



WSBA

**PLANNING AHEAD:
A GUIDE TO PROTECTING YOUR CLIENTS' INTERESTS
IN THE EVENT OF YOUR DISABILITY OR DEATH**

A Handbook and Forms

Washington State Bar Association

The Washington State Bar Association gratefully acknowledges the pioneering work done by the Oregon State Bar Professional Liability Fund in this area and its generous permission to use its publication, *The Duty to Plan Ahead*, as the basis for this booklet.

PLANNING AHEAD

Washington State Bar Association

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PLANNING FOR THE UNTHINKABLE

We do not like to think about unexpected events that could cause us to abruptly cease practicing law. However, events such as accidents, unexpected illnesses, and untimely death are known to occur. If any of these events were to happen to you, have you made adequate plans to assure that your clients' interests will be protected? If not, this handbook was prepared to help you start immediately to protect your interests and those of your clients.

A lawyer has a duty of competent representation pursuant to the Rules of Professional Conduct. See RPC 1.1, et seq. This includes making arrangements that will safeguard the client's interests (including the integrity of any trust moneys, confidentiality of information, and the continuing viability of the client's legal matter) in the event of the lawyer's death, disability, impairment, or incapacity. ABA Formal Op. 92-369. The majority of malpractice carriers require that the lawyers they insure make arrangements for the appropriate disposition of client matters in the event of the insured lawyer's death or disability. The Washington State Bar Association (WSBA) has created this handbook to assist you in planning for an orderly transfer of responsibility for your clients' affairs in the event of a crisis in your life.

An additional resource, which is always available to you, is the Law Office Management Assistance Program (LOMAP), offered through the WSBA. (For information, contact Pete Roberts at peter@wsba.org or 206-727-8237.) In planning the transfer of a client's case, you want to make sure that the client will promptly receive his or her file so that the client's rights are not jeopardized and so that the client can take it to the new attorney. You must also arrange for any moneys in the client's trust account to be promptly returned.

Terminology

The term "Assisting Attorney" is used through out this handbook. It refers to the lawyer(s) you have made arrangements with to close down your practice or to handle it while you are incapacitated.

The term "Authorized Signer" is used to refer to the person you have authorized as a signer on your lawyer trust account.

The term "Affected Attorney" refers to you, your estate, or your personal representative.

Implementing the Plan

First, you must find one or more attorneys to close your practice in the event of your death, disability, impairment, or incapacity.

The arrangements you make for closure of your office, or the temporary takeover of your practice, should include a signed consent form authorizing one or more Assisting Attorney(s) to contact your clients for instructions on transferring their files, authorization to obtain extensions of time in litigation matters when needed, and authorization to provide all relevant people with notice of closure of your practice.

The agreement should also include provisions that give the Assisting Attorney authority to: wind down your financial affairs; provide your clients with a final accounting and statement; collect fees on your behalf; and liquidate or sell your practice. Arrangements for payment by you or your estate to the Assisting Attorney for services rendered can also be included in the agreement.

At the outset of your negotiations with the Assisting Attorney, it is important for the two of you to nail down the scope of the Assisting Attorney's duties to both you and your clients. If the Assisting Attorney is representing your interests as your attorney, he or she may be prohibited from also representing your clients on some, or possibly all, matters. Under this arrangement, the Assisting Attorney would owe his or her fiduciary obligations to you. For example, the Assisting Attorney could not inform a client of your legal malpractice or ethical violations, unless you consented in writing. However, if the Assisting Attorney is expected to represent your clients, he or she may have an ethical obligation to inform the client of your errors or omissions.

In either event, the Assisting Attorney must be aware of conflict of interest issues and must check for conflicts if he or she (1) is providing legal services to your clients or (2) must review confidential file information to assist in transferring clients' files. In the latter case, the conflicts check must occur before the file review.

Not only do you need to have at least one Assisting Attorney, you also need to recruit an Authorized Signer who can sign on your trust account under these circumstances. This should be someone other than the Assisting Attorney. You want to provide for checks and balances, since two people will have access to your records and information. It also avoids the potential for any conflicting fiduciary duties that could arise if the trust account does not balance.

This planning process, which is intended to protect your clients' interests in the event of your disability or death, involves some difficult decisions, including: the type of access that the Assisting Attorney and/or Authorized Signer will have; the conditions under which they will have access; and who will determine when those conditions are met. Commentators have expressed the belief that these decisions are the hardest part of this advance planning.

For example, if you are incapacitated, you may not be able to give consent to someone to assist you. Have you determined under what circumstances you want someone to assert the right to help you or take over your practice? Who decides that you are incapacitated and what criteria will be used?

One suggested approach is to give the Assisting Attorney and/or the Authorized Signer access during a specific time period or after a specific event and to allow the Assisting Attorney and/or the Authorized Signer to determine whether the contingency has occurred. Another approach is to have someone else (such as a spouse, trusted friend, or family member) keep the applicable documents (such as a limited power of attorney for the Assisting Attorney and/or the Authorized Signer) until he or she determines that the specific event has occurred. A third approach is to provide the Assisting Attorney and/or Authorized Signer with access to records and accounts at all times. With the amendments to RPC 1.15A in 2006, access to and control of both client files and client moneys is restricted to a licensed attorney.

If you want the Assisting Attorney and/or the Authorized Signer to have access to your accounts contingent on a specific event or during a particular time period, you have to decide how you are going to document the agreement. Depending on where you live and the bank you use, some approaches may work better than others. Some banks require only a letter signed by both parties granting authorization to sign on the account. You and the Assisting Attorney and/or the Authorized Signer may want to sign a limited power of attorney. Most banks prefer a power of attorney. Signing a separate limited power of attorney increases the likelihood that the bank will honor the agreement. It also provides you and the Assisting Attorney and/or the Authorized Signer with a document limited to bank business that can be given to the bank. (The bank does not need to know all the terms and conditions of the agreement between you and the Assisting Attorney and/or the Authorized Signer.)

If you choose this approach, consult the manager of your bank. When you do, be aware that the power of attorney forms *provided by the bank* are generally unconditional authorizations to sign on your account and may include an agreement to indemnify the bank. Get written confirmation that the bank will honor *your* limited power of attorney or other written agreement. Otherwise, you may think you have taken all necessary steps to allow access to your accounts, yet when the time comes the bank may not allow the access you intended.

If the access is going to be contingent, you may want to have someone (such as your spouse, family member, personal representative, or trusted friend) to hold the power of attorney until the contingency occurs. This can be documented in a letter of understanding, signed by you and the trusted friend or family member. Then, when the event occurs, the trusted friend or family member provides the Assisting Attorney and/or the Authorized Signer with the power of attorney.

If the authorization will be contingent on an event or for a limited duration, the terms must be specific and the agreement should state how to determine whether the

event has taken place. For example, are the Assisting Attorney and/or the Authorized Signer authorized to sign on your accounts only after obtaining a letter from a physician that you are disabled or incapacitated? Is it when the Assisting Attorney and/or the Authorized Signer, based on reasonable belief, says so? Is it for a specific period of time -- for example, a period during which you are on vacation? You and the Assisting Attorney and/or the Authorized Signer must review the specific terms and be comfortable with them.

The same issues apply if you choose to have a family member or friend hold a general power of attorney until the events or contingency occurs. All parties need to know what to do and when to do it. Likewise, to avoid problems with the bank, the terms should be specific, and it must be easy for the bank to determine whether the terms are met.

Another approach is to allow the Assisting Attorney and/or the Authorized Signer access at all times. With respect to your bank accounts, this approach requires going to the bank and having the Assisting Attorney and/or Authorized Signer sign the appropriate cards and paperwork. When the Assisting Attorney and/or Authorized Signer are authorized to sign on your account, he or she has complete access to the account. This is an easy approach that allows the Assisting Attorney and/or Authorized Signer to carry out office business even if you are just unexpectedly delayed from vacation. Adding someone as signer on your accounts allows him or her to write checks, withdraw money, or close the account at any time, even if you are not dead, disabled, impaired, or otherwise unable to conduct your business affairs. Under this arrangement, you cannot control the signer's access. These risks make it an extremely important decision. If you choose to give another person full access to your accounts, it had better be an attorney and your choice of signer is crucial to the protection of your clients' interests, as well as your own.

See Forms 4.1, 4.2, 4.3, and 4.4.

Access to the Trust Account

As mentioned above, when arranging to have someone take over or wind down your financial affairs, you should also consider whether you want someone to have access to your trust account. If you do not make arrangements to allow someone access to the trust account, your clients' money will remain in the trust account until a court orders access. For example, if you become physically, mentally, or emotionally unable to conduct your law practice and no access arrangements were made, your clients' money will most likely remain in your trust account until the court takes jurisdiction over your practice and your accounts. In many instances, the client needs the money he or she has on deposit in the lawyer's trust account to hire a new lawyer, and the delay puts the client in a difficult position. This is likely to prompt ethics complaints, Client Security Fund claims, malpractice complaints, or other civil suits.

On the other hand, as emphasized above, allowing access to your trust account is a serious matter. You must give careful consideration to whom you give access and under what circumstances. If someone has access to your trust account and that person misappropriates money, your clients will suffer damages. In addition, you may be held responsible.

There are no easy solutions to this problem, and there is no way to know absolutely whether you are making the right choice. There are many important decisions to make. Each person must look at the options available to him or her, weigh the relative risks, and make the best choices he or she can.

Adding an Assisting Attorney or Authorized Signer to your general or lawyer trust account is permitted regardless of the form of entity you use for practicing law.

