SUCCESSION PLANNING: NOT JUST FOR SENIOR LAWYERS

2019 Annual Meeting & Law Day Celebration
The Bar Association of Montgomery County, Maryland
May 31, 2019

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"Plans are nothing; planning is everything." – Dwight David Eisenhower.

The Ethical Considerations

The Maryland Rules of Professional Conduct ("MRPC") 19-301.3 (diligence) provides that: "A lawyer shall act with reasonable diligence and promptness in representing a client." This duty of diligence includes protecting the client's interest upon death or disability of a sole practitioner:

> To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent attorney to review client files, notify each client of the attorney's death or disability, and determine whether there is a need for immediate protective action. See Md. Rule 19-734 (providing for appointment of a conservator to inventory the files of an attorney who is deceased or has abandoned the practice of law, and to take other appropriate action to protect the attorney's clients in the absence of a plan to protect the clients' interests).[1]

Fundamentals of Client Matters

Although the need for succession planning is more acute for sole practitioners, it may be an issue for law firms in general, particularly if the lawyers of the firm operate in his/her own "silo." A Pennsylvania case illustrates the malpractice exposure that may flow from the lack of

[1] Cmt. 5, MRPC 19.301.3 (cmt. 5 deviates somewhat from the language of the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct).

having, and following, a succession plan in the event of the death of a partner. In Clingen v. Tilley, 620 A. 2d 529 (Pa.Super. 1993) a lawyer received notice that one of his cases had been terminated due to inactivity. The lawyer neglected the notice and died within a year of receiving the notice. Pennsylvania law permits a case terminated for inactivity to be reinstated if a reasonable excuse for the inactivity can be shown. The law firm caught the error one year after the lawyer's death. The trial court held that the year delay from the death of the lawyer to the firm seeking to rectify the error was not a reasonable excuse.[2]

Md. Rule 19-739 (summary placement on inactive status) directs that an attorney may be placed summarily on inactive practice if the attorney has been judicially determined to be mentally incompetent and/or to require a guardian of the person or has been involuntarily admitted to a facility for inpatient care treatment of a mental disorder. The procedure for summary placement on inactive status calls for Bar Counsel to serve the petition and all other papers filed with the Court of Appeals on the disabled attorney and, in addition, upon any guardian of the person of the attorney and on the director of the facility to which the attorney has been admitted. Maryland Rule 19-734 (conservator of client matters) provides that if an attorney is placed on inactive status or has died or is otherwise not able to practice law, and there are open client matters, and "there is not know to exist any personal representative, partner, or other individual who is willing to conduct and capable of conducting the attorney's client affairs, Bar Counsel may petition requesting appointment of a conservator to inventory the attorney's files and to take other appropriate action to protect the attorney's clients."[3] The committee report to Maryland Rule 19-734 states:

> The conservator will be responsible for dealing with the attorney's trust accounts and client matters over which a guardian or personal representative, even if one exists, ordinarily should have no

[2] See Andrew Jones and Spencer Richards, "Succession: Having a Plan for the Future," 20 No. 19 Lawyers J. 1 (2018) (An Alleghany Co., Pennsylvania Court Bar Association journal).
[3] Md. Rule 19-734(a).

> authority. A guardian or personal representative who has been appointed should be served with a petition and order, however, to avoid the prospect of conflicts.[4]

Some Inherent Difficulties in Planning

These rules illustrate an ambiguity inherent in the sole practitioner naming a successor in a power of attorney, Will, or other planning document to step into his/her law practice in case of a disability or death. Even if the attorney designates a surrogate who is a licensed attorney to assist in transitioning his/her practice such a designation may be invalid because of the necessity of client consent and due to the general rules governing the confidentiality of client matters.

This disconnect prompted the American Bar Association House of Delegates to recommend that "bar associations and courts … develop, adopt, promote and implement programs and procedures to encourage and enable lawyers to plan for law practice contingencies by designating in advance another lawyer who is willing and able to assume the lawyer's practice or to assist in the transfer of client matters and papers and electronic files, in the event that the lawyer has any physical or mental disability that significantly impairs the lawyer's ability to practice law, or the lawyer has died, disappeared, been suspended or disbarred, or otherwise been restricted from the practice of law."[5]

Under Indiana law, a lawyer may designate an attorney surrogate at the time of completing his/her annual registration as required by Indiana law. Upon a triggering event, the court shall appoint an attorney/surrogate either, the one designated by the disabled attorney, or a suitable member of the Bar in good standing, or a senior judge. In other words, the designation is not binding upon the court but provides a reasonable way for sole practitioners to plan by designating

[4] Committee cmt. 2 Md. Rule 19-704(a).

[5] Resolution adopted by the House of Delegates, American Bar Association, August 13-14, 2007. See Exhibit A of these materials for the text of the recommendation and the report as well as a summary of the approaches in Florida, New York, and Indiana.

a fellow attorney to take over the practice for the purposes of continuing, closing down, or selling the practice. The Indiana statute provides that, absent intentional wrongdoing, an attorney surrogate is immune from civil suit for damages for all actions and omissions acting under the statute.[6]

Absent a rule change, such as the one adopted by Indiana, Maryland sole practitioners could designate a surrogate without colliding with the consent and confidentiality rules by providing in the fee agreement, that in the event of the attorney's disability, a named surrogate attorney would provide certain duties on behalf of the dead or disabled attorney. It would be prudent to spell out exactly what these tasks would be, for example, (1) reviewing client files and returning client property to the client, (2) communicating with the court to establish continuances if appropriate, (3) notifying the client that they are permitted to either stay represented by the surrogate attorney or seek other counsel.

