the specific directions in the engagement letter. In the future, however, we would recommend implementing a policy whereby you obtain informed consent of your destruction policy at the commencement of your representation and, subsequently before destroying any deal files, you send an email or letter to the client notifying him or her that the firm has a 30-day retention policy as indicated in the engagement letter and unless you hear from the client before a certain date, the firm will proceed to destroy those files in accordance with the firm's policy.

A dearth of clear rules for attorney file retention means that attorneys have an obligation to review files at the conclusion of a matter and use their good judgment to determine what files may be discarded in each case. In addition to potentially violating ethical rules and performing a disservice to your client, hasty file destruction also can lead to an inability to protect your own firm's interests down the road in the event you need to defend yourself against a malpractice claim. We know that keeping files can be expensive but there are many lawyers who believe that they will get repeat business if the clients have to come back for their files. Everything should be kept in balance. We recommend including your retention policies in the engagement letter at the start of your representation with a client, obtaining informed consent from the client as to your firm's file storage policies at the outset, creating policies that require attorneys in your firm to retain emails that may be deemed important to your clients, reviewing the contents of each file before it is destroyed, giving the client notice of the firm's intention to destroy certain files, and providing the client with a reasonable opportunity to obtain those files.

Sincerely,
The Forum by

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- *The Attorney Professionalism Forum: Unraveling the Files of a Deceased Solo Practitioner* | Reprinted with permission from New York State Bar Association Journal, Vol. 89, No. 1 | January 2017

To the Forum:

I have a new client that is a party to a number of related actions with many parties. My client's prior attorney was a solo practitioner and she recently passed away unexpectedly. My client relied on the prior attorney implicitly, doesn't have any of the voluminous files for the litigation, and believes that the attorney was holding money in her escrow account pending the resolution of the litigation. I have been in communication with the prior attorney's husband, who is attempting to wind up the law office. It is clear, however, that in addition to being completely distraught about the loss of his wife, he is not an attorney and doesn't have any idea what to do. He is so concerned that he is going to turn over the wrong files to the wrong person, or turn over files without having collected all of his wife's fees, that he just refuses to turn anything over. He isn't sure if he is going to try to sell the practice or just dissolve it. It doesn't seem like he will be able to resolve this quickly. Meanwhile, I am having a very difficult time moving forward with my client's cases without her file, and the client and remaining parties are beginning to lose patience.

Although I am sympathetic to the husband's dilemma, my client is beginning to suffer from the delays. I am worried that I am not doing enough to convince the former attorney's husband to assist me in getting the files and turn over the escrow funds. In our last conversation, he even asked me, "Do you have any thoughts about whether I should dissolve the practice or try to sell it? Would you be interested in purchasing it?" When I asked my client if he had fully paid the prior attorney's fees, the client told me he thought he might owe some fees, but due to the recent delay, he believed that he no longer had to pay them.

Is there anything I can do to encourage the prior attorney's unrepresented husband to turn over the file and escrow funds? Should I be concerned that I am trying to get the file even though the prior attorney may not have been fully paid by my client? I have also been thinking about the offer to buy the practice. Here, it would kill three birds with one stone: I would get the file for my client, help out the prior counsel's husband, and expand my practice. Would I create a conflict of interest with my client by performing due diligence and negotiating to purchase the practice? What if I wasn't buying the practice, but just offering to assist in dissolving the practice?

Sincerely,
Somewhat Conflicted

Dear Somewhat Conflicted:

Your dilemma is a cautionary tale for all solo practitioners who have not created a plan in the event that they should unexpectedly pass away or become disabled and unable to practice law. Rule 1.3(b) of the New York State Rules of Professional Conduct (RPC) states that a "lawyer shall not neglect a legal matter entrusted to the lawyer." Comment 5 to RPC 1.3 addresses the ramifications of an attorney who suddenly is unable to practice: "To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for imme-

diate protective action." Similarly, the American Bar Association has stated that "[t]o fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-369 (1992). The New York State Bar Association (NYSBA) publishes an excellent tool to assist in creating such a plan entitled, *NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interest in the Event of Your Disability, Retirement or Death*. This free guide is available online and is highly recommended for any solo practitioner or practice that has not prepared an exit plan. *See* www.nysba.org/PlanningAhead-Guide2016. Unfortunately, it appears that your client's prior counsel did not prepare such a plan and that you and your client are now left to unravel the difficult ramifications from that oversight.

As a general matter, Rule 321(c) of the N.Y. Civil Practice Law and Rules (CPLR) protects parties where their attorney unexpectedly passes away in that it prohibits further proceedings against the party, "without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs." However, it appears that you have already been substituted as new counsel and your client may no longer be entitled to this statutory protection. While we would hope that both opposing counsel and the judge on the matter would be sympathetic to your client's situation, and that you have explained your efforts to obtain the file, we are cognizant that opposing counsel similarly faces a diligence burden for their clients under RPC 1.3.

As we read your question, you are trying to obtain your client's files and escrowed funds in an expedited manner from the deceased lawyer's husband, a non-lawyer and unrepresented party, and there is a reasonable possibility that your client has conflicting interests with the deceased lawyer's estate due to your client's intent to contest legal fees owed to the estate.

As an initial matter, we note that RPC 4.3 governs your communication with the former attorney's husband because he is unrepresented. *See* RPC 4.3. It provides that an attorney "shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." *Id*. Moreover, RPC 4.3 prohibits you from stating, or even implying, to the prior lawyer's husband that you are disinterested in his situation and, if you should reasonably know that the husband misunderstands your role in the matter, you must take reasonable efforts to correct the misunderstanding. *See id*. Therefore, it goes without saying that you should not assist him in dissolving the practice or otherwise. Indeed, if you have not done so already, you should make clear to the deceased lawyer's husband that you cannot provide him with advice concerning his wife's estate or law practice, other than to recommend to him that he hire counsel immediately to advise him on the various issues he is confronting as a result of his wife's death. *See id*.

With respect to the husband's refusal to turn over the files, we note that while the files belong to the client and the delays caused by his refusal may be problematic, the husband's position is not entirely unreasonable. The NYSBA Planning Ahead Guide states that "[c]are should be taken to safeguard against improper access to client files and information by unauthorized persons, *e.g.*, non-attorney family members." *NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death* (2015), www.nysba.org/PlanningAheadGuide2016, at 7. The guide also states that if the "executor [of the solo practice] is not

an attorney, it is important that he or she avoid inappropriate access to client files and information and rely instead on an attorney or office staff to attend to these matters." *Id.* at 9. These risks may be avoided if the husband were to retain counsel to review the files to make sure that only the appropriate files are turned over.

This analysis applies even if you are engaged in discussions to potentially buy the deceased attorney's practice. Indeed, RPC 1.17(b) specifically restricts the information that a seller may disclose to prospective buyers providing that only certain information about clients may be disclosed, such as the identity of the clients, the status and general nature of the matters, material available in public court files, and the financial terms and payment status of the clients' accounts. *See* RPC 1.17(b)(2). Absent the informed consent of the client, the seller is prohibited from revealing confidential information or information that would cause a violation of the attorney-client privilege under RPC 1.6. *See* RPC 1.17(b)(1), (5). While RPC 1.17 does not explicitly state that a non-lawyer is prohibited from providing prospective buyers with information as to individual clients, an attorney is clearly needed to review the files to assess which materials are confidential and protected by attorney-client privilege.