Client Notification

Once you have made arrangements with an Assisting Attorney and/or Authorized Signer, the next step is to provide your clients with information about your plan. The easiest way to do this is to include the information in your retainer agreements and engagement letters. This provides clients with information about your arrangements and gives them an opportunity to object. Your client's signature on a retainer agreement provides written authorization for the Assisting Attorney to proceed on the client's behalf, if necessary. See Form 4.5.

Other Steps That Pay Off

You can take a number of steps while you are still practicing to make the process of closing your office smooth and inexpensive. These steps include: (1) making sure that your office procedures manual explains how to produce a list of client names and addresses for open files; (2) keeping all deadlines and follow-up dates on your calendaring system; (3) thoroughly documenting client files; (4) keeping your time and billing records up to date; (5) familiarizing your Assisting Attorney and/or Authorized Signer with your office systems; (6) renewing your written agreement with the Assisting Attorney and/or Authorized Signer each year; and (7) making sure you do not keep clients' original documents, such as wills or other estate plans. See Form 4.14.

If your office is in good order, the Assisting Attorney will not have to charge more than a minimum of fees for closing the practice. Your law office will then be an asset that can be sold and the proceeds remitted to you or your estate. An organized law practice is a valuable asset. In contrast, a disorganized practice requires a large investment of time and money and is less marketable.

Death of a Sole Practitioner: Special Considerations

If you authorize another lawyer to administer your practice in the event of death, disability, impairment, or incapacity, that authority terminates when you die. The

personal representative of your estate has the legal authority to bring your practice to a close. He or she must be told about your arrangement with the Assisting Attorney and/or Authorized Signer and about your desire to have the Assisting Attorney and/or Authorized Signer carry out the duties of your agreement. The personal representative can then authorize the Assisting Attorney and/or Authorized Signer to proceed.

It is imperative that you have an up-to-date will nominating a personal representative (and alternates if the first nominee cannot or will not serve) so that probate proceedings can begin promptly and the personal representative can be appointed without delay. If you have no will, there may be a dispute among family members and others as to who should be appointed as personal representative. A will can provide that the personal representative shall serve without bond. Absent such a provision, a relatively expensive fiduciary bond will have to be obtained before the personal representative is authorized to act. See Form 4.4.

For many sole practitioners, the law practice will be the only asset subject to probate. Other property will likely pass outside probate to a surviving joint tenant, usually the spouse. This means that unless you keep enough cash in your law practice bank account, there may not be adequate funds to retain the Assisting Attorney and/or Authorized Signer or to continue to pay your clerical staff, rent, and other expenses during the transition period. It will take some time to generate statements for your legal services and to collect the accounts receivable. Your accounts receivable may not be an adequate source of cash during the time it takes to close your practice. Your Assisting Attorney and/or Authorized Signer may be unable to advance expenses or may be unwilling to serve without pay. One solution to this problem is to maintain a small insurance policy, with your estate as the beneficiary. Alternatively, your surviving spouse or other family members can be named as beneficiary, with instructions to lend the funds to the estate, if needed.

You should check the current law to determine the extent of the personal representative's power to continue a decedent's business to preserve its value, to sell or wind down the business, and to hire professionals to help administer the estate. However, for the personal representative's protection, you may want to include language in your will that expressly authorizes that person to arrange for closure of your law practice. The appropriate language will depend on the nature of the practice and the arrangements you make ahead of time. For an instructive and detailed will for a sole practitioner, see Thomas G. Bousquet, *Retirement of a Sole Practitioner's Law Practice*, 29 LAW ECONOMICS & MANAGEMENT 428 (1989).

It is important to allocate sufficient funds to pay an Assisting Attorney and/or Authorized Signer and necessary secretarial staff in the event of disability, incapacity, or impairment. To provide funds for these services, consider maintaining both a disability insurance policy and a life insurance policy in amounts sufficient to cover these projected office closure expenses in the event of your unanticipated disability, impairment, incapacity, or death.

Start Now

We encourage you to immediately: select an attorney to assist you; follow the procedures outlined in this handbook; call LOMAP for assistance; and forward the name and contact information of your Assisting Attorney to a designated personal representative for your estate. See Forms 4.1, 4.2, 4.4, 4.5, and 4.14.

This is something you can do now, at little or no expense, to plan for your future and protect your assets and your clients. Don't put it off – read this handbook and start the process today.

Chapter 2

WHAT IF? ANSWERS TO FREQUENTLY ASKED QUESTIONS

If you are an attorney planning to close your office (the Affected Attorney) or if you are an attorney considering helping a friend or colleague close his or her practice (the Assisting Attorney), in the event of death or disability, there are numerous issues to resolve. The first may well be drafting the agreement that you should both sign. How you structure your agreement will determine what the Assisting Attorney must do if the Assisting Attorney finds: (1) errors in the files, such as missed time limitations; (2) errors in the Affected Attorney's trust account; or (3) misappropriation 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 Assisting Attorney interacts with the Affected Attorney's former clients. If these issues are not discussed, the Affected Attorney and the Assisting Attorney may be surprised to find that the Assisting Attorney has an obligation to inform the Affected Attorney's clients about a potential malpractice claim.

The best way to avoid these problems, as noted above, is for the Affected Attorney and the Assisting Attorney to have a written agreement and, when applicable, for the Assisting Attorney to have a written agreement with the Affected Attorney's former clients.

If there is no written agreement clarifying the obligations and relationships, an Assisting Attorney may find that the Affected Attorney believes that the Assisting Attorney is representing the Affected Attorney's interests. At the same time, the former clients of the Affected Attorney may also believe that the Assisting Attorney is representing their interests. It is important to keep in mind that an attorney-client relationship can be established by the reasonable belief of a would-be client. *See, e.g., Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992); *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983).

This section reviews some of these issues and the various arrangements that the Affected Attorney and the Assisting Attorney can make. All of these frequently asked questions, **except #9**, are presented as if the Assisting Attorney is posing the questions.

You should also be aware that a process exists, under Enforcement of Lawyer Conduct (ELC) Rule 7.7, for the appointment by the Chair of the Disciplinary Board of a custodian "to act as counsel for the limited purpose of protecting clients' interests" in the event of a lawyer's suspension, disbarment, disability, death, or disappearance.

1. Must I notify the former clients of the Affected Attorney if I discover a potential malpractice claim against the Affected Attorney?

The answer is largely determined by the agreement that you have with the Affected Attorney and the Affected Attorney's former clients. If you do not have an attorney-client relationship with the Affected Attorney, and you are the new lawyer for the Affected Attorney's former clients, you must inform your client (the Affected Attorney's former client) of the error, and advise him or her to submit a claim to the professional malpractice insurance carrier of the Affected Attorney, unless the scope of your representation of the client excludes actions against the Affected 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. In fact, as a general rule, always tell the Affected Attorney's former clients that they have the right to seek a second opinion.

If you are the Affected Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Affected Attorney and review his or her obligation to inform the client and malpractice insurance carrier of the error. Under these circumstances, you would not be obligated to inform the Affected Attorney's client of the error.

However, you must be careful to avoid making any misrepresentations. *See* RPC 4.1; 8.4(a)(3). This situation could arise if the Affected Attorney refuses to fulfill his or her obligation to inform the client – and also instructs you not to tell the client. Thus, for example, if the Affected Attorney had previously told the client a complaint had been filed, but the complaint had not actually been filed, you should not say or do anything that would lead the client to believe the complaint had been filed. In any event, keep in mind that the Affected Attorney's malpractice insurance carrier should be notified as soon as you become aware of any error or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to a "late notice" provision.

If you are the Affected Attorney's lawyer, an alternative arrangement you can make with the Affected Attorney is that you may inform the Affected Attorney's former clients of any malpractice errors. This would not be permission to represent the former clients on malpractice actions against the Affected Attorney. Rather, it would authorize you to inform the Affected Attorney's former clients that a potential error exists and that they should seek independent counsel. If you undertake to represent the Affected Attorney's former clients while acting as the Assisting Attorney, avoiding conflicts will be problematic at best.

See Forms 4.1 and 4.2.

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

Again, the answer depends on your relationship with the Affected Attorney and the Affected Attorney's clients. If you are the Affected Attorney's lawyer, you would be limited to disclosing any information that the Affected Attorney authorizes you to disclose. You would, however, want to make clear to the Affected Attorney's clients that you do not represent them and that they should seek independent counsel. If the Affected Attorney suffers from a condition of a sensitive nature and does not want you to disclose this information to the client, you cannot do so.

See Forms 4.1 and 4.2.

3. Because the Affected Attorney is no longer practicing law, does the Affected Attorney have malpractice coverage?

This depends on the type of coverage the Affected Attorney had. Most malpractice policies include a short automatic extended reporting period of 60 or 90 days, which 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 (often called a tail). 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 timeframe. This may pose a significant conflict for the Assisting Attorney, unless there is a provision in the agreement between the attorneys that allows the Assisting Attorney to alert the former client in this circumstance, because otherwise the former client will not know of the error within the reporting period.

4. What protection will I have under the Affected 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. However, the best insurance is the Assisting Attorney’s own malpractice policy.

5. In addition to transferring files and helping to close the Affected Attorney’s practice, I want to represent the Affected Attorney’s former clients. Am I permitted to do so?

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

If you are representing the Affected Attorney, you are unable to represent the Affected Attorney’s former clients on any matter in which there would be a conflict of interest with the Affected Attorney. This would include, but not be limited to, representing the Affected Attorney’s former client on a malpractice claim, ethics complaint, or fee claim against the Affected Attorney.