Even absent client consent in advance, arguably the ethical rules permit a designated surrogate attorney to assume responsibilities over client matters and files:

> Although the designation of an Assisting Attorney to assume responsibilities for client files raises issues of client confidentiality, it is reasonable to read the rules of professional conduct as authorizing such access and disclosure under these circumstances. (RPC 1.6, RPC 1.17, RPC 1.18). Remember that if an Assisting Attorney discovers evidence of legal malpractice or ethical violations, he or she may have an ethical obligation to take appropriate action.
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> * * *
>
> Your Assisting Attorney must also be aware of conflict of interest issues and do a conflicts check if he or she is either providing legal services to your clients or reviewing confidential file information to assist with referral of your clients' files. Your Assisting Attorney should be prepared to delegate to another attorney those files with which he or she has a conflict of interest, while being careful to

[6] Indiana Rule 23 (disciplinary commission and proceedings), § 27 (attorney surrogates). Attached as Exhibit B.

> protect materials and information that may be subject to attorney-client privilege or duty of confidentiality.[7]

Maryland Rule 19-734 provides that Bar Counsel may petition for the appointment of a conservator if there was no other individual who is willing to conduct and *capable* of conducting the attorney's client affairs. Accordingly, the rule seems to suggest that an attorney may appoint a surrogate attorney to take over the practice if the attorney dies or becomes disabled. Indeed, Bar Counsel may well welcome such a designation.

If the attorney appoints a surrogate attorney by a power of attorney under the Maryland General and Limited Power of Attorney Act, Estates & Trust § 17-113 arguably creates a duty to protect the appointing lawyer. Consequently, such a lawyer may not be able to disclose possible malpractice or ethical breaches just as if he/she were counsel to the disabled lawyer. A designated surrogate attorney may wish to request that Bar Counsel file a petition naming him or her as the conservator. Although the rule itself does not give immunity to the conservator other rules may give the designated attorney firmer legal footing but probably would shift the duty of loyalty to the client. Maryland Rule 19-703(f), importantly, provides that the conservator is entitled to periodic payments for his or her efforts and, if the conservator is unable to obtain full payment from the attorney's assets or estate for his or her reasonable hourly fees, then the conservator may seek a judgment for those fees and have those fees paid from the Disciplinary Fund.

The State Bar of California website is a useful checklist for attorneys who may find themselves in the position of being a conservator or otherwise coming into a practice to take over,

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[7] The New York State Bar Association Planning Ahead Guide (How to establish an advance exit plan to protect your clients' interests in the event of your disability, retirement or death), Law Practice Management Committee, Sub-Committee on Law Practice Continuity (2015-16 2d ed), at Page 6 (available online at nysba.org as a guide to the Bar. The NYSBA Planning Ahead Guide is arguably one of the most thorough treatments of the issues confronting succession planning for the sole practitioner. Attached as Exhibit C is the Table of Contents of the Guide and the Introduction to it. Exhibit C consists of the first fifteen pages of the Guide which in total is 144 pages. The Rules of Professional Conduct cited in the quote correspond to MRPC 19-301.6 (Confidentiality of Information), MRCP 19-301.17 (Sale of a Law Practice), and MRPC (Duties to Prospective Clients).

wind it down, or try to sell the practice.[8] This checklist is a useful guide for what instructions a lawyer should prepare as part of his or her advance planning. The California checklist is a comprehensive but practical list of the nature of information a surrogate would require from how office systems are organized to how to determine the status of active files.

Sale of a Law Practice

For many years, a Maryland lawyer was prohibited from selling his or her law practice. A consequence of this old rule was the view that a law practice has no "goodwill" separate from the practitioner: "We are of the opinion that the goodwill of a solo law practice is personal to the individual practitioner. Goodwill in such circumstances is not severable from the reputation of the sole practitioner regardless of the contributions made to the practice by the spouse or employees." *Prahinski v. Prahinski*, 321 Md. 227 (1990). (No value of goodwill for marital property purposes even when the practice consisted of 95% to 97% real estate settlement work and the non-lawyer spouse worked alongside the lawyer for over ten years. There would be, of course, a liquidation value based on equipment, accounts receivable, and other assets. *Prahinski* was based on the fact that the law practice could not be sold.)

MRPC 19-301.17 (sale of law practice) now permits the sale of a law practice:

> **Rule 19-301.17. Sale of Law Practice.**
>
> (a) Subject to paragraph (b), a law practice, including goodwill, may be sold if the following conditions are satisfied:
>
> (1) Except in the case of death, disability, or appointment of the seller to judicial office, the entire practice that is the subject of the sale has been in existence at least five years prior to the date of sale;

[8] Attached hereto as Exhibit D is the State Bar of California "Guidelines for Closing or Selling a Law Practice," http://calbar.ca.gov.

(2) The practice is sold as an entirety to another lawyer or firm; and

(3) Written notice has been mailed to the last known address of the seller's current clients regarding:

(A) the proposed sale;

(B) the terms of any proposed change in the fee arrangement;

(C) the client's right to retain other counsel, to take possession of the file, and to obtain any funds or other property to which the client is entitled; and

(D) the fact that the client's consent to the new representation will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice.

(b) If a notice required by paragraph (a)(3) is returned and the client cannot be located, the representation of that client may be transferred to the purchaser only by an order of a court of competent jurisdiction authorizing the transfer. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer. [9]

The provision requiring the practice to be sold to <u>one</u> lawyer or law firm is to avoid the cherry-picking of clients or lucrative matters. The ABA Study Committee on Solo and Small Firm Practitioners filed an objection to this aspect of the rule. It would prohibit a lawyer selling one area of practice as part of a way for the lawyer to "slow down" but not "stop" the practice.[10]

The price and terms for the sale of a solo or small firm practice are problematic. Unlike, perhaps, the situation of a large firm that may have institutional clients, the valuation for the smaller shop will depend on a judgment as to the likelihood those clients will remain. Given the one-to-one relationship between the sole practitioner and the client, assessing retainage may be

[9] This was part of the ABA's Ethics 2000 proposals.