The husband's concern about releasing the funds held in the practice's escrow account is similarly a legitimate one. As a non-lawyer, the husband is prohibited from being an authorized signatory to the escrow account. *See* RPC 1.15(e) ("Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account."); NYSBA Comm. on Prof'l Ethics, Op. 693 (1997) ("[I]t is clear that only a lawyer may control the lawyer's client escrow account and be a signatory of it"). RPC 1.15(g) identifies the procedure regarding control of escrow accounts where the sole signatory attorney on the escrow account passes away. It requires an application to the Supreme Court of the State of New York for an order designating a successor signatory for the escrow account who is a member of the bar and admitted to practice in New York. *See* RPC 1.15(g)(1). This application may be made by, among others, a legal representative of the deceased lawyer's estate or any person who has a beneficial interest in the funds in the escrow account, such as your client. *See* RPC 1.15(g)(2). The New York Supreme Court can then designate a successor signatory and direct the disbursement of escrowed funds where appropriate. *See* RPC 1.15(g)(3).

In light of the foregoing ethical considerations, if you find that the husband is not inclined to retain an attorney for the estate, or is not acting expeditiously to hire one, your best option here may be to move before the appropriate court for an order directing that the files be turned over and appointing a successor signatory to the escrow bank accounts pursuant to the procedure set forth in RPC 1.15(g). *See In re Hickey*, 142 A.D.3d 753, 754 (3d Dep't 2016) (application made by Tompkins County Bar Association for the appointment of one or more attorneys as custodian of the files of a law office of a solo practitioner who died without a plan for his practice after his death and for the appointment of a successor signatory to decedent's law office and escrow bank accounts under RPC 1.15(g); granting bar association's motion to become a limited custodian of the law office files, but denying the motion for appointment of a successor signatory on the escrow account, without prejudice, because the motion failed to comply with procedure set forth in RPC 1.15(g)(2).) A motion would circumvent any conflicts that may arise from any direct communications with the husband, and may also ultimately encourage the husband to retain an attorney to review the files and make determinations as to which files should be turned over. Even if the husband chooses not to retain counsel once you have filed your motion and proceeds *pro se*, at that point, a judge is likely to appoint a custodian of the law firm's files

and successor signatory to the attorney's escrow account in order to protect the deceased lawyer's clients' funds.

The decision to make such a motion and have a successor signatory appointed is not without risks to your client. If an attorney is appointed by the court as a successor signatory, the outstanding legal fees issue is likely to be brought to the forefront since the successor signatory will likely review the file, and any outstanding charged fees, before releasing any escrowed funds or your client's files for that matter. Even though you may have replaced the former attorney as counsel of record in the litigation, the estate may claim a retaining lien and retain the file until the estate has been paid. *See* RPC 1.8(i)(1) (a lawyer may "acquire a lien authorized by law to secure the lawyer's fee or expenses"); *see, e.g.*, *Roe v. Roe*, 117 A.D.3d 1217, 1218–19 (3d Dep't 2014) ("A retaining lien . . . permits the discharged attorney to retain the contents of the client's file until such time as the attorney has been paid or 'the client has otherwise posted adequate security ensuring [the] payment [there]of'") (internal citation omitted); *Sec. Credit Sys., Inc. v. Perfetto*, 242 A.D.2d 871, 871 (4th Dep't 1997) ("Plaintiff submitted no proof that defendant was discharged for cause. Thus, defendant was entitled to reimbursement for his disbursements before returning the files to the client."). In any event, this may nevertheless be the best option to get what you need.

With respect to your interest in potentially purchasing the deceased lawyer's practice, we see two issues: (1) the husband may not be in a position at this time to make decisions regarding the sale of the practice unless he has been appointed as a legal representative of the deceased lawyer's estate; and (2) you should know that you will not be able to pick and choose which cases you want and do not want to take over from the practice. The estate's sale of the law practice is controlled by RPC 1.17, and provides that the personal representative of a deceased lawyer "may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice." RPC 1.17(a). According to Professor Roy Simon's annotation on RPC 1.17(a), this section "will not come into play unless a court appoints a legal representative" for the deceased lawyer. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 983 (2016 ed.). Moreover, the rule "requires that the seller's *entire* practice be sold" and that "[t]he buyers are required to undertake all client matters in the practice subject to client consent." RPC 1.17 Comment 6. The purpose of this rule is to protect the clients whose matters are less lucrative and might have a hard time finding other counsel. *See id.* Accordingly, unless a court has already appointed the husband as the legal representative for his wife's estate, he may not even be able to sell the practice at this point and he certainly cannot sell off certain cases.

But even if a legal representative has been appointed for the estate, and that legal representative approaches you about a potential sale offer, a conflict of interest may exist here with your current client, which may prevent you from purchasing the practice unless certain conditions are met. Specifically, RPC 1.7(a)(1) prohibits representation of a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing different interests." RPC 1.7(a)(1). Comment 10 to RPC 1.7 notes that, "[t]he lawyer's own financial, property, business or other personal interest should not be permitted to have an adverse effect on representation of a client." *Id.* If you are seeking to have the seller turn over litigation materials and escrowed funds for your client at the same time you are negotiating the purchase price of a solo practice for your personal benefit, your client's needs could become a source of leverage in the sale negotiation thereby creating a significant conflict of interest between you and your client. Professor Simon examines a similar risk in his discussion of payments to non-lawyers after an attorney's death under RPC 5.4(a)(2). *See* Simon, *Simon's New York*

Rules of Professional Conduct Annotated, at 1424 ("The drafters [of the RPC] may have believed that there would be too great a risk that a widow, child, or relative of a deceased lawyer would seek to influence the handling of a particular pending matter in order to increase or expedite the payment of the deceased lawyer's share."). You may be able to avoid the conflict by resolving the file, escrow, and attorney fee issues to your client's satisfaction before considering the sale offer and then obtaining the informed consent of your current client in writing (*see* RPC 1.7(b, d)).

The unexpected death or disability of an attorney will be devastating to family, coworkers, colleagues, and clients on a personal level and creates numerous issues particularly where there is no plan in place providing for the continuity of the law practice and maintenance and protection of client files and interests. The designation of another attorney to manage or dissolve a solo practice in the event of death or disability, with basic written instructions and authorizations for the designated attorney, should be considered a bare minimum for all solo practitioners. In other words, it is wise to plan ahead for the benefit of your family and clients. For substituting counsel, your best option to retrieve your client's files and funds is to recommend to the unrepresented party that he retain counsel immediately and to communicate with the attorney assuming responsibility for the client files of the deceased lawyer. Alternatively, you should make a motion to the appropriate court seeking an order directing that the files and escrowed funds be turned over to you.