If you do not represent the Affected Attorney, you are limited, as you would be with any new potential client, by conflicts of interest arising from your other cases and clients. You must check your client list for possible client conflicts before undertaking representation or reviewing confidential information of an Affected Attorney’s former client.

Even if a conflict check reveals that you are permitted to represent the client, you might be wise 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, financial resources, or staff to handle the case. In addition, if the Affected 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 zealously 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 an appropriate lawyer referral service.

See Form 4.9.

6. What procedures should I follow for distributing the funds that are in the Affected Attorney’s trust account?

If your review or the Authorized Signer’s review of the Affected Attorney’s trust 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 CR

22. Or, if there is a clear shortfall in the available fund, you may need to involve the Washington State Bar Association, as discussed below.

7. If there is an ethical violation, must I tell the Affected Attorney's former clients?

The answer depends on the relationships and the circumstances. If the Affected Attorney has violated an ethics rule and you are his or her lawyer, you are not obligated, and in many cases not permitted, to inform the Affected Attorney's former clients of such violations if your knowledge of the misconduct is confidential information of your client, the Affected Attorney. However, under the ethics rules, disclosure is mandatory to the extent you reasonably believe necessary to prevent reasonably certain death or substantial bodily harm (RPC 1.6(b)(1)), or when disclosure is necessary to avoid assisting a criminal or fraudulent act by the lawyer who is your client (unless disclosure is prohibited by RPC 1.6) (RPC 4.1(b)).

You may have other responsibilities as well. For example, if you discover that some of the client funds are not in the Affected Attorney's trust account as they should be, you, as the attorney for the Affected Attorney, should discuss this matter with the Affected Attorney and encourage the Affected Attorney to correct the shortfall. If the Affected Attorney does not correct the shortfall, and you believe the Affected Attorney's conduct violates the disciplinary rules, you should resign. *See* RPC 1.2(d); 4.1, cmt. [3]; 8.4(a); 8.4(c).

If you are the attorney for the Affected Attorney, and the Affected Attorney is deceased, you should contact the personal representative of the estate. If the Affected Attorney is alive but unable to function, you (or the Authorized Signer) may have to disburse the amounts that are available and inform the Affected Attorney's former clients that they have the right to seek legal advice.

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

If you are not the attorney for the Affected Attorney, and you are not representing any of the former clients of the Affected Attorney, you may still have a fiduciary obligation (as an Authorized Signer on the trust account) to notify the clients of a shortfall in the trust account. You should also report any notice of a potential claim to the Affected Attorney's malpractice insurance carrier in order to preserve coverage under the Affected Attorney's malpractice insurance policy.

If you are the attorney for a former client of the Affected Attorney, you have an obligation as a fiduciary to inform the client of ethical violations by the Affected Attorney that are relevant to that client's interests. *See* RPC 1.4. If you are a friend of the Affected Attorney, this is a particularly important issue.

You may wish to limit, *in advance*, the scope of your representation by informing your clients (the former clients of the Affected Attorney) that you do not intend to inform them about ethics violations, or potential ethics violations, of the Affected Attorney. A limited representation must be reasonable under the circumstances, and the clients must give informed consent, preferably in writing. RPC 1.2(c). It is recommended that you also advise the client, in writing, to seek independent representation on these issues.

Nevertheless, there are situations in which such a limitation will not be reasonable and you will be obligated ethically and legally to inform your clients of an Affected Attorney's ethical violation, notwithstanding the agreement limiting the representation. For example, if you discover a shortfall in the trust account, you must inform the client about the shortfall and advise him or her of available remedies. These remedies may include pursuing the Affected Attorney for the shortfall, filing a claim with the Lawyer's Fund for Client Protection, filing a claim with the Affected Attorney's malpractice insurance carrier, and filing a complaint with the Office of Disciplinary Counsel.

See Forms 4.1 and 4.2.

8. If the Affected Attorney stole client funds, do I have exposure to professional discipline against me?

You will not be disciplined for stealing the money unless: (1) in some way you aided or abetted the Affected Attorney in the unethical conduct (RPC 8.4(a)), or (2) the Affected Attorney was your client and you counseled or assisted him or her in such criminal or fraudulent conduct (RPC 1.2(d)). Whether you have an obligation to inform the Affected Attorney's former clients of the defalcation depends on your relationship with the Affected Attorney and with the Affected Attorney's former clients. (See #7 above.)

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

9. Question Posed by the Affected Attorney: What are the pros and cons of allowing someone to have access to my trust account? How do I make arrangements to give my Authorized Signer 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, an Authorized Signer 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 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 person who has been granted access. An Authorized Signer with unconditional access has the ability to write trust account checks, withdraw funds, or close the account at any time, even if you are not dead, disabled, impaired, or for some other reason unable to conduct your business affairs. It is very important to carefully choose the person you authorize as a signer, and when possible, to continue monitoring your accounts. Keep in mind that, pursuant to RCP 1.15A(h)(9), only lawyers admitted to practice law may be authorized signatories on trust accounts.

If you decide to have an Authorized Signer, you must decide if you want to give: (a) access only during a specific time period or when a specific event occurs (e.g., incapacity), or (b) access all the time.

10. The Affected Attorney wants to authorize me as a trust account signer. Am I permitted also to be the attorney for the Affected Attorney?

Not if there is a conflict of interest. As an Authorized Signer on the Affected Attorney's trust account, you would have a duty to properly account for the funds belonging to the Affected Attorney's former clients. This duty could conflict with your duty to the Affected Attorney if: (a) you were hired to represent him or her on issues related to the closure of his or her law practice, and (b) there were defalcations in the trust account. Because of this potential conflict of interest, it is probably best EITHER to choose to be an Authorized Signer OR to represent the Affected Attorney on issues related to the closure of his or her practice, but not both. (See #4 above.)

Chapter 3

CHECKLISTS

3.1 CHRONOLOGY OF CLOSING A LAW OFFICE AS A RESULT OF DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

First Two Weeks

Check the calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, and so on.

Write to clients with active files, advising them that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this. See Forms 4.6 and 4.7.

Contact courts and opposing counsel immediately for files that require discovery or court appearances. Obtain resets of hearings or extensions which necessary. Confirm extensions when necessary.

For cases with pending court dates, depositions, or hearings, discuss with the clients how to proceed. When appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and your client.

For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.

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

Look for an office procedure manual. Determine whether anyone has access to a list of clients with active files.

Within First Month

Make copies of files for clients. Retain original files. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys. If a client is picking up the file, return original documents to the client and keep copies in your file.

Tell all clients where their closed files will be stored and whom they should contact to retrieve them. Obtain all clients' permission to destroy the files after approximately **10** years. If a closed file is to be stored by another attorney, get 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.

If the Affected Attorney is a sole practitioner, ask the telephone company for a new phone number to be given out when the disconnected phone number is called. This eliminates the problem created when clients call the prior phone number and get a recording stating that the number has been disconnected.

Contact the Affected Attorney's Malpractice Insurance carrier and the Assisting Attorney's excess carrier, if applicable, about extending reporting coverage.

3.2 CHECKLIST FOR LAWYERS PLANNING TO PROTECT CLIENTS' INTERESTS IN THE EVENT OF THE LAWYER'S DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

These matters need to be attended to by a responsible attorney planning for death, disability, impairment of incapacity.

1. Use retainer agreements that state you have arranged for an Assisting Attorney to close your practice in the event of death, disability, impairment, or incapacity
2. Have a thorough and up-to-date office procedure manual that includes information on:
 - a. How to check for a conflict of interest;
 - b. How to use the calendaring system;
 - c. How to generate a list of active client files, including client names, addresses, and phone numbers;
 - d. Where client ledgers are kept;
 - e. How the open/active files are organized;
 - f. How the closed files are organized and assigned numbers;
 - g. Where the closed files are kept and how to access them;
 - h. The office policy on keeping original client documents;
 - i. Where original client documents are kept;
 - j. Where the safe deposit box is located 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; and
 - o. Where the post office or other mail service box is located and how to access it.

See generally Form 4.14.

3. Make sure all your file deadlines (including follow-up deadlines) are calendared.
4. Document your files.
5. Keep your time and billing records up-to-date.
6. Have a written agreement with an attorney who will close your practice (the "Assisting Attorney") that outlines the responsibilities involved in closing your practice. Determine whether the Assisting Attorney will also be your personal attorney. Choose an Assisting Attorney who is sensitive to conflict-of-interest issues. See Forms 4.1 and 4.2.

7. If your written agreement authorizes the Assisting Attorney to sign 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 on the happening of a specific event. In some instances, you and the Assisting Attorney will have to sign bank forms authorizing the Assisting Attorney to have access to your general account.
8. If your written agreement provides for an Authorized Signer for your trust 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 on the happening of a specific event. In most instances, you and the Authorized Signer will have to sign bank forms providing for access to your trust account. Choose your Authorized Signer wisely; he or she will have access to your clients' funds.
9. Familiarize your Assisting Attorney with your office systems and keep him or her apprised of office changes. See Form 4.14.
10. Introduce your Assisting Attorney and/or Authorized Signer to your office staff. See Form 4.3. Make certain your staff knows where you keep the written agreement and how to contact the Assisting Attorney and/or Authorized Signer if an emergency occurs before or after office hours. If you practice without regular staff, make sure your Assisting Attorney and/or Authorized Signer knows whom to contact (the landlord, for example) to gain access to your office. See Form 4.14.
11. Inform your spouse or closest living relative and the personal representative of your estate of the existence of this agreement and how to contact the Assisting Attorney and/or Authorized Signer. See Forms 4.3 and 4.4.
12. Renew your written agreement with your Assisting Attorney and/or Authorized Signer annually. See Forms 4.1 and 4.2.
13. Review your retainer agreement each year to make sure that the name of your Assisting Attorney is current. See Form 4.5.
14. Fill out the Law Office List of Contacts practice aid provided in this handbook (Form 4.14). Make sure your Assisting Attorney has a copy.