[10] Attached as Exhibit E is the Report of the ABA Standing Committee on Solo & Small Firm Practices, cmts. to Ethics 2000 proposals which criticized the sale of the entire practice and cease the practice of law.

impossible. Obviously setting a valuation is not an exact science. Often the price will be partially paid by a note that will adjust to reflect the actual stream of business coming from the existing clients for a number of years after the sale. Given that the sale of a solo practice is a relatively new concept, it may take some time before reasonable valuation methodologies are developed.

The Problematic Nature of Client Files

The focus of the comment to MRPC 19-301.3 (diligence) is handling active, open matters in the event of a sole practitioner's death or disability. Although the comment is directed at sole practitioners, the same concern would apply if lawyers effectively practiced in separate silos within a larger group practice.

Client files of even "closed" matters, however, also require planning. Generally, the attorney-client privilege is "owned" by and, indeed, survives the client's death.[11] The death of the lawyer, of course, does not change that dynamic.

Client property should be returned to the client.[12] Presumably the general obligation for a lawyer to preserve closed client files ought to be part of the planning in the event of the lawyer's death or disability. Client file retention rules are a bit ambiguous:

> Unfortunately, file retention is not a cut and dry process; it requires some specific review by the attorney and some discretion and decision making. The Maryland State Bar Association Committee on Ethics, in addressing a lawyer's responsibilities to maintain files, has adopted and repeated the following standards promulgated by the American Bar Association:
>
> 1. Unless the client consents, 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 on behalf of the client, the return of which could reasonably be expected by the

[11] *Swindler & Berlin vs. U.S.,* 524 U.S. 399 (1998) (the Vince Foster case).

[12] MRPC 19.301.16(d) ("Upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect the client's interest, such as … surrendering papers and property to which the client is entitled …").

client, and original documents (especially when not filed or recorded in the public records).

2. A lawyer should use care not to 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 the which the applicable statutory limitations period has not expired.

3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.

4. In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.

5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.

6. In disposing of a file, a lawyer should protect the confidentiality of the contents.

7. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.

8. A lawyer should preserve, perhaps for an extended time an index or identification of the files that the lawyer has destroyed or disposed of.

See e.g., Ethics Docket No. 2005-01 (noting, with regard to item 5, that this standard pre-dates the changes in the ethical rules and the adoption of the requirement to preserve such records for five years). In a world where space is always a luxury, an attorney would be well-served to devote some time to closed client matters and review those matters in light of the above.[13]"

[13] James N. Gaither, "Client File Retention," 48-April Md.B.J. 46 (2015).

Preserving information that may be "useful in the assertion … of a client's position in a matter" may be problematic in some circumstances. The testamentary exception to the attorney-client privilege, for example, is based on an implied waiver that the client would want the client's estate planning file to be used to support his or her estate planning documents if challenged or, on the other hand, if they were the result of undue influence to provide evidence that may tend to defeat the purported documents.[14] The evidence contained in the dead or disabled attorney's files may also be useful in trust construction cases which continue to make those files relevant throughout the term of the trust. Thus, preservation of the client's file may be a long-term proposition under the ABA Standards.

Accordingly, the duty of diligence may require finding a successor to cull through the files and determine what to retain and for how long.

In the case of digitally preserved files, of course, that is a relatively inexpensive matter. For files retained in paper form only, however, the very act of preserving those files can be an expensive proposition.

The Mechanics of Appointing a Surrogate Attorney

Traditionally surrogates to assist a disabled individual with his or her business affairs are appointed by a durable power of attorney and/or a revocable trust or, at least, an inter vivos trust naming a trustee and giving that trustee authority. In the event of death, the decedent's surrogate is the personal representative and can be named in a will although that person would be subject to approval by the appropriate court. Using these tools, a sole practitioner should authorize a fellow attorney to, at a minimum, "review client files, notify each client of the lawyer's death or disability,

[14] *Zook v. Pesce*, 438 Md. 232, 243 (2014) ("we reaffirm that in a dispute between putative heirs and devisees under a will or trust, the attorney-client privilege does not bar admission of testimony and evidence regarding communications between the decedent and any attorneys involved in the creation of the instrument provided that the evidence or testimony tends to help clarify the donative intent of the decedent.")

and determine whether there is a need for immediate protective action."[15] This does not mean that every sole practitioner must only name an attorney as his or her agent under a power of attorney, as the successor trustee under a revocable trust, or as the personal representative under a will. Other family members could be designated in general as the agent, successor trustee, or personal representative. Instead, the sole practitioner should name an attorney under a limited power of appointment for the purposes of acting as a surrogate attorney and likewise as a limited successor trustee and as a limited personal representative solely to handle the practice. The scope of authority of the surrogate should be lifted from the California Bar and/or New York Bar guidelines. The specific authority would include:

- Securing client trust funds and/or other business accounts and freezing those accounts until formal authority is obtained by court appointment or otherwise.
- Securing files and the office: if appropriate, it may be accomplished with the assistance of office personnel who are instructed to limit access to the files and not to have any files removed.
- Reviewing the calendar for eminent calendaring deadlines such as the statute of limitations, court appearances, discovery deadlines, depositions, etc. These deadlines, other than statute of limitations, should prompt arrangements to postpone due dates and appearances until order can be imposed upon the practice.
- Establishing how the incoming practitioner is going to be compensated.
- Identifying any potential conflicts of interest and taking appropriate action.
- Making sure that a malpractice tail is in place and if malpractice is found that raises issues of whether the duty is to the deceased, disabled lawyer or to the relying client.