Sincerely,
The Forum by

Vincent J. Syracuse, Esq.
Maryann C. Stallone, Esq.
Carl F. Regelmann, Esq.
Tannenbaum Helpern Syracuse & Hirschtritt LLP

FORMS

§ 5.5
HIPAA Form[1]

OCA Official Form No.: 960

AUTHORIZATION FOR RELEASE OF HEALTH INFORMATION PURSUANT TO HIPAA

[This form has been approved by the New York State Department of Health]

Patient Name	Date of Birth	Social Security Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form:

In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), I understand that:

1. This authorization may include disclosure of information relating to **ALCOHOL** and **DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV* RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
2. If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
3. I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
4. I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
5. Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
6. **THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**

7. Name and address of health provider or entity to release this information:

8. Name and address of person(s) or category of person to whom this information will be sent:

9(a). Specific information to be released:

- ❑ Medical Record from (insert date) _____ to (insert date) _____
- ❑ Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers.
- ❑ Other: _____

Include: (*Indicate by Initialing*)

_____ **Alcohol/Drug Treatment**
_____ **Mental Health Information**
_____ **HIV-Related Information**

Authorization to Discuss Health Information

(b) ❑ By initialing here _____ I authorize _____
Initials — Name of individual health care provider

to discuss my health information with my attorney, or a governmental agency, listed here:

_____
(Attorney/Firm Name or Governmental Agency Name)

10. Reason for release of information: ❑ At request of individual ❑ Other:	11. Date or event on which this authorization will expire:
12. If not the patient, name of person signing form:	13. Authority to sign on behalf of patient:

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

_____ Date: _____
Signature of patient or representative authorized by law.

* **Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.**

1 NYS Unified Court System, OCA Official Form No.: 960, http://www.nycourts.gov/forms/hipaa_fillable.pdf.

Instructions for the Use of the HIPAA-compliant Authorization Form to Release Health Information Needed for Litigation

This form is the product of a collaborative process between the New York State Office of Court Administration, representatives of the medical provider community in New York, and the bench and bar, designed to produce a standard official form that complies with the privacy requirements of the federal Health Insurance Portability and Accountability Act ("HIPAA") and its implementing regulations, to be used to authorize the release of health information needed for litigation in New York State courts. It can, however, be used more broadly than this and be used before litigation has been commenced, or whenever counsel would find it useful.

The goal was to produce a standard HIPAA-compliant official form to obviate the current disputes which often take place as to whether health information requests made in the course of litigation meet the requirements of the HIPAA Privacy Rule. It should be noted, though, that the form is optional. This form may be filled out on line and downloaded to be signed by hand, or downloaded and filled out entirely on paper.

When filing out Item 11, which requests the date or event when the authorization will expire, the person filling out the form may designate an event such as "at the conclusion of my court case" or provide a specific date amount of time, such as "3 years from this date".

If a patient seeks to authorize the release of his or her entire medical record, but only from a certain date, the first two boxes in section 9(a) should both be checked, and the relevant date inserted on the first line containing the first box.

§ 5.6
Sample New York Statutory Power of Attorney Form

POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to any third parties who may have acted upon it, including the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.nysenate.gov or www.nyassembly.gov.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, _____ _____

(name of principal) *(address of principal)*

hereby appoint:

_____ _____

(name of agent) *(address of agent)*

_____ _____
(name of second agent) (*address of second agent*)

as my agent(s).

If you designate more than one agent above and you do not initial the statement below, they must act together.

(____) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If any agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):

_____ _____
(*name of successor agent*) (*address of successor agent*)

_____ _____
(*name of second successor agent*) (*address of second successor agent*)

If you do not initial the statement below, successor agents designated above must act together.

(____) My successor agents may act SEPARATELY.

You may provide for specific succession rules in this section. Insert specific succession provisions here:

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications".

(e) This POWER OF ATTORNEY DOES NOT REVOKE any Powers of Attorney previously executed by me unless I have stated otherwise below, under "Modifications."

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either

(1) Initial the bracket at each authority you grant, or

(2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

(____) (A) real estate transactions;

(____) (B) chattel and goods transactions;

(____) (C) bond, share, and commodity transactions;

(____) (D) banking transactions;

(____) (E) business operating transactions;

(____) (F) insurance transactions;

(____) (G) estate transactions;

(____) (H) claims and litigation;

(____) (I) personal and family maintenance: If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five thousand dollars;

(____) (J) benefits from governmental programs or civil or military service;

(____) (K) financial matters related to health care; records, reports, and statements;

(____) (L) retirement benefit transactions;

(____) (M) tax matters;

(____) (N) all other matters;

(____) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;

(____) (P) EACH of the matters identified by the following letters _____.

You need not initial the other lines if you initial line (P).

(g) CERTAIN GIFT TRANSACTIONS: (OPTIONAL)

In order to authorize your agent to make gifts in excess of an annual total of $5,000 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), and/or to make changes to interest in your property, you must expressly grant that authorization in the Modifications section below. If you wish to authorize your agent to make gifts to himself or herself, you must expressly grant such authorization in the Modifications section below. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. Your choice to grant such authority should be discussed with a lawyer.

(____) I grant my agent authority to make gifts in accordance with the terms and conditions of the Modifications that supplement this Statutory Power of Attorney.

(h) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including, but not limited to, language to limit or supplement authority granted to your agent, language to grant your agent the specific authority to make gifts to himself of herself, and /or language to grant your agent the specific authority to make other gift transactions and/or changes to interests in your property. Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. In this section, you may make additional provisions if you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, and you may define "reasonable compensation."

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

If you wish to appoint monitor(s), initial and fill in the section below:

(____) I wish to designate _____, whose address(es) is (are) _____, as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S):

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, and/or you wish to define "reasonable compensation," you may do so above, under "Modifications."

(k) ACCEPTANCE BY THIRD PARTIES:

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION:

This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____, 20__

PRINCIPAL signs here: ====>_____

STATE OF NEW YORK)

)ss:

COUNTY OF _____)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

(n) SIGNATURE OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Power of Attorney in my presence and in the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Power of Attorney reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as an agent or as a permissible recipient of gifts.

_____	_____
Signature of Witness 1	Signature of Witness 2
_____	_____
Date	Date
_____	_____
Print name	Print name
_____	_____
Address	Address
_____	_____
City, State, Zip Code	City, State, Zip Code

(o) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;

(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;

(4) keep a record of all transactions conducted for the principal or keep all receipts of payments and transactions conducted for the principal; and

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manners: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in the modifications section of this document or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent: The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(p) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities.

In Witness Whereof I have hereunto signed my name on _____ 20__

Agent(s) sign(s) here:==> _____

_____

STATE OF NEW YORK)

)ss:

COUNTY OF _____)

On the _____ day of _____, 20__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

(q) SUCCESSOR AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as SUCCESSOR agent(s) for the principal named therein.

In Witness Whereof I have hereunto signed my name on _____ 20__

Successor Agent(s) sign(s) here:==> _____

==> _____

STATE OF NEW YORK)

)ss:

COUNTY OF _____)

On the _____ day of _____, 20___, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

LAWS AND REGULATIONS

§ 5.7
Rules of Professional Conduct

New York State Rules of Professional Conduct[2]

(Effective April 1, 2009, as amended through April 1, 2021

With Comments as amended through October 30, 2021)

2 New York Rules of Professional Conduct, New York State Bar Association, https://nysba.org/attorney-resources/professional-standards/.