3.3 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 cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this.
3. For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.
4. For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.
5. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
6. Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as attorney of record or have a Substitution of Attorney filed with the court.
7. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys.
8. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.

[Editor's Note: These materials are based upon a booklet published by the Oregon State Bar Professional Liability Fund and entitled, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Death or Disability*, which have been edited for Washington lawyers.]

Chapter 4

FORMS

4.1 AGREEMENT TO CLOSE LAW PRACTICE -- FULL FORM

(Sample — Modify as appropriate)

The sample *Agreement to Close Law Practice –Full Form* provided on the next page gives the Assisting Attorney the power to determine if you are disabled, impaired, or incapacitated and provides the Assisting Attorney with authority under the designated circumstances to sign on your bank accounts (including your trust account) and to close your law practice. The agreement also enumerates powers such as termination, payment for services, and resolution of disputes.

If you do not want the Assisting Attorney to be the person who determines if you are disabled, incapacitated, or impaired, you will need to modify this agreement. For a discussion of alternatives, see Chapter 1 of this handbook.

AGREEMENT TO CLOSE LAW PRACTICE

Between: _____, hereinafter referred to as “Affected Attorney,”
and: _____, hereinafter referred to as “Assisting Attorney.”

1. Purpose.

The purpose of this agreement is to protect the legal interests of the clients of Affected Attorney in the event Affected Attorney is unable to continue Affected Attorney’s law practice due to death, disability, impairment, or incapacity.

2. Parties.

The term *Assisting Attorney* refers to the attorney designated in the caption above or the Assisting Attorney’s alternate. The term *Affected Attorney* refers to the attorney designated in the caption above and the Affected Attorney’s representatives, heirs, or assigns.

3. Establishing Death, Disability, Impairment, or Incapacity.

In determining whether Affected Attorney is dead, disabled, impaired, or incapacitated, Assisting Attorney may act upon such evidence as Assisting Attorney shall deem reasonably reliable, including, but not limited to, communications with Affected Attorney’s family members, representative, or a written opinion of one or more medical doctors duly licensed to practice medicine. Similar evidence or medical opinions may be relied upon to establish that Affected Attorney’s disability, impairment, or incapacity has terminated. Assisting Attorney is relieved from any responsibility and liability for acting in good faith upon such evidence in carrying out the provisions of this Agreement.

4. Consent to Close Practice.

Affected Attorney hereby gives consent to Assisting Attorney to take all actions necessary to close Affected Attorney’s legal practice in the event that Affected Attorney is unable to continue in the private practice of law and Affected Attorney is unable to close Affected Attorney’s own practice due to death, disability, impairment, or incapacity. Affected Attorney hereby appoints Assisting Attorney as attorney-in-fact, with full power to do and accomplish all of the actions contemplated by this Agreement as fully and as completely as Affected Attorney could do personally if Affected Attorney were able. It is Affected Attorney’s specific intent that this appointment of Assisting Attorney as attorney-in-fact shall become effective only upon Affected Attorney’s death, disability, impairment, or incapacity. The appointment of Assisting Attorney shall not be invalidated because of Affected Attorney’s death, disability, impairment, or incapacity, but instead the appointment shall fully survive such death, disability, impairment, or incapacity and shall be in full force and effect so long as it is necessary or convenient to carry out the terms of this Agreement. In the event of Affected Attorney’s death, disability, impairment, or incapacity, Affected Attorney designates Assisting Attorney as signator, or in substitution of Affected Attorney’s signature, on all of Affected Attorney’s law office accounts with any bank or financial institution, including, but not limited to, checking accounts, savings accounts, and trust accounts. Affected Attorney’s consent includes but is not limited to:

- Entering Affected Attorney’s office and using Affected Attorney’s equipment and supplies as needed to close Affected Attorney’s practice;

- Opening Affected Attorney's mail and processing it;
- Taking possession and control of all property comprising Affected Attorney's law office, including client files and records;
- Examining files and records of Affected Attorney's law practice and obtaining information as to any pending matters that may require attention;
- Notifying clients, potential clients, and others who appear to be clients, that Affected Attorney has given this authorization and that it is in their best interest to obtain other legal counsel;
- Copying Affected Attorney's files;
- Obtaining client consent to transfer files and client property to new attorneys;
- Transferring client files and property to clients or their new attorneys;
- 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 employment of other counsel by the clients;
- Filing notices, motions, and pleadings on behalf of clients where the clients' interests must be immediately protected and other legal counsel has not yet been retained;
- Contacting all appropriate persons and entities who may be affected, and informing them that Affected Attorney has given this authorization;
- Arranging for transfer and storage of closed files;
- Winding down the financial affairs of Affected Attorney's practice, including providing Affected Attorney's clients with a final accounting and statement for services rendered by Assisting Attorney, return of client funds, collection of fees on Affected Attorney's behalf or on behalf of Affected Attorney's estate, payment of business expenses, and closure of business accounts when appropriate;
- Advertising Affected Attorney's law practice or any of its assets to find a buyer for the practice; and
- Arranging for an appraisal of Affected Attorney's practice for the purpose of selling Affected Attorney's practice.

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

5. Payment for Services.

Affected Attorney agrees to pay Assisting Attorney a reasonable sum for services rendered by Assisting Attorney while closing the law practice of Affected Attorney. Assisting Attorney agrees to keep accurate time records for the purpose of determining amounts due for services rendered. Assisting Attorney agrees to provide the services specified herein as an independent contractor.

6. Preserving Attorney-Client Privilege.

Assisting Attorney agrees to preserve confidences and secrets of Affected Attorney's clients and their attorney-client privilege and shall only make disclosures of information reasonably necessary to carry out the purpose of this Agreement.

7. Assisting Attorney is Attorney for Affected Attorney (delete one of the following paragraphs as appropriate).

Assisting Attorney is the attorney for Affected Attorney. Assisting Attorney will protect the attorney-client relationship and follow the Washington Rules of Professional Conduct. (**Optional:** Assisting Attorney has permission to inform the Professional Liability Fund of errors or potential errors of Affected Attorney, may inform Affected Attorney's former clients of any errors or potential errors, and instruct them to obtain independent legal advice. Assisting Attorney also has permission to inform Affected Attorney's former clients of any ethics violations committed by Affected Attorney.)

OR:

Assisting Attorney is Not Attorney for Affected Attorney

Assisting Attorney is not the attorney for Affected Attorney. (**Optional:** Assisting Attorney has permission to inform the Professional Liability Fund of errors or potential errors of Affected Attorney, may inform Affected Attorney's former clients of any errors or potential errors, and instruct them to obtain independent legal advice. Assisting Attorney also has permission to inform Affected Attorney's former clients of any ethics violations committed by Affected Attorney.)

8. Providing Legal Services.

Affected Attorney authorizes Assisting Attorney to provide legal services to Affected Attorney's former clients providing Assisting Attorney has no conflict of interest and obtains the consent of Affected Attorney's former clients to do so. Assisting Attorney has the right to enter into an attorney-client relationship with Affected Attorney's former clients and to have clients pay Assisting Attorney for his or her legal services. Assisting Attorney agrees to check for conflicts of interest, and when necessary, to refer the clients to another attorney.

9. Informing Washington State Bar Association.

Assisting Attorney agrees to inform the Washington State Bar Association Regulatory Services where Affected Attorney's closed files will be stored and the name, address, and phone number of the contact person for retrieving those files.

10. Providing Clients with Accounting.

Assisting Attorney agrees to provide Affected Attorney's former clients with a final accounting and statement for legal services of Affected Attorney based on the Affected Attorney's records. Assisting Attorney agrees to return client funds to Affected Attorney's former clients and to submit funds collected on behalf of Affected Attorney to Affected Attorney or Affected Attorney's estate representative.

11. Assisting Attorney Alternate (delete one of the following paragraphs as appropriate).

If Assisting Attorney is unable or unwilling to act on behalf of Affected Attorney, Affected Attorney appoints as Assisting Attorney's Alternate, hereinafter known as Assisting Attorney's Alternate. Assisting Attorney's Alternate is authorized to act on behalf of Affected Attorney pursuant to this Agreement. Assisting Attorney's Alternate shall comply with the terms of this Agreement. Assisting Attorney's Alternate consents to this appointment, as shown by the signature of the Assisting Attorney's Alternate on this Agreement.

OR:

If Assisting Attorney is unable or unwilling to act on behalf of Affected Attorney, Assisting Attorney may appoint an alternate. Assisting Attorney shall enter into an agreement with any such Assisting Attorney's Alternate under which Assisting Attorney's Alternate consents to the terms and provisions of this Agreement.