Advanced planning for death or disability of a sole practitioner requires that office procedures be memorialized so that a third-party can follow how the files are set up, how to tell

[15] Cmt. 5, MRPC 19.301.3. As discussed above, however, unilaterally naming such a surrogate without containing a provision in the engagement letter is problematic in itself.

active from inactive matters, in other words, it requires a high degree of organization and documentation if chaos is to be minimized.

Other than being organized, the most important aspect of the orderly planning for the disability or death of a sole practitioner is for that practitioner to arrange with another lawyer to be identified and empowered to step in if needed. Attached hereto are documents prepared by the New York Bar that provide examples of documents that might be of use (as with any form these must be tailored to specific situations):

- Agreement to close law practice in the future. New York Model Exhibit F.
- Limited power of attorney to manage law practice at a future date. New York Model Exhibit G.
- Letter from closing attorney advising lawyer unable to continue in the practice of law. New York Model Exhibit H.
- Special provisions for attorney's will regarding handling law practice. New York Model Exhibit I.

Conflicts

The surrogate attorney and the planning attorney need to clarify the status of the surrogate attorney and that needs to be in writing. If the surrogate attorney is representing the planning attorney then almost certainly that attorney would have difficulty representing a client of the planning attorney because of the possibility that the surrogate attorney could discover malpractice and/or ethical violations. Additionally, of course, one would need to do conflicts checks before undertaking a representation. There is the additional general prohibition against solicitation although given that a transition can be structured as a sale of a law practice it would seem that such solicitation issues are no longer paramount. Nevertheless, even in the sale of a practice clients

must be told clearly that they are not obligated to stay with the purchaser. The client always gets to decide who will be his/her lawyer:

> The client has the right to choose the attorney or attorneys who will represent it. Clients are not the "possession" of anyone, but, to the contrary, control who represents them. Clients are not merchandise. They cannot be bought, sold, or traded. The attorney-client relationship is personal and confidential, and the client's choice of attorneys in civil cases is near absolute.[16]

[16] *Attorney Grievance Comm'n v. Potter*, 380 Md. 128, 157 (2004) (quoting *Matter of Cupples*, 952 S.W. 226, 234 (Mo. 1997)). (Internal quotations and citations omitted).

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
August 13-14, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges bar associations and courts to develop, adopt, promote and implement programs and procedures to encourage and enable lawyers to plan for law practice contingencies by designating in advance another lawyer who is willing and able to assume the lawyer's practice or to assist in the transfer of client matters and papers and electronic files, in the event that the lawyer has any physical or mental disability that significantly impairs the lawyer's ability to practice law, or the lawyer has died, disappeared, been suspended or disbarred, or otherwise been restricted from the practice of law. The designee shall be in good standing in the jurisdiction where the lawyer is practicing law, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction.

REPORT

1. OVERVIEW: What Happens When a Lawyer is Unable or Unavailable to Practice Law?

There are several different scenarios where a lawyer may become unavailable or unable to practice law, temporarily or permanently, voluntarily or involuntarily. For example, an unplanned absence from the practice of law can result from accident, illness, death, disappearance, disbarment, or abandonment of a law practice. In such circumstances, the clients' interests must be protected and it is unlikely and unreasonable to expect that all lawyers will have made advance arrangements to address the needs of such situations. This may be especially true if the lawyer is a solo practitioner or is not formally in practice with other lawyers.

Multiple issues must be considered whenever any lawyer becomes absent or is unable to practice law. Problem areas which need to be addressed include: Conflicts of interest; confidentiality; malpractice and insurance; handling of escrow and trust accounts; file preservation, storage, disposition, transfer and destruction; provision for staffing and expenses; and arranging for compensation to resolve pending legal matters. Planning ahead to address such issues may be difficult and time consuming but not planning at all is not a satisfactory option. The legal profession needs to focus on identifying these issues and educating lawyers on ways in which to solve the problems and mitigate potential adverse consequences.

2. AVAILABLE GUIDANCE AND INFORMATION

Current ABA Model Rules For Lawyer Disciplinary Enforcement provides guidance in certain limited situations. For example, Model Rule 28 provides as follows:

> "Rule 28. 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 the 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 any information contained in any files inventoried 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.*

Commentary
In any situation in which the lawyer is not available to protect clients, the agency has an obligation to protect them. When such information comes to the attention of the agency, it need not await the determination that misconduct has occurred before acting.

The cost of the inventory may be paid from the fees owing to the lawyer whose files are inventoried. The cost may also be paid by funds made available for that purpose by state and local bar associations. Often the lawyer appointed as trustee will waive all or part of his or her fee as a public service.

The trustee is appointed to inventory the files of the lawyer's clients, not to represent them. The trustee should review each file and recommend to the judge who appointed him or her a proposed disposition. The trustee may take only such action with respect to each client's file as is authorized by the judge who appointed him or her.

The lawyer-client privilege must be extended so that review of the file by the trustee is not deemed to be disclosure to a third party, which would waive the privilege".