2.2 [Reserved]
2.3 Evaluation for Use by Third Persons
2.4 Lawyer Serving as Third-Party Neutral
3.1 Non-Meritorious Claims and Contentions
3.2 Delay of Litigation
3.3 Conduct Before a Tribunal
3.4 Fairness to Opposing Party and Counsel
3.5 Maintaining and Preserving the Impartiality of Tribunals and Jurors
3.6 Trial Publicity
3.7 Lawyer as Witness
3.8 Special Responsibilities of Prosecutors and Other Government Lawyers
3.9 Advocate in Non-Adjudicative Matters
4.1 Truthfulness in Statements to Others
4.2 Communication with Persons Represented by Counsel
4.3 Communicating with Unrepresented Persons
4.4 Respect for Rights of Third Persons
4.5 Communication After Incidents Involving Personal Injury or Wrongful Death
5.1 Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers
5.2 Responsibilities of a Subordinate Lawyer
5.3 Lawyer's Responsibility for Conduct of Nonlawyers
5.4 Professional Independence of a Lawyer
5.5 Unauthorized Practice of Law
5.6 Restrictions on Right to Practice
5.7 Responsibilities Regarding Nonlegal Services
5.8 Contractual Relationship Between Lawyers and Nonlegal Professionals
6.1 Voluntary Pro Bono Service
6.2 [Reserved]
6.3 Membership in a Legal Services Organization
6.4 Law Reform Activities Affecting Client Interests
6.5 Participation in Limited Pro Bono Legal Service Programs
7.1 Advertising
7.2 Payment for Referrals

7.3 Solicitation and Recommendation of Professional Employment

7.4 Identification of Practice and Specialty

7.5 Professional Notices, Letterheads, and Signs

8.1 Candor in the Bar Admission Process

8.2 Judicial Officers and Candidates

8.3 Reporting Professional Misconduct

8.4 Misconduct

8.5 Disciplinary Authority and Choice of Law

§ 5.8
Selected Appellate Division Rules

First Department:

22 N.Y.C.R.R. § 603.16 Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated

§ 603.16(d) Appointment of Attorney to Protect Clients' and Suspended Attorney's Interests

Second Department:

§ 691.13 Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated

§ 691.13(d) Appointment of Attorney to Protect Client's and Suspended Attorney's Interest

Third Department:

§ 806.10 Mental Incapacity of Attorney; Protection of Clients of Disbarred and Suspended Attorneys

§ 806.11 Appointment of Attorneys to Protect Clients' Interests

Fourth Department:

§ 1022.23 Incompetency or Incapacity of Attorney

§ 1022.24 Appointment of Attorney to Protect Clients of Suspended, Disbarred, Incapacitated or Deceased Attorney

§ 1022.25 Responsibilities of Retired Attorneys

§ 5.9
Selected CPLR and Judiciary Law Excerpts

CPLR 321. Attorney withdrawal

(b) Change or withdrawal of attorney

1. Unless the party is a person specified in section 1201, an attorney of record may be changed, by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

2. An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

(c) Death, removal or disability of attorney. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

CPLR 4503. Attorney-client privilege

(a) 1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

CPLR 5514. Extension of time to take appeal or to move for permission to appeal

(b) Disability of attorney. If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

(c) Other extensions of time; substitutions or omissions. No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, section 1022, or section 5520.

Judiciary Law § 468-a. Biennial registration of attorneys

4. The biennial registration fee shall be three hundred seventy-five dollars, sixty dollars of which shall be allocated to and be deposited in a fund established pursuant to the provisions of section ninety-seven-t of the state finance law, fifty dollars of which shall be allocated to and shall be deposited in a fund established pursuant to the provisions of section ninety-eight-b of the state finance law, twenty-five dollars of which shall be allocated to be deposited in a fund established pursuant to the provisions of section ninety-eight-c of the state finance law, and the remainder of which shall be deposited in the attorney licensing fund. Such fee shall be required of every attorney who is admitted and licensed to practice law in this state, whether or not the attorney is engaged in the practice of law in this state or elsewhere, except attorneys who certify to the chief administrator of the courts that they have retired from the practice of law.

5. Noncompliance by an attorney with the provisions of this section and the rules promulgated hereunder shall constitute conduct prejudicial to the administration of justice and shall be referred to the appropriate appellate division of the supreme court for disciplinary action.

Judiciary Law § 499. Lawyer assistance committees

1. Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privilege may be waived only by the person, firm or corporation which has furnished information to the committee.

2. Immunity from liability. Any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of, any of the committees referred to in subdivision one of this section shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of any proceeding, the good faith of any such person, firm or corporation shall be presumed.

22 N.Y.C.R.R. § 118.1. Filing Requirement

(g) Each registration statement filed pursuant to this section shall be accompanied by a registration fee of $375. No fee shall be required from an attorney who certifies that he or she has retired from the practice of law. For purposes of this section, the "practice of law" shall mean the giving of legal advice or counsel to, or providing legal representation for, particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere, it shall include the appearance as an attorney before any court or administrative agency. An attorney is "retired" from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law. For purposes of section 468-a of the Judiciary Law, a full-time judge or justice of the Unified Court System of the State of New York, or of a court of any other state or of a

Federal court, shall be deemed "retired" from the practice of law. An attorney in good standing, at least 55 years old and with at least 10 years experience, who participates without compensation in an approved pro bono legal services program, may enroll as an "attorney emeritus."

(h) Failure by any attorney to comply with the provisions of this section shall result in referral for disciplinary action by the Appellate Division of the Supreme Court pursuant to section 90 of the Judiciary Law.

22 N.Y.C.R.R. Part 1200. New York Rules of Professional Conduct

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Rule 1.16. Declining or Terminating Representation

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

22 N.Y.C.R.R. § 1500.5. Waivers, Modifications and Exemptions

(b) Exemptions. The following persons shall be exempt from the requirements of New York's continuing legal education program:

(4) Attorneys who certify that they are retired from the practice of law pursuant to § 468-a of the Judiciary Law.

§ 5.10
Selected Ethics Opinions

New York State Bar Association Committee on Professional Ethics

Opinion #	Year	Summary
341	1974	Notice to clients whose wills lawyer holds at retirement.
460	1977	Preservation of closed files.
521	1980	Wills; contact with executor, beneficiaries.
531	1981	Duty to report violation of Disciplinary Rule; communication to member of rehabilitative committee.
622	1991	Firm name; deceased partner; successor firm.
623	1991	Closed files; disposition procedures; dissolution of law firm.
641	1993	Lawyer must comply with recycling ordinance in such a way as to protect confidentiality of client information.
680	1996	Record retention by electronic means digest: lawyers may retain some records in the form of computer images, but certain records must be retained in original form.
699	1998	Sale of practice by newly elected judge.
707	1998	Sale of portion of law practice.
715	1999	Conflict of interest; sub-contractor to multiple law firms.
724	1999	Wills; obligations of law firm in regard to wills in its custody.
734	2000	Attorney's obligation to report to a client a significant error or omission that may give rise to a possible malpractice claim.
758	2002	Required trust account documents should be retained as paper copies where available to lawyer in the ordinary course of business; otherwise, these documents may be retained in electronic form.
766	2003	Former client and/or successor counsel presumptively entitled to access all attorney files.
775	2004	When possibly incapacitated former client asks lawyer to return client's original will, lawyer may communicate with former client and others to ascertain former client's condition and wishes.
780	2004	Generally proper for lawyer to retain copies of client's file; proper to require a release of malpractice liability as a condition of returning the file without retaining copies.
793	2006	Except for personal conflicts, conflicts imputed to attorney will also be imputed to all lawyers in any firm with which the attorney has an of counsel relationship; where two firms share an of counsel relationship, conflicts of one firm will be imputed to the other.