12. Indemnification.

Affected Attorney agrees to indemnify Assisting Attorney against any claims, loss, or damage arising out of any act or omission by Assisting Attorney under this agreement, provided the actions or omissions of Assisting Attorney were made in good faith, were made in a manner reasonably believed to be in Affected Attorney's best interest, and occurred while Assisting Attorney was assisting Affected Attorney with the closure of Affected Attorney's office. This indemnification agreement does not extend to any acts, errors, or omissions of Assisting Attorney while rendering or failing to render professional services in Assisting Attorney's capacity as attorney for the former clients of Affected Attorney. Assisting Attorney shall be responsible for all acts and omissions of gross negligence and willful misconduct.

13. Option to Purchase Practice.

Assisting Attorney shall have the first option to purchase the practice of Affected Attorney under the terms and conditions specified by Affected Attorney or Affected Attorney's representative in accordance with the Washington Rules of Professional Conduct and other applicable law.

14. Arranging to Sell Practice.

If Assisting Attorney opts not to purchase Affected Attorney's practice, Assisting Attorney will make all reasonable efforts to sell Affected Attorney's practice and will pay Affected Attorney or Affected Attorney's estate all monies received.

15. Fee Disputes to be Arbitrated.

4.2 CONSENT TO CLOSE OFFICE — SHORT FORM *(Sample — Modify as appropriate)*

The sample *Consent to Close Office –Short Form* provided on the next page includes authorization to sign on your bank accounts (trust and general) and to close your law practice. It does not include a provision for payment to the Assisting Attorney, a description of termination powers, consent to represent the Affected Attorney’s clients, or other provisions included in the sample *Agreement to Close Law Practice –Full Form* (4.1).

CONSENT TO CLOSE OFFICE

This Consent to Close Office (hereinafter “this Consent”) is entered into between _____, hereinafter referred to as “Affected Attorney,” and _____, hereinafter referred to as “Assisting Attorney,” and _____, hereinafter referred to as “Authorized Signer.”

I, (*insert name of Affected Attorney*), authorize (*insert name of Assisting Attorney*), Assisting Attorney, and any attorney or agent acting on my behalf, to take all actions necessary to close my law practice upon my death, disability, impairment, or incapacity. These actions include, but are not limited to:

- Entering my office and using my equipment and supplies, as needed, to close my practice;
- Opening and processing my mail;
- Taking possession and control of all property comprising my law office, including client files and records;
- Examining client files and records of my law practice and obtaining information about any pending matters that may require attention;
- Notifying clients, potential clients, and others who appear to be clients that I have given the authorization and that it is in their best interest to obtain other legal counsel;
- Copying my files;
- Obtaining client consent to transfer files and client property to new attorneys;
- Transferring client files and property to clients or their new attorneys;
- 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 employment of other counsel by my clients;
- Filing notices, motions and pleadings on behalf of my clients when their interest must be immediately protected and other legal counsel has not yet been retained;
- Contacting all appropriate persons and entities who may be affected and informing them that I have given this authorization;
- Winding down the business affairs of my practice, including paying business expenses and collecting fees;
- Informing the Washington State Bar Regulatory Services where closed files will be stored and the name, address, and phone number of the contact person for retrieving the files; and
- Contacting the Professional Liability Insurance Carrier concerning claims and potential claims.

I authorize (*insert name of Authorized Signer*), Authorized Signer, to sign checks on my trust accounts and provide an accounting to my clients of funds in trust.

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

For the purposes of this Consent, my death, disability, impairment, or incapacity shall be determined by evidence the Assisting Attorney deems reasonably reliable, including but not limited to, communications with my family members or representative or a written opinion of one or more medical doctors duly licensed to practice medicine. Upon such evidence, the Assisting Attorney is relieved from any responsibility or liability for acting in good faith in carrying out the provisions of this Consent.

Assisting Attorney and Authorized Signer agree to reserve client confidences and secrets and the attorney client privilege of my clients and to make disclosure only to the extent reasonably necessary to carry out the purpose of this Consent. Assisting Attorney and Authorized Signer are appointed as my agents 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.

(Delete one of the following paragraphs as appropriate :)

Assisting Attorney represents me and acts as my attorney in closing my law practice. Assisting Attorney has permission to inform the Professional Liability Insurance Carrier of my errors or potential errors. Assisting Attorney has permission to inform my clients of any errors or potential errors and to instruct them to obtain independent legal advice. Assisting Attorney also has permission to inform my clients of any ethics violations committed by me.

OR:

Assisting Attorney does not represent me and is not acting as my attorney in closing my law practice. While fulfilling the obligations of this Consent, Assisting Attorney has permission to inform the Professional Liability Insurance Carrier of my errors or potential errors. Assisting Attorney may inform my clients of any errors or potential errors and instruct them to obtain independent legal advice. Assisting Attorney also has permission to inform my clients of any ethics violations committed by me.

Authorized Signer is not my attorney. Authorized Signer may inform my clients of any misappropriations in my trust account and instruct them to obtain independent legal advice or contact the Washington State Bar Client Security Fund.

I, Affected Attorney, appoint Authorized signer as signator, in substitution or my signature, on my lawyer trust account(s) upon my death, disability, impairment, or incapacity.

I understand that neither Authorized Signer nor Assisting Attorney will process, pay, or in any other way be responsible for payment of my personal bills.

4.3 NOTICE OF DESIGNATED ASSISTING ATTORNEY

I, _____, have authorized the following attorneys to assist with the closure of my practice:

Name of Authorized Assisting Attorney: _____

Address: _____

Phone Number: _____

Name of Assisting Attorney's Alternate: _____

Address: _____

Phone Number: _____

[Affected Attorney]

[Date]

[Assisting Attorney]

[Date]

[Alternate Assisting Attorney]

[Date]

Mail this form to:

Director of Personal and Practice Management Assistance
Professional Liability Insurance Carrier
(Insert Address here)

4.4 WILL PROVISIONS

(Sample - Modify as appropriate)

With respect to my law practice, my personal representative is expressly authorized and directed to carry out the terms of the Agreement to Close Law Practice dated _____; if that Agreement is not in effect, my personal representative is authorized to enter into a similar agreement with another attorney that my personal representative, in his or her sole discretion, may determine to be necessary or desirable to protect the interests of my clients and dispose of my practice.

OR

My personal representative is expressly authorized and directed to take such steps as he or she deems necessary or desirable, in my personal representative's sole discretion, to protect the interests of the clients of my law practice and to wind down or dispose of that practice, including, but not limited to, selling that practice, collecting accounts receivable, paying expenses relating to the practice, providing trust accounting and issuing unused trust balances owing to my clients, employing an attorney or attorneys to review my files, completing unfinished work, notifying my clients of my death and assisting them in finding other attorneys, and returning closed files to my clients and/or providing access to my closed files.

**4.5 ENGAGEMENT LETTER AND FEE AGREEMENT
(FOLLOW-UP LETTER TO INITIAL INTERVIEW)
(Sample — Modify as appropriate)**

Re: [Subject]

Dear [Name]:

We met to discuss your case on [date], and I have agreed to represent you in connection with [type of matter] and we agreed to [insert appropriate details].

Thank you for selecting our law firm to represent you in this matter. At this time I also wish to set forth our agreement regarding payment of our fees. Our fees for legal services are [amount per hour], plus any expenses such as filing fees, deposition charges, copying costs, postage, and related expenses. We will bill you approximately monthly, depending on the amount of work that was done on your file during that period of time. At this point, it is difficult to estimate the amount of time and expense that will be necessary to adequately represent you in this case. However, as we discussed, we estimate the fee will be approximately [dollar amount]. We will also advise you before we do any work that will substantially increase the amount of fees.

You have deposited [dollar amount] with us for fees and costs. We will hold your funds in our Lawyer's Trust Account. We will provide you with a monthly statement of fees, costs, and expenses. After we mail you the monthly statement, we will apply the funds to fees earned, costs, and expenses incurred. You are also responsible for paying fees, costs, and expenses in excess of the funds that we hold.

My goal is to provide you with excellent legal services. I also want to protect your interests in the event of my unexpected death, disability, impairment, or incapacity. In order to accomplish this, I have arranged with another attorney to assist with closing my practice in the event of my death, disability, impairment, or incapacity. In such event, my office staff or the assisting attorney will contact you and provide you with information about how to proceed.

I will send you pleadings, documents, correspondence, and other information throughout the case. These copies will be your file copies. I will also keep the information in a file in my office. The file in my office will be my file. Please bring your file to all of our meetings so that we both have all of the necessary information available to us. When I have completed all the legal work necessary for your case, I will close my file and return the original documents to you. I will then store the file for approximately 10 years. I will destroy the file after that period of time unless you instruct me in writing now to keep it longer.

I have included a copy of this letter for you to review, sign, and return to me. If any of the information in this letter is not consistent with your understanding of our agreement, please contact me before signing the letter. Otherwise, please sign the enclosed copy and return it to me.

On behalf of the firm, we appreciate the opportunity to represent you in this matter. If you have any questions, please feel free to call.

Very truly yours,

[Attorney]

[Firm]

I have read this letter and consent to it.

[Client]

[Date]

Enclosure

[NOTE: This is a sample form only. Use of this letter will help to establish clear expectations and avoid misunderstandings between you and your client. It will not, however, provide absolute protection against a malpractice action.]

4.6 LETTER ADVISING THAT LAWYER IS UNABLE TO CONTINUE IN PRACTICE

(Sample – Modify as appropriate)

Re: *[Name of Case]*

Dear *[Name]*:

Due to ill health, *[Affected Attorney]* is no longer able to continue practice. You will need to retain the services of another attorney to represent you in your legal matters. I will be assisting *[Affected Attorney]* in closing *[his/her]* practice. We recommend that you retain the services of another attorney immediately so that all your legal rights can be preserved.