On the national level, in 1996, Stephen N. Maskaleris, Esq. of the ABA Senior Lawyers Division sent surveys to 55 states and U.S. territories and 61 county and city bar associations on the question of "What happens when a lawyer dies". Responses were received from 50 state bars (100%), from the District of Columbia, one territorial bar and from 30 local bars (49%) of those surveyed. The results of this survey, published in a Report prepared by Mr. Maskaleris entitled: "What Happens When a Lawyer Dies", are of great interest. In summary, 29 state or territorial bar associations had plans in place to deal with the death of a member, and of that group 14 depended upon court rules which apply to abandonment, disbarment or death. Five states relied upon disciplinary rules for guidance. In addition, five states answered that they depended upon informal conservatorship or "buddy" relationships to solve the problem. Twenty-two states had no plans and nine offered little comment on what to do when a lawyer dies.

Several state bar associations have published materials which provide valuable information on the subject of this Report. For example, see: Guidebook entitled: "Planning Ahead-Establish an Advance Exit Plan to Protect Your Clients' Interest in the Event of Your Disability, Retirement or Death", prepared by the New York State

Bar Association's Committee on Law Practice Continuity, available as a free download at www.nysba.org. See also: "Planning Ahead: Protecting Your Client's Interest in the Event of Your Disability or Death", published by the Ethics Department of the Virginia State Bar, as well as: "Planning Ahead: A Guide to Protecting Your Clients' Interest in the Event of Your Disability or Death", by Barbara S. Fishleder, published by the Oregon State Bar Professional Liability Fund.

3. MORE GUIDANCE AND ASSISTANCE IS NEEDED TO ENCOURAGE AND ENABLE MANY LAWYERS TO ESTABLISH VOLUNTARY ADVANCE PLANS

The Model Rule 28, referenced above, addresses the problem of an absent or disabled lawyer in a disciplinary context, but this provides little or no guidance in the non-disciplinary context.

While there may be no "cure-all" solution which could apply to every conceivable non-disciplinary situation, a voluntary advance exit plan which contemplates potential unplanned absences seems desirable and necessary. A Uniform Model rule could be useful, but the development and approval of such guidance is unlikely, at least in the short term. Until such time as there may be a Uniform Model rule, each jurisdiction can determine an approach to the problem which best suits the needs of their jurisdiction. Individual lawyers should know best their own professional situations and circumstances and should be in the best position to plan ahead for various possible contingencies. Bar associations and law firms can be of great assistance in the process of educating lawyers and should assist and encourage advance consideration of the potentially disastrous possibilities and possible ways in which to avoid them. Wise individual advance planning can lessen or avoid potentially serious adverse consequences which lawyers and their clients can face in the event of numerous "what if" scenarios.

Partnerships or professional entities with one, or more, lawyers, are often better prepared to protect the clients' interests in continuing ongoing representation when an individual lawyer is unable to practice law. In such situations, even if the client chooses to select a new lawyer or law firm, the former firm can assist in the transition of the client and the transfer of files. In reality, many practitioners may not have adequate support staff or professional colleagues who would be available to assist in the transition of clients and their files if the lawyer's practice was interrupted or terminated by the lawyer's inability or disability to practice law.

Possible resources to assist lawyers and clients include state or local bar associations, the court system and related agencies, which might be able to create and/or support various mechanisms, for members and non-members, to provide law practice continuity benefits and services in the event of unforeseen professional absence or unavailability. For example, a state or local bar association might maintain a data base of lawyers who are ready, willing and able to assist other lawyers who find

themselves unable to practice, temporarily or permanently. Bar associations and courts, or related agencies, might also receive and store a listing of lawyers who have been designated in advance by other lawyers, and who have agreed to facilitate orderly law practice transition, in the event a designating lawyer is unable or unavailable to practice law.

Court or appropriate agencies in each jurisdiction might also be in position to serve as a repository of listings for voluntary advance designations. Courts might also encourage advance exit planning by urging lawyers to establish advance voluntary arrangements and inviting lawyers to provide appropriate information on annual or periodic lawyer registration filings, stating the existence of an arrangement and identifying the name, address and telephone number of a designated lawyer who is willing and able to assume specified law practice transition responsibilities.

4. ALTERNATIVES TO VOLUNTARY ADVANCE PLANNING INCLUDE FORMALIZED COURT-MANDATED PROCEDURES AND/OR RULES

As an alternative to a voluntary advance designation approach, some jurisdictions have already established or are considering more structured and defined processes and procedures. Several jurisdictions already have some form of mandatory advance designation, caretaker or surrogate lawyer rules. See, for example, Rules in Florida, Michigan, Oregon, North Carolina, South Carolina, and Wisconsin. In Delaware, the Court has implemented a mandatory advance designation requirement by order.

Still other jurisdictions are considering rules for the appointment of "Caretaker" or "Surrogate" attorneys in situations where there has been no advance planning. For example, the New York State Bar Association recommended a Uniform Court Rule on the Appointment of Caretaker Attorneys to the Courts in the State of New York, which is currently under advisement by the four Appellate Divisions in New York which have the responsibility for regulating the legal profession in that state. The New York "Caretaker" Rule would require Caretaker Attorneys to have professional liability insurance, to further protect the clients' interests.

In contrast to the New York proposal, requiring malpractice insurance, Indiana's proposed amended rule, which would require solo practitioners to designate a Surrogate Attorney, would grant immunity, absent intentional wrongdoing, for all acts or omissions while acting as Surrogate Attorney.

This proposed Recommendation and Report takes no position on the so-called "mandated-approach" and does not recommend the use of any particular term or definition for a "Designated Attorney". Appropriate terms for an advance designee, such as: "Substitute", "Interim", "Inventory" "Successor", "Caretaker", or "Surrogate" Attorney, or substitutes for any of these terms, may best be decided in the context of the particular practices, procedures and circumstances of each jurisdiction, as the responsible Court or related agency may determine.