831	2009	Where a lawyer learns that a client, before April 1, 2009 (the effective date of the new Rules of Professional Conduct), had committed fraud on a tribunal, lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of former Code of Professional Responsibility, which generally did not permit disclosure of confidences or secrets, and not by rule 3.3 of the new Rules of Professional Conduct, which may require disclosure of confidential information necessary to remedy the fraud. Where the fraud occurred before April 1, 2009, this conclusion applies whether the lawyer learns of the fraud before or after April 1, 2009.
850	2011	A law firm may not use the name of a former partner in the firm name if the former continues to practice law elsewhere.
854	2011	Lawyer who was employed by another lawyer must report knowledge of former employer's violation of the Rules of Professional Conduct if the violation raises a substantial question about employer's honesty, trustworthiness, or fitness as a lawyer and if the report does not disclose confidential information. If former employee lacks knowledge, he may report good faith belief or suspicion of former employer's professional misconduct to an appropriate authority if the report does not disclose confidential information, but may not communicate that belief or suspicion to the employer's clients.
865	2011	Lawyer who prepared estate plan for decedent may represent executor despite recent change in law of legal malpractice in Estate of Schneider v. Finmann (N.Y. 2010) provided that lawyer does not perceive a colorable claim of legal malpractice arising out of the estate planning.
961	2013	The price of a practice may be based, at least in part, on future revenue generated by the clients of the selling attorney.
1077	2015	A law firm may scan original signed retainer agreements into the firm computer system and then destroy the original agreements, provided that the firm maintains the scanned copies for seven years after the events they record.
1089	2016	A lawyer who is retired from the practice of law under Section 118.1(g) of the Rules of the Chief Administrative Judge and who therefore may render legal services only without compensation may use the title "Esq.", but must indicate the retired status or the limitations on his or her right to practice if there is a risk of confusion regarding his or her role.
1092	2016	A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, also representing the client, has committed a significant error or omission that may give rise to a malpractice claim.
1100	2016	An attorney who obtains the designation "Accredited Estate Planner®" from the National Association of Estate Planners & Councils may not use that designation on the attorney's website or business cards because, even though the American Bar Association has approved a different specialization program of the sponsoring organization, the ABA has not approved its "Accredited Estate Planner®" program.

1114	2017	Attorneys may electronically sign checks issued from their law firm's "special," trust or IOLA account, provided that an authorized signatory who is a New York lawyer personally reviews and approves the issuance of the check with his or her digitized signature.
1128	2017	A lawyer who undertakes to complete unfinished legal business of a deceased attorney may pay the deceased lawyer's estate that proportion of the total compensation that fairly represents the services (if any) that the deceased lawyer rendered in the matter. If the lawyer instead refers the matter to a third attorney, the lawyer and the third attorney may share legal fees provided they comply with Rule 1.5(g).
1133	2017	A lawyer who is the transferee and solely a custodian of client files arising from a transaction other than a sale of law practice may communicate with the prior lawyer's clients if the lawyer does not review confidential information in the files more than reasonably necessary to identify the contact information of the prior lawyer's clients and complies with the rules governing advertising and solicitation of prospective clients.
1142	2018	Where a lawyer keeps client files received in electronic form in that form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form in which the client can access them, but the lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy.
1159	2018	Following the death of a lawyer who was the sole shareholder of a law firm, and the firm's dissolution, a former associate of the firm may share legal fees with the deceased lawyer's estate only as permitted by Rule 5.4(a) or as required by court order.
1168	2019	An attorney who purchases a law firm may continue to use that firm's name, provided it is not misleading. For example, a purchasing attorney could not continue to use the word "Group" in the firm name if the firm now had just one attorney. One of the purchased assets is the goodwill of the selling firm, and "the name of a law firm is central to its goodwill."
1163	2019	A lawyer represented a defendant who later defaulted in making payments under a settlement agreement, who cannot be now located by the lawyer, and who is facing a motion before a court based on the failure to make such payments, may inform the court that the lawyer no longer represents the defendant if the prior representation ended and the prior action before the court had ended. If the representation of the client had not concluded or the prior matter before the court had not been closed, the lawyer will have to seek permission from the court to withdraw from the representation, after using reasonable efforts to locate the client.
1164	2019	A lawyer has an interest in maintaining a copy of client-owned documents provided to the lawyer during a representation, but in certain instances that interest must yield to a client's legitimate request to destroy those copies. To protect the lawyer's exposure to later suit, the lawyer may

1172	2019	A retiring attorney who transfers his wills to another attorney can receive a referral fee for new representations of the testators or estates, if he assumes joint responsibility for the representation.
1182	2020	A lawyer may not dispose of wills even when the testators' locations and/or circumstances are unknown. A lawyer must safeguard the wills indefinitely unless the law provides an alternative.
1188	2020	A lawyer who receives estate funds solely as co-executor of an estate may not use an attorney trust account to hold or disburse such funds
1192	2020	With certain important exceptions, a lawyer has no ethical duty to retain closed client files (or other documents held by the lawyer owned by third parties) for an indefinite period when neither the client nor the third party requests their return. The exceptions are original documents of intrinsic value such as wills, deeds, or negotiable instruments, as well as documents that the lawyer knows or should know that the client or third party may need in the future. Apart from these documents, a lawyer has an ethical duty to retain for seven years certain books and records concerning an attorney-client relationship, and any documents otherwise required by law to maintain.
1201	2020	An attorney who was referred a case by an attorney who later retired is permitted to pay a referral fee to the retired attorney, provided the retired attorney assumed joint responsibility for the matter
1204	2020	A firm which purchased the practice of a retiring attorney may list the name of that attorney's firm and dates of operation on its letterhead, even after the death of that attorney.
1207	2020	As the result of a 2020 amendment to Section 7.5(b) of the Rules of Professional Conduct, a firm may use a trade name that does not include the name of any lawyer practicing in the firm, so long as it is not false, deceptive or misleading. Also, a firm name may continue to include the name of a retired partner.
1217	2021	A firm may generally continue to use in the firm name the name of a former partner who becomes "Of Counsel" to the firm, or who leaves the firm for non-legal employment.
1218	2021	A firm is ethically permitted to pay a former firm lawyer who has assumed public office a share of the fees for matters on which that lawyer rendered service
1220	2021	Separate and independent law firms may not form a PLLC and advertise themselves as members of "ABC Law Group PLLC" because (i) the name would be a false, deceptive or misleading trade name, (ii) the name would be misleading as to the identity of the lawyers practicing under that name, and (iii) the name would falsely imply that the separate firms were practicing law in association with each other.

1221	2021	A lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning. Such communications are not advertisements and therefore are not subject to the advertising provisions in Rule 7.1 or the solicitation provisions in Rule 7.3, but they are subject to the more general provisions in Rule 8.4(c) forbidding misrepresentation.
1226	2021	An attorney may use a domain name that differs from the name of the law firm under which the attorney practices, provided the domain name and law firm name, separately or combined, are not false, deceptive, or misleading.
1230	2021	A law firm may not include on its letterhead the name of deceased attorney who does not stand in a continuing line of succession with the firm.
1233	2021	A sole practitioner may not refer to associates of other law firms with whom she works as "associates" of her firm and may not include in her law firm name the phrase "and Associates" when she is referring to associates employed by another firm.
1234	2021	A New York lawyer may not be a partner, associate or employee of a law firm in New York or in another jurisdiction that has direct or indirect ownership by nonlawyers in accordance with the rules applicable in that jurisdiction, unless the lawyer is licensed in the other jurisdiction and principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not in New York.
1235	2021	A law firm may operate under two different assumed names that distinguish separate practice areas of the firm, provided that no particular facts and circumstances would make it false, deceptive, or misleading to do so.