You will need a copy of your legal file for use by you and your new attorney. I am enclosing a written authorization for your file to be released directly to your new attorney. You or your new attorney can forward this authorization to us, and we will release the file as instructed. If you prefer, you can come to *[address of office or location for file pick-up]* and pick up a copy of your file so that you can deliver it to your new attorney yourself.

Please make arrangements to pick up your file or have your file transferred to your new attorney by *[date]*. It is imperative that you act promptly so that all your legal rights will be preserved.

Your closed files will be stored in *[location]*. If you need a closed file, you can contact me at the following address and phone number until *[date]*:

[Name] *[Address]* *[Phone]*

After that time, you can contact *[Affected Attorney]* for your closed files at the following address and phone number:

[Name] *[Address]* *[Phone]*

You will receive a final accounting from *[Affected Attorney]* in a few weeks. This will include any outstanding balances that you owe to *[Affected Attorney]* and an accounting of any funds in your client trust account.

On behalf of *[Affected Attorney]*, I would like to thank you for giving *[him/her]* the opportunity to provide you with legal services. If you have any additional concerns or questions, please feel free to contact me.

Sincerely,

[Assisting Attorney]
[Firm]

Enclosure

4.7 LETTER ADVISING THAT LAWYER IS CLOSING HIS/HER OFFICE

(Sample – Modify as appropriate)

Re: *[Name of Case]*

Dear *[Name]*:

As of *[date]*, I will be closing my law practice due to *[provide reason, if possible]*. I will be unable to continue representing you on your legal matters.

I recommend that you immediately hire another attorney to handle your case for you. You can select any attorney you wish, or I would be happy to provide you with another lawyer referral service.

When you select your new attorney, please provide me with written authority to transfer your file to the new attorney. If you prefer, you may come to our office and pick up a copy of your file and deliver it to that attorney yourself.

It is imperative that you obtain a new attorney immediately. *[Insert appropriate language regarding time limitations or other critical time lines that client should be aware of.]* Please let me know the name of your new attorney or pick up a copy of your file by *[date]*.

I *[or insert name of the attorney who will store files]* will continue to store my copy of your closed file for the applicable period indicated in the attached grid. After that time, I *[or insert name of other attorney, if relevant]* will destroy my copy of the file unless you notify me in writing immediately that you do not want me to follow this procedure. *[If relevant, add: If you object to (insert name of attorney who will be storing files) storing my copy of your closed file, let me know immediately and I will make alternative arrangements.]*

If you or your new attorney need a copy of the closed file, please feel free to contact me. I will be happy to provide you with a copy.

Within the next *[fill in number]* weeks, I will be providing you with a full accounting of your funds in my trust account and fees you currently owe me.

You will be able to reach me at the address and phone number listed on this letter until *[date]*. After that time, you or your new attorney can reach me at the following phone number and address:

[Name]

[Address]

[Phone]

Remember, it is imperative to retain a new attorney immediately. This will be the only way that time limitations applicable to your case will be protected and your other legal rights preserved.

I appreciate the opportunity to have provided you with legal services. Please do not hesitate to give me a call if you have any questions or concerns.

Sincerely,
[Attorney] [Firm]

4.8 GUIDELINES FOR RETENTION OF CLIENT FILES

PRACTICE SPECIALTY	GUIDELINES
Probate Claims & Estates	Excluding tax, 10 years after final judgment; tax basis information—permanently.
Tort Claims (Plaintiff)	6 years after final judgment or dismissal, except when minor involved; then when minor attains majority plus three years.
Tort Claims (Defense)	6 years after final judgment or dismissal.
Contract Action	3 years after satisfaction of judgment, dismissal, or settlement.
Bankruptcy Claims & Filings	6 years after discharge of debtor, payment of claim, or discharge of trustee or receiver.
Dissolution	6 years after entry of final judgment or dismissal of action, or date at which settlement agreement is no longer effective, except when minor children are involved and then the youngest attaining majority plus three years.
Real Estate Transactions	Subject to guidelines and tax needs; otherwise 6 years after settlement date, judgment, termination of sale, foreclosure, or other completion of matter; Retain surveys and legal descriptions not of record.
Leases	6 years after termination of lease.
Original Wills	Return to client after signing and conclusion of matter or file with local court of proper jurisdiction.
Criminal Cases	6 years after date of acquittal or length of incarceration.

If questions about the Guide arise, users are encouraged to contact the WSBA’s Ethics Line at (206) 727-8284 or the Law Office Management Assistance Program at (206) 727-8237. You may use the toll-free number of (800) 945-WSBA.

4.9 LETTER FROM FIRM OFFERING TO CONTINUE REPRESENTATION

(Sample – Modify as appropriate)

Re: *[Name of Case]*

Dear *[Name]*:

Due to ill health, *[Affected Attorney]* is no longer able to continue representing you on your case(s). A member of this firm, *[Name]*, is available to continue handling your case if you wish *[him/her]* to do so. You have the right to select the attorney of your choice to represent you in this matter.

If you wish our firm to continue handling your case, please sign the authorization at the end of this letter and return it to this office.

If you wish to retain another attorney, please give us written authority to release your file directly to your new attorney. If you prefer, you may come to our office and pick up a copy of your file and deliver it to your new attorney yourself. 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 authorization for us to represent you or written authority to transfer your file by *[date]*.

I want to make this transition as simple and easy as possible. Please feel free to contact me with your questions.

Sincerely,

[Assisting Attorney]

Enclosures

I want a member of the firm of *[insert law firm's name]* to handle my case in place of *[insert Affected Attorney's name]*.

[Client]

[Date]

4.10 ACKNOWLEDGMENT OF RECEIPT OF FILE

I hereby acknowledge that I have received a copy of my file from the law office of
[*Firm/Attorney Name*].

I acknowledge that the law office of [*Firm/Attorney Name*] has not retained a copy of the
file.

[*Client*]

[*Date*]

4.11 AUTHORIZATION FOR TRANSFER OF CLIENT FILE

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

[Client]

[Date]

4.12 REQUEST FOR FILE

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

[Client]

[Date]

4.14 LAW OFFICE LIST OF CONTACTS

ATTORNEY Social Security
NAME: _____ #: _____

WA State Bar Federal Employer ID State Tax ID
#: _____ #: _____ #: _____

Date of Birth: _____

Office Address: _____

Office Phone: _____

Home Address: _____

Home Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

SPOUSE:

Name: _____

Work Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Employer: _____

OFFICE MANAGER:

Name: _____

Home Address: _____

Home Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

COMPUTER AND TELEPHONE PASSWORDS:

(Name of person who knows passwords or location where passwords are stored, such as a safe deposit box)

Name: _____

Home Address: _____

Home Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

POST OFFICE OR OTHER MAIL SERVICE BOX:

Location: _____

Box No.: _____

Obtain Key From: _____

Address: _____

Phone: _____

Other Signatory: _____

Address: _____

Phone: _____

SECRETARY:

Name: _____

Home Address: _____

Home Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

BOOKKEEPER:

Name: _____

Home Address: _____

Home Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

LANDLORD:

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Location of Office Lease: _____

Lease Expiration

Date: _____

PERSONAL REPRESENTATIVE:

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

ATTORNEY:

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

ACCOUNTANT:

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

ATTORNEYS TO HELP WITH PRACTICE CLOSURE:

First Choice: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Second Choice: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Third Choice: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

LOCATION OF WILL AND/OR TRUST:

Access Will and/or
Trust
by Contacting: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

PROFESSIONAL CORPORATIONS:

Corporate Name: _____

Date
Incorporated: _____

Location of
Corporate
Minute Book: _____

Location of
Corporate
Seal: _____

Location of Corporate
Stock Certificate: _____

Location of
Corporate
Tax Returns: _____

Fiscal Year-End
Date: _____

Corporate Attorney: _____

Address: _____

Phone:

Cell Phone:

Fax:

Email Address:

PROCESS SERVICE COMPANY:

Name:

Address:

Phone:

Fax:

Contact:

OFFICE-SHARER OR OF COUNSEL:

Name:

Address:

Phone:

Cell Phone:

Fax:

Email Address:

Name:

Address:

Phone:

Cell Phone: _____

Fax: _____

Email Address: _____

OFFICE PROPERTY/LIABILITY COVERAGE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Contact Person: _____

OTHER IMPORTANT CONTACTS:

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Reason for Contact: _____

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Reason for Contact: _____

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Reason for Contact: _____

GENERAL LIABILITY COVERAGE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Contact Person: _____

LEGAL MALPRACTICE – PRIMARY COVERAGE:

Provider: _____

Address: _____

Phone: _____

LEGAL MALPRACTICE – EXCESS COVERAGE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Contact Person: _____

VALUABLE PAPERS COVERAGE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Contact Person: _____

OFFICE OVERHEAD/DISABILITY INSURANCE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Contact Person: _____

HEALTH INSURANCE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Persons Covered: _____

Contact Person: _____

DISABILITY INSURANCE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Contact Person: _____

RETIREMENT FUND INFORMATION:

Plan Name: _____

Account number(s): _____

Plan Administrator &
Contact Person: _____

Address: _____

Phone: _____

Fax: _____

Email Address: _____

LIFE INSURANCE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Persons Covered: _____

Contact Person: _____

WORKERS' COMPENSATION INSURANCE:

Insurer: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Policy No.: _____

Persons Covered: _____

Contact Person: _____

STORAGE LOCKER LOCATION: (Continued on next page)