For illustrative informative purposes only, information relating to the terms: "Inventory Attorney", "Caretaker Attorney" and Attorney Surrogate", used or proposed in the States of Florida, New York and Indiana, is described in the attached Appendix.

5. CONCLUSION

The Recommendations will produce multiple benefits to law clients, lawyers and the judicial system. First, the actions urged will help to educate lawyers as to the problems associated with a lawyer's unplanned absence or inability to practice law and the benefits of voluntary advance planning by the designation of another lawyer to protect the interests of the lawyer's clients. Additionally, the Recommendations will further help to protect clients by encouraging courts and bar associations to develop, adopt, promote and implement meaningful programs and procedures to encourage and enable lawyers to designate, in advance, another lawyer who is willing and able to assume the lawyer's practice or to assist in the transfer of client matters and files, in accordance with applicable rules, practices and procedures in the jurisdiction where the lawyer practices law, in the event the lawyer has a physical or mental disability resulting from accident, injury, disease, chemical dependency, or a physical or mental condition that significantly impairs the lawyer's ability to practice law, or the lawyer has died, disappeared, been suspended or disbarred, or has been otherwise restricted from the practice of law.

Respectfully submitted,

Theodore A. Kolb, Chair
Senior Lawyers Division
August, 2007

APPENDIX

FLORIDA

Under Rule 1-3.8, adopted by the Florida Supreme Court, effective January 1, 2006, lawyers who practice in-state must designate an inventory attorney, who takes possession of the files of a member who dies, disappears, is disbarred or suspended, becomes delinquent, or suffers involuntary leave of absence due to military service, and no other responsible party capable of conducting the member's affairs is known. The inventory attorney has the responsibility of notifying all clients that their lawyer is no longer able to represent them. The inventory attorney also may give the file to a client for finding substitute counsel; may make referrals to substitute counsel with the agreement of the client; or may accept representation of the client, but is not required to do so. For more information about the designation "Inventory" Attorney in Florida, see the Florida Bar web site at www.floridabar.org.

NEW YORK

In a proposed new NYCRR 1250.5, suggested by the New York State Bar Association's Law Practice Continuity Committee, the Role, Duties and Authority of a "Caretaker Attorney" are defined as follows:

(a) The role of a caretaker attorney is to protect the clients of the respondent or assisted attorney and, to the extent possible and not inconsistent with the protection of such clients, to protect the interests of the attorney to whom this rule applies.

(b) A caretaker attorney appointed by the court shall enter the offices of the respondent or assisted attorney and may, with the assistance of that attorney if possible, do the following, as authorized by the court:

(1) prepare an inventory of the matters being handled by the attorney;

(2) protect the clients' rights, files and property;

(3) notify all clients represented in pending matters of the appointment of the caretaker attorney or attorneys as promptly as possible, personally or by mail, or both, and, unless the practice is likely to be sold or the assisted attorney is likely to resume practice, advise them to seek counsel of their choice;

(4) act as interim counsel upon the request of a client;

(5) deliver files and property to the clients upon their request, - subject to the respondent's or assisted attorney's right to retain copies of such files or assert a retaining or charging lien against such files or property if fees or disbursements for past services rendered are owed to the attorney by the client;

(6) collect outstanding attorney's fees, costs and expenses, and-make arrangements for the prompt resolution of any disputes concerning outstanding attorney's fees, costs and expenses;

(7) collect any moneys and safeguard any assets in the office of they respondent or assisted attorney and hold the moneys and assets in trust pending their disposition upon order of the court;

(8) request compensation for his or her professional services and reasonable and necessary expenses;

(9) to the extent possible, assist and cooperate with the respondent or assisted attorney and his or her representative in the transition, sale or windup of his or her practice;

(10) act as signatory on trust, escrow, IOLA, special and operating accounts, disburse funds to clients or other persons entitled thereto, and otherwise safeguard such funds.

(11) submit such accountings as the court may require.

(c) A caretaker attorney shall maintain or procure professional liability coverage with a carrier admitted to do insurance business in New York, which coverage shall insure his or her work as a caretaker attorney under these rules and, if requested, shall present proof of such coverage to the court appointing the caretaker attorney.

(d) A caretaker attorney shall not disclose any information pertaining to any matter so inventoried or handled without the consent of the client to whom such matter relates, except as necessary to carry out the order of the appointing court.

(e) In the event of the death, disappearance or incapacity of a sole practitioner, the caretaker attorney and his or her law firm:

(1) shall not, except upon approval of the court, serve in any other capacity as counsel for the respondent or assisted attorney, or as executor or administrator of, or counsel to, the respondent or assisted attorney's estate;

(2) may assist the respondent or assisted attorney's personal representative, guardian, conservator or other representative, or his or her estate, in the termination or sale of the law practice under DR 2-111 [22 NYCRR 1200.15-a];

(3) shall not without the permission of the court represent a client, other than
to temporarily protect the interests of the client, except and until the caretaker attorney purchases the law practice as permitted under DR 2-111 [22 NYCRR 1200.15-a];

(4) may be eligible to purchase the law practice under DR 2-111 [22 NYCRR
1200.15-a], but only upon the court's approval of such sale.

(5) shall provide such accountings to the personal representative, respondent
or assisted attorney as the court may direct.

(f) A caretaker attorney is governed by the Code of Professional Responsibility and the same rules of professional conduct applicable to the respondent or assisted attorney with respect to client matters or files.

(g) The caretaker attorney shall be deemed to be a member of a Lawyer Assistance Committee under Judiciary law §499 and DR 1-103 [22 NYCRR 1200.4], except that the caretaker attorney shall be liable to the clients of the respondent or assisted attorney and third parties for acts and omissions outside the scope of these rules or the court order appointing the caretaker attorney.