	NYCLA Professional Ethics Committee
Formal Opinion 749	A lawyer's ethical duty of competence extends to the manner in which he provides legal services to the client as well as the lawyer's substantive knowledge of the pertinent areas of law. The duty of competence expands as technological developments become integrated into the practice of law. Lawyers should be aware of the disclosure risks associated with the transmission of client confidential information by electronic means and should possess the technological knowledge necessary to exercise reasonable care with respect to maintaining client confidentiality and fulfilling e-discovery demands. Further, a lawyer's duty of competence in a litigation or investigation requires that the lawyer have a sufficient understanding of issues relating to securing, transmitting, and producing electronically stored information ("ESI"). The duty of technological competence required in a specific engagement will vary depending on the nature of the ESI at issue and the level of technological knowledge required. A lawyer fulfills his or her duty of technological competence if the lawyer possesses the requisite knowledge personally, acquires the requisite knowledge before performance is required, or associates with one or more persons who possess the requisite technological knowledge.
	Nassau County Bar Association Committee on Professional Ethics
Opinion No. 2012-2	A retired attorney who has properly certified his status with the Office of Court Administration may continue to provide legal services to clients without restriction if those services are rendered without compensation and the client is fully informed of any material limitations that might be placed on the representation as a result of the attorney's retired status—A retired attorney who agrees to hold funds or property in trust for clients must comply fully with Rule 1.15 concerning preservation of identity of funds and property of others—A retired attorney may give legal advice and provide legal services as an executor and trustee provided those services are rendered for no compensation—A retired attorney must disclose and explain his retired status to any prospective or current client with respect to any legal representation undertaken after retirement. But a retired attorney need not make any disclosure to third parties or adversaries with whom he deals on the client's behalf, or alter office signage, personal stationary or directory listings to reveal that he is retired from practice.

Opinion No. 2013-1	A retired attorney who has properly certified his status with the Office of Court Administration may continue to provide legal services to clients without restriction if those services are rendered without compensation and the client is fully informed of any material limitations that might be placed on the representation as a result of the attorney's retired status—A retired attorney who agrees to hold funds or property in trust for clients must comply fully with Rule 1.15 concerning preservation of identity of funds and property of others—A retired attorney may give legal advice and provide legal services as an executor and trustee provided those services are rendered for no compensation—A retired attorney must disclose and explain his retired status to any prospective or current client with respect to any legal representation undertaken after retirement. But a retired attorney need not make any disclosure to third parties or adversaries with whom he deals on the client's behalf, or alter office signage, personal stationary or directory listings to reveal that he is retired from practice.
	Erie County Bar Association Committee on Professional Ethics
Opinion # 11-06	Attorney must return funds to entitled parties; IOLA Fund receives any interest on the account; Lawyers' Fund for Client Protection receives unaccounted for or unclaimed funds; lawyer or successor must maintain records of the account for seven years.
	American Bar Association Standing Committee on Ethics and Professional Responsibility
Formal Opinion 483 (2018)	Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.
Formal Opinion 471 (2015)	Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

Formal Opinion 06-444 (2006)	Under ABA Model Rule of Professional Conduct 5.6(a), a lawyer may participate in offering or making a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship only if the agreement concerns benefits upon retirement. To be considered an agreement concerning retirement benefits under the Rule, however, the provision must affect benefits that are available only to a lawyer who is in fact retiring from the practice of law, and cannot impose a forfeiture of income already earned by the lawyer. Beyond that, law firms and employers have significant latitude in shaping the nature and scope of the restrictions on practice and the penalties for noncompliance.
Formal Opinion 03-431(2003)	A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(a)(2), which requires that she withdraw from the representation of clients.
Formal Opinion 03-429 (2003)	If a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

FAQs

§ 5.11
ABA FAQs on Extended Reporting ("Tail") Coverage

[Starts on page 213]

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY

EXTENDED REPORTING ("TAIL") COVERAGE

APRIL 2013

Section A: Terms to know regarding Extended Reporting, or "tail," Coverage:

Bare, "going bare": Not what you do in the bathtub, but rather, a lawyer who practices for a period of time without professional liability insurance coverage.

Career Coverage: A policy or policy provisions that provide coverage for claims arising from the acts, errors or omissions of an insured when providing legal services at any law firm during or prior to the current policy period. Most professional liability policies for law firms of size only provide coverage for claims arising from work done on behalf or in the name of the insured law firm, but career coverage covers claims arising from work done at any prior point in a lawyer's career, irrespective of where the lawyer worked. Such coverage may be limited or non-existent if the lawyer is joining another firm, as that firm's insurance carrier (or the firm itself) may not wish to cover such exposure when it doesn't have to do so.

Claims-Made and Reported Coverage: Most professional liability policies are written on this basis. In order for a claim to be covered, the claim must be first made against the insured lawyer and reported to the insurance company during the policy period. Some polices may be "claims-made" forms, where the claim must be made during the policy period, but the insured's requirement to report the claim to the insurance company may extend to a time period beyond the expiration of the policy period (such as "within a reasonable period of time" or "as soon as practicable").

ERC: An acronym for extended reporting coverage. Coverage is provided for claims made and reported after the expiration of a claims-made policy, if such claims arose from acts or omissions occurring during an insured period of time, before the ERC was issued or effective.

ERP: Extended reporting period. May be used interchangeably with the term ERC, although this term more accurately refers to the length of time ERC is provided. The period of time during which a claim arising from an act or omission occurring prior to the inception date of the ERP can (in most cases) be reported and covered. Most professional liability policies provide the insureds with options to purchase ERPs of varying length.

Occurrence Coverage: A policy that provides coverage for claims arising from acts or omissions occurring during the period of time covered by the policy, regardless of when the claim is actually made. This form of coverage is very familiar to most consumers, and while it is used for many casualty insurance products (such as auto and homeowners insurance), it is rarely used for professional liability coverage.

Prior Acts Coverage: Coverage for claims arising from acts, errors or omissions occurring at some point prior to the inception date of the policy. A policy providing "full prior acts" coverage covers claims arising for work done in the name or on behalf of the insured firm without a time limitation. Some policies have a "retro date" or retroactive date, which limits prior acts coverage to claims arising for work done in the name or on behalf of the insured firm on or after the retro date. Whether or not prior acts coverage is limited only for work done on behalf of or with the named insured firm will depend upon the policy provided by the particular insurance company.
Retro Date: See Prior Acts Coverage, supra.

"Tail" Coverage: A lawyer's exposure for claims arising from work done during a particular policy period extends well past the expiration of the policy period, since such a claim may not be made for several years after the work is performed. This exposure is often referred to as "tail exposure", because it trails the attorney like a tail trails an animal. "Tail coverage" is generally referred to as the coverage for this exposure provided under an Extended Reporting Period (ERP) or ERC, supra.

Section B: FAQ's Regarding Extended Reporting Coverage, and coverage for "prior acts."

This topic may be important to you if any of the following occur during your legal career:

- You change firms;
- A law firm you work for merges with another firm;
- The lawyers in your firm decide to dissolve the firm; or
- You retire from practice, or permanently leave the practice of law.