Storage Company: _____ Locker No.: _____

Address: _____

Phone: _____

Fax: _____

Obtain Key From: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Items Stored: _____

Storage Company: _____ Locker No.: _____

Address: _____

Phone: _____

Fax: _____

Obtain Key From: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Items Stored: _____

Storage Company: _____ Locker No.: _____

Address: _____

Phone: _____

Fax: _____

Obtain Key

From: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Items Stored: _____

SAFE DEPOSIT BOXES: (Continued on next page)

Institution: _____

Box No.: _____

Address: _____

Phone: _____

Fax: _____

Obtain Key

From: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Other

Signatory: _____

Address: _____

Phone:

Cell Phone:

Fax:

Email Address:

Items Stored:

Institution:

Box No.:

Address:

Phone:

Fax:

Obtain Key
From:

Address:

Phone:

Cell Phone:

Fax:

Email Address:

Other
Signatory:

Address:

Phone:

Cell Phone:

Fax: _____

Email Address: _____

Items Stored: _____

Institution: _____

Box No.: _____

Address: _____

Phone: _____

Fax: _____

Obtain Key
From: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Other
Signatory: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Items Stored: _____

LEASES: (Continued on next page)

Item Leased: _____

Lessor: _____

Address: _____

Phone: _____

Fax: _____

Expiration Date: _____

Item Leased: _____

Lessor: _____

Address: _____

Phone: _____

Fax: _____

Expiration Date: _____

Item Leased: _____

Lessor: _____

Address: _____

Phone: _____

Fax: _____

Expiration Date: _____

Item Leased: _____

Lessor: _____

Address: _____

Phone: _____
Fax: _____
Expiration Date: _____

LAWYER TRUST ACCOUNT:

IOLTA: _____
Institution: _____
Address: _____

Phone: _____
Fax: _____
Account No.: _____
Other
Signatory: _____
Address: _____

Phone: _____
Cell Phone: _____
Fax: _____
Email Address: _____

INDIVIDUAL TRUST ACCOUNT:

Name of Client: _____
Institution: _____
Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Account No.: _____

Other
Signatory: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

GENERAL OPERATING ACCOUNT: (Continued on next page)

Institution: _____

Address: _____

Phone: _____

Fax: _____

Account No.: _____

Other
Signatory: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Institution: _____

Address: _____

Phone: _____

Fax: _____

Account No.: _____

Other
Signatory: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Institution: _____

Address: _____

Phone: _____

Fax: _____

Account No.: _____

Other
Signatory: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

BUSINESS CREDIT CARD:

Institution: _____

Address: _____

Phone: _____

Fax: _____

Account No.: _____

Other
Signatory: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Institution: _____

Address: _____

Phone: _____

Fax: _____

Account No.: _____

Other
Signatory: _____
Address: _____

Phone: _____
Cell Phone: _____
Fax: _____
Email Address: _____

MAINTENANCE CONTRACTS:

Item Covered: _____
Vendor: _____
Address: _____

Phone: _____
Fax: _____
Expiration: _____

Item Covered: _____
Vendor: _____
Address: _____

Phone: _____
Fax: _____
Expiration: _____

Item Covered: _____
Vendor: _____

Address: _____

Phone: _____

Fax: _____

Expiration: _____

ALSO ADMITTED TO PRACTICE IN THE FOLLOWING STATES: (Continued on next page)

State of: _____

Bar Address: _____

Phone: _____

Bar ID No.: _____

State of: _____

Bar Address: _____

Phone: _____

Bar ID No.: _____

State of: _____

Bar Address: _____

Phone: _____

Bar ID No.: _____

PROFESSIONAL MEMBERSHIP ORGANIZATIONS: (Continued on next page)

Name: _____

Address: _____

Phone: _____

Fax: _____

Email Address: _____

Member Number: _____

Name: _____

Address: _____

Phone: _____

Fax: _____

Email Address: _____

Member Number: _____

PROFESSIONAL MEMBERSHIP ORGANIZATIONS:

Name: _____

Address: _____

Phone: _____

Fax: _____

Email Address: _____

Member Number: _____

Name: _____

Address: _____

Phone: _____

Fax: _____

Email Address: _____

Member Number: _____

OTHER IMPORTANT CONTACT INFORMATION: (Continued on next page)

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Reason to
Contact: _____

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Reason to
Contact: _____

Name: _____

Address: _____

Phone: _____

Cell Phone: _____

Fax: _____

Email Address: _____

Reason to
Contact: _____

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4.15 MOTION FOR ACCESS TO IOLTA [OR SPECIFIC TRUST] ACCOUNT

IN THE SUPERIOR COURT OF WASHINGTON
FOR _____ COUNTY

In re _____) NO.
)
) MOTION FOR ACCESS TO IOLTA [OR
) SPECIFIC TRUST] ACCOUNT
)
)
)

[Assisting Attorney], the assisting attorney for [Affected Attorney], respectfully moves the Court for an order authorizing [Assisting Attorney] to access [Affected Attorney's] [IOLTA or Trust account]:

I. RELIEF REQUESTED

An order granting [Assisting Attorney] authority to access [Affected Attorney's] [IOLTA or Trust] account at [name of financial institution] account number [insert partial account number] and allowing [Assisting Attorney] to sign on the account.

II. STATEMENT OF FACTS

The facts supporting this Motion are set forth in the Declaration of [Assisting Attorney] filed in support of this Motion.

III. STATEMENT OF ISSUES

Whether the Court should enter an order granting [Assisting Attorney] access to and signing authority over [Affected Attorney's] [IOLTA or Trust] account at [name of financial institution] account number [insert partial account number].

IV. EVIDENCE RELIED UPON

1. Declaration of [Assisting Attorney].
2. The records and files herein.

V. AUTHORITY

This motion is based on RPC 1.15A.

DATED: _____.

_____, WSBA # _____
Assisting Attorney

ARTICLES, RULES, FORMAL OPINIONS, RESOURCES

5.1 WASHINGTON STATE BAR ASSOCIATION GUIDE TO BEST PRACTICES FOR CLIENT FILE RETENTION AND MANAGEMENT April 2007:

<http://www.wsba.org/info/recordmanagement407.pdf>

5.2 AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY,

541 N. Fairbanks Court, Chicago, Illinois 60611 Telephone (312)988-5300 CHAIR: David B. Isbell,
Washington, DC _ Daniel Coquillette, Newton, MA _ Ralph G. Elliott, Hartford, CT _ Lawrence J. Fox,
Philadelphia, PA _ Margaret Love, Washington, DC _ William C. McClearn, Denver, CO _ Richard
McFarlain, Tallahassee, FL _ Truman Q. McNulty, Milwaukee, WI _ CENTER FOR PROFESSIONAL
RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Joanne P. Pitulla, Assistant Ethics Counsel
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Formal Opinion 92-369 December 7, 1992

Disposition of Deceased Sole Practitioners' Client Files and Property

To 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. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death. A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with Rule 1.15.

The Committee has been asked to render an opinion based on the following circumstances. A lawyer who has a large solo practice dies. The lawyer had hundreds of client files, some of which concern probate matters, civil litigation and real estate

transactions. Most of the files are inactive, but some involve ongoing matters. The lawyer kept the active files at his office; most of the inactive files he removed from the office and kept in storage at his home.

The questions posed are two:

- 1) What steps should lawyers take to ensure that their clients' matters will not be neglected in the event of their death?
- 2) What obligations do lawyers representing the estates of deceased lawyers, or appointed or otherwise responsible for review of the files of a lawyer who dies intestate, have with regard to the deceased lawyer's client files and property?

I. Sole Practitioner's obligations with regard to making plans to ensure that client matters will not be neglected in the event of the sole practitioner's death

The death of a sole practitioner could have serious effects on the sole practitioner's clients. See Program: Preparing for and Dealing with the Consequences of the Death of a Sole Practitioner, prepared by the ABA General Practice Section, Sole Practitioners and Small Law Firms Committee, August 7, 1986. Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death.

Model Rules of Professional Conduct 1.1 (Competence) and 1.3 (Diligence) are relevant to this issue, and read in pertinent part:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Furthermore, the Comment to Rule 1.3 states in relevant part:

A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety....

According to Rule 1.1, competence includes "preparation necessary for the representation," which when read in conjunction with Rule 1.3 would indicate that a lawyer should diligently prepare for the client's representation. Although representation should terminate when the attorney is no longer able to adequately represent the client,¹

¹ See Model Rule of Professional Conduct 1.16 ("... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if: ... (2) the

the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship.²

Lawyers have a fiduciary duty to inform their clients in the event of their partnership's dissolution.³ A sole practitioner would seem to have a similar duty to ensure that his or her clients are so informed in the event of the sole practitioner's dissolution caused by the sole practitioner's death. Because a deceased lawyer cannot very well inform anyone of his or her death, preparation of a future plan is the reasonable means to preserve these obligations. Thus, the lawyer ought to have a plan in place which would protect the clients' interests in the event of the lawyer's death.⁴

Some jurisdictions, operating under the Model Code of Professional Responsibility, have found lawyers to have violated DR6-101(A)(3) when the attorneys have neglected client matters by reason of ill-health, attempted retirement, or personal problems.⁵ The same problems are clearly presented by the attorney's death, thus suggesting that a lawyer who died without a plan for the maintenance of his or her client files would be guilty of neglect. Such a result is also consistent with two of the three justifications for lawyer

lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client....")