INDIANA

Proposed Amended Rule 23 in the Indiana Rules for Admission to the Bar and the Discipline of Attorneys, defines the term "Attorney Surrogate" as a member of the bar of this State, in good standing, who has been designated by a lawyer under this section as an attorney surrogate or has been appointed by a court of competent jurisdiction to act as an attorney surrogate for a lawyer. The term "Disabled" means "that a lawyer has a physical or mental condition resulting from an accident, injury, disease, chemical dependency, mental health problem or age that significant impairs his/her ability to practice law.". The term "Lawyer" means a member of the bar of this State who is engaged in the private practice of law in this State. For purposes of the attorney surrogate section of these rules, however, the term "lawyer" shall not include a lawyer (a) whose sole employment is by an organization that is not engaged in the private practice of law, or (b) who is engaged with one or more other lawyers in the private practice of law pursuant to (1) Ind. Admission and Disciplinary Rule 27 or (ii) articles of partnership filed with the office of the Indiana Secretary of State. The proposed Indiana Rule requires Indiana lawyers to designate on their annual registration forms, the name, office

address and residence address of their attorney surrogate. Also, the proposed Indiana Rule requires that a lawyer designated as an attorney surrogate shall evidence acceptance of the designation by a writing, which shall confirm that satisfactory arrangements have been made for compensation for the performance of the attorney surrogate's duties. The designation of an attorney surrogate shall remain in effect until revoked by either the attorney surrogate or the lawyer designating the attorney surrogate

Section 27. Attorney Surrogates

(a) *Definitions for purposes of this Section only.*

(1) "Attorney Surrogate" means a senior judge certified by the Indiana Judicial Nominating Commission or another member of the bar of this State, in good standing, who has been appointed by a court of competent jurisdiction to act as an Attorney Surrogate for a Lawyer.

(2) "Court of competent jurisdiction" means a court of general jurisdiction in the county in which a Lawyer maintains or has maintained a principal office.

(3) "Disabled" means that a Lawyer has a physical or mental condition resulting from accident, injury, disease, chemical dependency, mental health problems, or age that significantly impairs the Lawyer's ability to practice law.

(4) "Fiduciary Entity" means a partnership, limited liability company, professional corporation, or a limited liability partnership, in which entity a Lawyer is practicing with one or more other members of the Bar of this State who are partners, shareholders or owners.

(5) "Lawyer" means a member of the Bar of this State who is engaged in the private practice of law in this State. "Lawyer" does not include a member of the Bar whose practice is solely as an employee of another Lawyer, a Fiduciary Entity, or an organization that is not engaged in the private practice of law.

(b) *Designation of Attorney Surrogate.*

(1) At the time of completing the annual registration required by Ind. Admission and Discipline Rule 2(b), a Lawyer may designate an Attorney Surrogate in the Clerk of Courts Portal provided by the Supreme Court Clerk by specifying the attorney number of the Attorney Surrogate and certifying that the Attorney Surrogate has agreed to the designation in a writing in possession of both the Lawyer and the surrogate. The designation of an Attorney Surrogate shall remain in effect until revoked by either the designated Attorney Surrogate or the Lawyer designating the Attorney Surrogate. The Lawyer who designates the Attorney Surrogate shall notify the Supreme Court Clerk of any change of designated Attorney Surrogate within thirty (30) days of such change. The Supreme Court Clerk shall keep a list of designated Attorney Surrogates and their addresses.

(2) A Lawyer, practicing in a Fiduciary Entity, shall state the name and address of the Fiduciary Entity where indicated in the Attorney Surrogate designation section of the Clerk of Courts Portal. Because of the ongoing responsibility of the Fiduciary Entity to the clients of the Lawyer, no Attorney Surrogate shall be appointed for a Lawyer practicing in a Fiduciary Entity.

(3) A Lawyer not practicing in a Fiduciary Entity who does not designate an Attorney Surrogate pursuant to subsection (1) above shall be deemed to designate a senior judge or other suitable member of the bar of this State in good standing appointed by a court of competent jurisdiction to perform the duties of an Attorney Surrogate.

(c) *Role of Attorney Surrogate.*

(1) Upon notice that a Lawyer has:

(i) Died;

(ii) Disappeared;

(iii) Become disabled; or

(iv) Been disbarred or suspended and has not fully complied with the provisions of Ind. Admission and Discipline Rule 23, Section 26,

any interested person (including a local bar association) or a designated Attorney Surrogate may file in a court of competent jurisdiction a verified petition (1) informing the court of the occurrence and (2) requesting appointment of an Attorney Surrogate.

(2) A copy of the verified petition shall be served upon the Lawyer at the address on file with the Supreme Court Clerk or, in the event the Lawyer has died, upon the Lawyer's personal representative, if one has been appointed. Upon the filing of the verified petition, the court shall, after notice and opportunity to be heard (which in no event shall be longer than ten (10) days from the date of service of the petition), determine whether there is an occurrence under (a), (b), (c) or (d), and an Attorney Surrogate needs to be appointed to act as custodian of the law practice. If the court finds that an Attorney Surrogate should be appointed then the court shall appoint as Attorney Surrogate either the designated Attorney Surrogate as set forth pursuant to subsection (b)(1), a suitable member of the Bar of this State in good standing or a senior judge.