What is extended reporting coverage (ERC), sometimes referred to as an extended reporting period (ERP) or "tail" coverage?

As with most forms of errors and omissions insurance, almost all lawyers' professional liability insurance (LPL) is written on a claims-made basis. With many policies, in order for a claim to be covered, the claim has to be first made against the policyholder *and* reported to the insurance company during the policy period (claims-made and reported coverage). If a policy expires, and a claim is thereafter made, the lawyer or firm will not have coverage under that policy. Some policies will provide coverage for claims made during the policy period, provided that the claim is reported within a reasonable time after the policy expiration date. These policies are known as "claims made" policies. ERC provides coverage for claims arising from work performed prior to the expiration of the policy period that are made and reported after the time in which to report a claim has expired.

Why is this coverage sometimes referred to as "tail" coverage?

Lawyers' professional liability insurance is often called a "long-tail" line of insurance. An act or omission may take place today, but a claim arising from that act or omission may not be discovered or made against the lawyer for a considerable period of time, sometimes years later. Compare such claims to the typical auto accident or property damage insurance claims. The vast

majority of those claims are reported to an insurance company within a relatively short period of time after the event giving rise to the claim. A significant percentage of LPL claims are not made, and therefore not reported, for some time after the act or omission giving rise to the claim, hence the term "long-tail" line of insurance.

Is such coverage automatically provided after a claims-made and reported policy expires?

The answer to this question depends upon the specific policy language. Many policies provide a *limited* period of time in which to report a claim after a policy expiration date, usually between 30 to 60 days. Some polices offering such coverage require that the claim be first made before the expiration date of the policy, but provides additional time after expiration to report the claim to the insurer. A few policies will provide "free" ERC to an insured for a much longer period of time, provided certain conditions are met. These conditions usually include a certain number of years insured by the given insurer, and retirement from law practice by the lawyer. Such policies are by far the exception, not the rule.

Most insurers will, for additional premium paid at the time of exercise, offer an optional ERC. The insured typically may purchase ERC for a period of one year, two years, three years, five years, and, under some policies, an unlimited time period. The cost is generally a multiple of the last annual policy premium, and depends upon the length of time selected for the ERC.

Furthermore, most insurers require the purchase of ERC to take place within a certain number of days from the date of policy expiration, or the option to purchase this coverage will be lost.

Some policies require that ERC be purchased, if at all, by the law firm, and it is not available to individual attorneys

If a lawyer leaves a law firm for other employment, how can the lawyer be certain that she or he remains covered for what she/he did while working for the law firm?

If the law firm remains an ongoing entity, the lawyer is usually covered as a former member or employee of the firm for claims arising from services rendered while she/he was with the firm, assuming the firm retains its claims-made coverage. However, if the firm divides or dissolves at some point thereafter, and does not buy ERC for the firm upon its termination, then there may be no coverage for the lawyer for any claim made thereafter.

If a lawyer leaves one firm and joins another, is it possible to purchase coverage for acts or omissions that occurred prior to joining the new firm, thus avoiding any issue with respect to having ERC for prior acts or omissions?

In most cases, the new firm's insurance policy will by its terms cover only the lawyer's acts on behalf of the new firm. Most carriers will *not* agree to provide coverage for claims arising from acts or omissions of the lawyer prior to joining the firm ("career coverage"), even if the new firm wishes to secure this coverage for its new attorney. There are exceptions to this rule, however, with some commercial insurers and state bar-related insurers either providing career coverage in

the policy form or willing to endorse the policy (with or without additional premium) to provide such coverage. The lawyer may also be able to cover prior acts or omissions by purchasing ERC when leaving a firm, if the option for an individual ERC is available in the prior firm's policy.

Example: Lawyer Jones leaves law firm Blood, Swet & Howe and joins firm Silver & Gold. The policy for Blood, Swet has no provision for the purchase of an individual tail. The insurer for Silver & Gold only agrees to cover claims arising from acts or omissions of Jones after joining that firm. "Career coverage" for Lawyer Jones is not available with Silver & Gold. In the event that Blood, Swet dissolves or merges with another firm without purchasing ERC that covers lawyers in the firm or formerly in the firm, Jones may have no coverage for any claim later made arising out of her work while employed with Blood, Swet.

A lawyer wishes to purchase ERC, but the cost is prohibitive. Are there possible options to assist with the purchase?

Some insurers may allow the premium for the ERC to be paid in installments over time. If an installment premium is not paid, the ERC will be cancelled. It may also be possible to purchase an ERC with lower limits of liability than was provided by the expiring policy, thus reducing the cost of the ERC. Of course, the lawyer or law firm should determine if it is prudent to do so. This option may not be widely available, but some insurers are willing to negotiate such modification of limits.

If a lawyer does work after the ERC is in place, and a claim arises from the services performed after the claims-made and reported policy expiration or termination date, but within the ERC period, is that claim covered by the ERC?

No. The ERC only covers claims arising for professional services rendered prior to the expiration or termination of the policy that are made and reported subsequent to the policy expiration or termination date and prior to the end of the ERC termination date.

Can a lawyer buy his/her own ERC coverage when leaving a firm, or at some point after leaving the firm, if it becomes necessary to have ERC in place for services rendered while with the firm?

The answer depends in part upon what the firm's policy provisions allow. Most often, the lawyer will not be able to buy his/her own ERC when leaving the firm (unless the attorney thereafter ceases to practice law, discussed below), in part because the insurer continues to cover the lawyer under the firm's policy, and to provide additional coverage to the lawyer could create additional exposure for the insurer for a claim, when no such additional exposure was contemplated. Insurers may sell some form of individual ERC to a departing lawyer, but this coverage may be conditioned upon the lawyer's retirement from private practice, disability, or death. Some policies may also provide for individual ERC if the lawyer leaves the private practice of law, such as becoming a judge, or becoming employed in a non-legal or "in-house" capacity.

Furthermore, ERC is generally not commercially available to a lawyer or law firm as a "stand alone" insurance product. As a rule, ERC is only available in conjunction with a previously issued claims-made policy. There are select markets that may provide stand-alone ERC, but this is not common, and typically applies to larger law firms facing dissolution or merger.

A lawyer decides to leave a law firm, but do some limited amount of solo private practice. Can that lawyer purchase coverage for his/her prior acts or omissions while with the firm?

There may be several options for a lawyer to secure coverage for his/her prior acts in this particular circumstance. *First*, it should be remembered that for so long as the lawyer's prior firm remains covered under a typical claims made policy, that lawyer will have coverage for claims arising from work performed while at that firm. *Second,* a lawyer leaving a firm and going solo may be able to purchase his/her own "prior acts" coverage in connection with a policy issued to cover his/her solo activities (see below). Some insurers that provide "prior acts" coverage in these cases may refuse to do so, if the lawyer left a large law firm where a self-insured retention, or deductible amount, was very high, often six-figures or possibly even greater. The new insurer may consider such retention to be the equivalent of having been uninsured. *Third,* there may be an option under the lawyer's former firm's policy to purchase an individual ERC.

Some insurers may offer a "part-time" policy to lawyers who are doing a limited amount of work. Even though the policy is issued on a part-time basis, at least one state bar-related insurer will cover full-time prior acts under such a policy.