² See *Murphy v. Riggs*, 213 N.W. 110 (Mich.1927) (fiduciary obligations of loyalty and confidentiality continue after agency relationship concluded); *Eoff v. Irvine*, 18 S.W. 907 (Mo.1892) (same.)

³ See *Vollgraff v. Block*, 458 N.Y.S.2d 437 (Sup.Ct.1982) (breach of fiduciary duty if partnership's clients not advised of dissolution of partnership). A state bar association is considering creating an "archive form"--indicating the location of client files--which lawyers would complete and file with the state bar association in the event they terminate or merge their practice, thus enabling clients to locate their files. See ABA ETHICSearch, September 1992 Report. Such a form would be consistent with the duty discussed in *Vollgraff*, as simply informing a client of a firm's dissolution without telling the client where the client's files are located would be tantamount to saying "your files are no longer here."

⁴ The Fla.Bar, Professional Ethics Comm., Op. 81-8(M) (Undated) discussed the obligations of a lawyer who was terminally ill with regard to client files:

After diligent attempt is made to contact all clients whose files he holds, a lawyer anticipating termination of his practice by death should dispose of all files according to his client's instructions. The files of those clients who do not respond should be individually reviewed by the lawyer and destroyed only if no important papers belonging to the clients are in the files. Important documents should be indexed and placed in storage or turned over to any lawyer who assumes control of his active files. In any event, the files may not be automatically destroyed after 90 days.

⁵ See *In re Jamieson*, 658 P.2d 1244 (Wash.1983) (neglect due to ill-health and attempted retirement); *In Re Whitlock*, 441 A.2d 989 (D.C.App.1982) (neglect due to poor health, marital difficulties and heavy caseload); *Committee on Legal Ethics of West Virginia State Bar v. Smith*, 194 S.E.2d 665 (W.Va.1973) (neglect due to illness and personal problems).

discipline.⁶ Sanctioning of lawyers who had inadequately prepared to protect their clients in the event of their death would tend to dissuade future acts by other lawyers, and it would help to restore public confidence in the bar.⁷

Although there is no specifically applicable requirement of the rules of ethics, it is fairly to be inferred from the pertinent rules that lawyers should make arrangements for their client files to be maintained in the event of their own death. Such a plan should at a minimum include the designation of another lawyer who would have the authority to look over the sole practitioner's files and make determinations as to which files needed immediate attention, and provide for notification to the sole practitioner's clients of their lawyer's death.⁸

II. Duties of lawyer who assumes responsibility for deceased lawyer's client files

This brings us to the second question, namely the ethical obligations of the lawyer who assumes responsibility for the client files and property of the deceased lawyer. Issues commonly confronting the lawyer in this situation involve the nature of the lawyer's duty to inspect client files, the need to protect client confidences and the length of time the lawyer should keep the client files in the event that the lawyer is unable to locate certain clients of the deceased lawyer.

At the outset, the Committee notes that several states' rules of civil procedure make provision for court appointment of lawyers to take responsibility for a deceased lawyer's client files and property.⁹ Since the lawyer's duties under these statutes constitute questions of law, the Committee cannot offer guidance as to how to interpret them.¹⁰

⁶ See *In Re Moynihan*, 643 P.2d 439 (Wash.1982) (three objectives of lawyer disciplinary action are to prevent recurrence, to discourage similar conduct on the part of other lawyers, and to restore public confidence in the bar).

⁷ Obviously, sanctions would have no deterrent effect on deceased lawyers.

⁸ Although the designation of another lawyer to assume responsibility for a deceased lawyer's client files would seem to raise issues of client confidentiality, in that a lawyer outside the lawyer-client relationship would have access to confidential client information, it is reasonable to read Rule 1.6 as authorizing such disclosure. Model Rule of Professional Conduct 1.6(a) ("A lawyer shall not reveal information relating to representation of a client ... except for disclosures that are impliedly authorized in order to carry out the representation.") Reasonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.

⁹ See, e.g., Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases:

Appointment of Receiver. When it comes to the attention of the circuit court in any judicial circuit from any source that a lawyer in the circuit is unable properly to discharge his responsibilities to his clients due to disability, disappearance or death, and that no partner, associate, executor or other responsible party capable of conducting that lawyer's affairs is known to exist, then, upon such showing of the presiding judge in the judicial circuit in which the lawyer maintained his practice, or the supreme court, may appoint an attorney from the same judicial circuit to perform certain duties hereafter enumerated ...

Duties of Receiver. As expeditiously as possible, the receiver shall take custody of and make an inventory of the lawyer's files, notify the lawyer's clients in all pending cases as to the lawyer's

A. Duty to inspect files

Many state and local bar associations have explored the issues presented when a lawyer assumes responsibility for a deceased lawyer's client files.¹¹ The ABA Model Rules for Lawyer Disciplinary Enforcement also address some aspects of the question.¹² A lawyer who assumes such responsibility must review the client files carefully to determine which files need immediate attention; failure to do so would leave the clients in the same position as if their attorney died without any plan to protect their interests. The lawyer should also contact all clients of the deceased lawyer to notify them of the death of their lawyer and to request instructions, in accordance with Rule 1.15.¹³ Because the reviewing lawyer does not represent the clients, he or she should review only as much

disability, or inability to continue legal representation, and recommend prompt substitution of attorneys, take appropriate steps to sequester client funds of the lawyer, and to take whatever other action is indicated to protect the interests of the attorney, his clients or other affected parties.

¹⁰ Lawyers who act as administrators of estates have fiduciary duties to all those who have an interest in it, such as beneficiaries and creditors. Questions involving the lawyer's fiduciary responsibility to the estate of a deceased lawyer are also questions of law that this Committee cannot address. See, e.g., *In Re Estate of Halas*, 512 N.E.2d 1276 (Ill.1987); *Aksomitas v. Aksomitas*, 529 A.2d 1314 (Conn.1987).

¹¹ See, e.g., *Md. State Bar Ass'n, Inc., Comm. on Ethics*, Op. 89-58 (1989); *State Bar of Wis., Comm. on Professional Ethics*, Op. E-87-9 (1987); *Miss.State Bar, Ethics Comm.*, Op. 114 (1986); *N.C. State Bar Ass'n, Ethics Comm.*, Op. 16 (1986); *Ala. State Bar, Disciplinary Comm'n.*, Op. 83-155 (1983); *Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics*, Ops. 89-43 and 89-23 (1989); *Ore.State Bar, Ethics Comm.*, Op. 1991-129 (1991).

¹² ABA Model Rules for Lawyer Disciplinary Enforcement (1989), Rule 28 states in relevant part:

APPOINTMENT OF COUNSEL TO PROTECT CLIENTS' INTERESTS WHEN RESPONDENT IS TRANSFERRED TO DISABILITY INACTIVE STATUS, SUSPENDED, DISBARRED, DISAPPEARS, OR DIES. A. Inventory of Lawyer Files. If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and no partner, executor or other responsible party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon proper proof of fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.

B. Protection for Records Subject to Inventory. Any lawyer so appointed shall not be permitted to disclose and information contained in any files inventories without the consent of the client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

¹³ Model Rule of Professional Conduct 1.15(b) ("Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.")

of the file as is needed to identify the client and to make a determination as to which files need immediate attention.¹⁴

B. Duty to maintain client files and property

Questions also arise as to how long the lawyer who assumes responsibility for the deceased lawyer's client files should keep the files for those clients he or she is unable to locate. ABA Informal Opinion 1384 (1977) provides general guidance in this area. We believe that the principles set out in that opinion are applicable to the instant question. Informal Opinion 1384 states as follows:

A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed to the clients' detriment.

Informal Opinion 1384 then lists eight guidelines that lawyers should follow when deciding whether to discard old client files. One of these guidelines states that a lawyer should not "destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, and original documents." Another suggests that a lawyer should not "destroy or discard information that the lawyer knows or should know 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."

There is no simple answer to this question. Each file must be evaluated separately. Reasonable efforts must be made to contact the clients and inform them that their lawyer has died, such as mailing letters to the last known address of the clients explaining that their lawyer has died and requesting instructions.¹⁵

Finally, questions arise with regard to unclaimed funds in the deceased lawyer's client trust account. In this situation, reasonable efforts must be made to contact the clients. If this fails, then the lawyer should maintain the funds in the trust account. Whether the lawyer should follow the procedures as outlined in the applicable Disposition of Unclaimed Property Act that is in effect in the lawyer's state jurisdiction is a question of law that this Committee cannot address.¹⁶

¹⁴ Again, while issues of client confidentiality would appear to be raised here, a reasonable reading of Rule 1.6 suggests that any disclosure of confidential information to the reviewing attorney would be impliedly authorized in the representation. See note 8, *supra*.

¹⁵ Responding to a recent inquiry, the Committee on Professional Ethics of the Bar Association of Nassau County suggested that an attorney assuming responsibility for a deceased attorney's client files has an ethical obligation to treat the assumed files as his or her own. Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Op. 92-27 (1992).

¹⁶ There are at least 27 state and local bar opinions that discuss a lawyer's obligations when the lawyer cannot locate clients who have funds in lawyer trust accounts. See, e.g., State Bar of S.D., Ethics Comm., Op. 91-20 (1991); State Bar of Ariz., Comm. on Rules of Professional Conduct, Op. 90-11 (1990); R.I.Sup.Ct., Ethics Advisory Panel, Op. 90-21 (1990); Alaska Bar Ass'n,

Ethics Comm., Op. 90-3 (1990); Md.State Bar Ass'n, Inc., Comm. on Ethics, Op. 90-25 (1990);
Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Op. 89 (1990).

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