Example: Lawyer Smith leaves a law firm, and begins his own solo practice. Whether or not his prior firm maintains coverage for claims arising from acts or omissions while with the firm, Lawyer Smith may be able to find insurance coverage that will cover claims arising from acts or omissions prior to the start of the solo practice. Note a possible exception: where prior acts coverage is conditioned upon the insurer having provided coverage for the prior firm.

Is the length of ERC always limited in time to a certain number of years, or can such coverage be purchased that never expires?

The answer to this question depends upon the policy purchased. Many insurers will provide an option of ERC for a limited period of time, but some also provide the option of an "unlimited" period of time in which a claim can be reported. In other words, the ERC never terminates.

A lawyer has practiced "bare," or without insurance, for a period of time. Can that lawyer buy a claims-made policy that will cover prior acts or omissions, in a sense, ERC, even if they have not been previously insured?

Most insurers will not agree to cover claims arising from services performed during a period of time for which the lawyer had no insurance in place. There may be exceptions to this general rule.

§ 5.12
FAQs Re Document Destruction and Preservation

Question: How long does a lawyer or law firm have to keep closed files?

Answer: Lawyers and law firms have to keep different files and documents for different periods of time. For example, the New York Rules of Professional Conduct require lawyers to keep escrow, trust and operating account bank records for seven years. See Rule 1.15(d)(1).

Rule 1.15(d) also requires lawyers to keep for seven years copies of all retainer and compensation agreements with clients, client bills, all "records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed," as well as copies of all retainer and closing statements filed with the Office of Court Administration.

Court Rules in the First and Second Departments require attorneys for plaintiffs and defendants in personal injury actions to preserve virtually the entire file for seven years after the settlement or discontinuance of the action. See 22 N.Y.C.R.R. §§ 603.7(f) and 691.20(f).

Lawyers must maintain original client documents such as wills and trusts or return them to the clients for safekeeping. It is advisable to maintain files in most criminal cases indefinitely, as the need for such files can arise decades later. The same can be said for files in transactional matters and other areas of practice. In contrast, most litigation files need not be maintained for more than three years after the litigation is concluded or the representation of the client terminated, whichever is later (except for personal injury files in the First and Second Departments, which must be kept for seven years). The best practice is to adopt and adhere to a document retention policy and to advise clients of the policy.

Question: What bank records are covered by Rule 1.15(d)?

Answer: A lawyer or law firm should keep all monthly statements, cancelled checks, deposit slips, check books, check stubs, ledgers and reconciliation statements for all special, trust, IOLA and escrow accounts, as well as for all operating accounts. As a precaution, a lawyer or law firm should maintain such records for any other fiduciary account the lawyer or firm maintains. These records may be kept in paper or electronic formats. See NYSBA Ethics Opinion 940 (2012) (examining use of electronic tape back-up systems, cloud storage systems and legal obligations of attorneys to preserve certain documents in original form). See also NYC Bar Formal Op. 2008-1 (re a lawyer's obligation to retain electronic documents).

Question: What records do I have to keep for conflicts checking purposes?

Answer: The Rules of Professional Conduct require law firms to maintain a "conflicts check system" and "written records of its engagements." See Rule 1.10(e). Rule 1.10(e) identifies four situations in which lawyers must check for conflicts: (1) the firm agrees to represent a new client; (2) the firm agrees to represent an existing client in a new matter; (3)

the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter. Lawyers and law firms should keep enough information about client matters (open and closed) to determine, for example, whether they can represent a new client against a former client or concurrent clients with "differing interests." Lawyers considering a new representation need to be able to determine whether it is "substantially related" to a prior representation. It is advisable to keep the firm's client database (whether that is maintained on index cards or electronically) up to date, with complete information about client identity (including related entities) and the nature of the matter for which the lawyer or law firm was retained. These records must be maintained for as long as the lawyer is in practice or the law firm (or its successors) in business. After all, conflicts may follow lawyers from firm to firm and there is no fixed period for maintaining the information. Thus, a prudent lawyer should maintain it for as long as necessary, namely, as long as the lawyer is in practice. For guidance on former client conflicts, see Rule 1.9.

Question: Can a lawyer simply have a document destruction policy and get rid of all closed files after six months?

Answer: The answer is probably not. Six months sounds like much too short a time frame. The statute of limitations for legal malpractice actions is three years and it can be tolled by continuing representation of a client, even on unrelated matters. There is no statute of limitations for disciplinary complaints, which can be filed many years after a case is over. Except when otherwise required by rule or statute, it is wise to keep most client files for at least six years. There are additional considerations. Lawyers should not destroy documents that may be necessary for the representation of a client in the future or documents that have not been given to the client, but which the client could "reasonably expect that the lawyer will preserve." Attorneys are obliged to preserve electronic documents and email in many situations and certainly should not destroy client files before notifying the client. In *Sage Realty Corp., et al. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997), the Court of Appeals held that the client was entitled to the entire file, except for internal law firm documents. Law firms should give clients an opportunity to pick up their files before destroying them. Helpful guidance can be found in NYSBA Opinion 623 (1991) and NYSBA Opinion 460 (1977). See also NYSBA Opinion 766 (2003) ("Former client and/or successor counsel is presumptively entitled to access all attorney files"); NYCBAR 2010-1 (attorneys may put provision in engagement letter specifying handling of client's file at conclusion of matter, but "attorney must take reasonable steps to preserve all documents that she has an obligation to retain or return to the client").

Question: What about old original wills? Can those just be thrown out on the reasonable assumption that they are no longer needed because the clients have died or found new counsel?

Answer: No, if a lawyer or law firm has retained original wills, they must be preserved or returned to the testators for safekeeping. Lawyers who retain original wills should make arrangements for someone else to safeguard them after they retire or cease practicing. Of course, it is impossible to return old wills to persons known or presumed to be deceased. Consider filing the wills in the local Surrogate's court. Note there is a filing fee of $45, though the court may reduce or dispense with the fee. Get informed about common prac-

tices in your region. Some County Bar Associations offer will registries which may be useful. Another law office may be willing to retain the wills of a deceased or retired attorney. Like wills, certain contracts, property deeds, trust instruments and other documents that a client might need to establish "substantial personal or property rights," or other original documents like birth and marriage certificates and passports, must be returned to the client or safeguarded by the lawyer. Failure to do so can result in professional discipline for failure to safeguard a client's property or damages for breach of fiduciary duty. (See Rule 1.15(c); NYSBA Opinion 940 (2012) (examining use of electronic tape back-up systems, cloud storage systems and legal obligations of attorneys to preserve certain documents in original form); NYCBAR Formal Opinion 2010-1 (examining lawyer's obligation to retain client files).

Question: Is there anything else that a lawyer or law firm should consider in designing a document retention program or policy?

Answer: Yes. First, no documents or files should be discarded if they might be necessary to the firm's defense of its own conduct or its handling of a matter. A firm should be particularly careful not to destroy documents that show that the firm committed malpractice or violated the ethics rules. Second, it is very important that client confidentiality be preserved during any document or file destruction. Shredding is advisable, since anything else may lead to disclosure of client confidences or secrets and liability for the firm. Similar caution should be used when computer equipment is replaced. No computer should be disposed of before the hard drive has been carefully erased, scrubbed or shredded, which can be accomplished simply by using available software programs. Just deleting files and documents won't do, since a person with sufficient computer expertise can retrieve most of those files and documents with a "restore" function. Expert advice is strongly recommended.

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