(3) Upon such appointment, the Attorney Surrogate may:

(i) Take possession of and examine the files and records of the law practice, and obtain information as to any pending matters which may require attention;

(ii) Notify persons and entities who appear to be clients of the Lawyer that it may be in their best interest to obtain replacement counsel;

(iii) Apply for extensions of time pending employment of replacement counsel by the client;

(iv) File notices, motions, and pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained;

(v) Give notice to appropriate persons and entities who may be affected, other than clients, that the Attorney Surrogate has been appointed;

(vi) Arrange for the surrender or delivery of clients' papers or property;

(vii) As approved by the court, take possession of all trust accounts subject to Ind. Prof. Cond. R. 1.15(a), and take all appropriate actions with respect to such accounts;

(viii) Deliver the file to the client; make referrals to replacement counsel with the agreement of the client; or accept representation of the client with the agreement of the client; and

(xi)[2] Do such other acts as the court may direct to carry out the purposes of this Section.

(4) If the Attorney Surrogate determines that conflicts of interest exist between the Attorney Surrogate's clients and the clients of the Lawyer, the Attorney Surrogate shall notify the court of the existence of the conflict of interest with regard to the particular cases or files and the Attorney Surrogate shall take no action with regard to those cases or files.

(5) Upon appointment, the Attorney Surrogate shall notify the Disciplinary Commission.

(d) *Jurisdiction of court.* A court of competent jurisdiction that has granted a verified petition for appointment under this Section shall have jurisdiction over the files, records, and property of clients of the Lawyer and may make orders necessary or appropriate to protect the interests of the Lawyer, the clients of the Lawyer, and the public. The court shall also have jurisdiction over closed files of the clients of the Lawyer and may make appropriate orders regarding those files including, but not limited to, destruction of the same.

(e) *Time limitations suspended.* Upon the granting of a verified petition for appointment under this Section, any applicable statute of limitations, deadline, time limit, or return date for a filing as it relates to the Lawyer's clients (except as to a response to a request for temporary emergency relief) shall be extended automatically to a date 120 days from the date of the filing of the petition, if it would otherwise expire on or after the date of filing of the petition and before the extended date.

(f) *Applicability of attorney-client rules.* Persons examining the files and records of the law practice of the Lawyer pursuant to this Section shall observe the attorney-client confidentiality requirements set out in Ind. Professional Conduct Rule 1.6 and otherwise may make disclosures in camera to the court only to the extent necessary to carry out the purposes of this Section. The attorney-client privilege shall apply to communications by or to the Attorney Surrogate to the same extent as it would have applied to communications by or to the Lawyer. However, the Attorney Surrogate relationship does not create an attorney/client relationship between the Attorney Surrogate and the client of the Lawyer.

(g) *Final report of Attorney Surrogate: petition for compensation; court approval.* When the purposes of this Section have been accomplished with respect to the law practice of the Lawyer, the Attorney Surrogate shall file with the court a final report and an accounting of all funds and property coming into the custody of the Attorney Surrogate. The Attorney Surrogate may also file with the court a petition for reasonable fees and expenses in compensation for performance of the Attorney Surrogate's duties. Notice of the filing of the final report and accounting and a copy of any petition for fees and expenses shall be served as directed by the court. Upon approval of the final report and accounting, the court shall enter a final order to that effect and discharging the Attorney Surrogate from further duties. Where applicable, the court shall also enter an order fixing the amount of fees and expenses allowed to the Attorney Surrogate. The amount of fees and expenses allowed shall be a judgment against the Lawyer or the estate of the Lawyer. The judgment is a lien upon all assets of the Lawyer (except trust funds) retroactive to the date of filing of the verified petition for appointment under this Section. The judgment lien is subordinate to nonpossessory liens and security interests created prior to its taking effect and may be foreclosed upon in the manner prescribed by law. To the extent a senior judge is not fully compensated under this subsection, the senior judge may seek compensation pursuant to Administrative Rule 5 (B)(10).

(h) *Immunity.* Absent intentional wrongdoing, an Attorney Surrogate shall be immune from civil suit for damages for all actions and omissions as an Attorney Surrogate under this Section. This immunity shall not apply to an employment after acceptance of representation of a client with the agreement of the client under subsection (c)(3)(viii) above.

Section 28. [reserved]

V. Trust Accounts

Section 29. Trust Account Funds

(a) *Required trust account records.* An attorney who is licensed in Indiana shall maintain current financial records as provided for in this Rule and required by Rule 1.15 of the Indiana Rules of Professional Conduct. An attorney shall keep records sufficient to determine, at any time, the amount held for each client or other beneficiary in relation to the total amount held in the trust account as a pooled whole. For each trust or other fiduciary account, attorneys shall create and retain the following records for a period of five (5) years after the conclusion of each matter:

(1) Deposit and disbursement journals containing a record of deposits to and withdrawals from each trust account, specifically identifying the date, source of funds, description, amount, and client or beneficiary of each item deposited; the date, payee, purpose, amount, and client or beneficiary of each item disbursed; and a running total of the balance of the trust account as a pooled whole (an example of a deposit and disbursement journal is appended to this Section as Exhibit A);

(2) Ledgers for all trust accounts showing, for each separate trust client or beneficiary, the amount of funds disbursed or deposited, the date of disbursement or deposit, the source of funds deposited, the payee of funds disbursed, and a running total of the amounts held in trust for each separate client or beneficiary (examples of client ledgers are appended to this Section as Exhibit B);

NEW YORK STATE BAR ASSOCIATION

NYSBA Planning Ahead Guide

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

Law Practice Management Committee
Subcommittee on Law Practice Continuity

Second Edition

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ISBN: 1-57969-475-6
Product Number: 41700E

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Introduction

by Sarah Diane McShea

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

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

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

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

We would remiss if we did not thank the leadership of the NYSBA for encouraging and consistently supporting the work of the Committee on Law Practice Continuity and the Law Practice Management Committee over the past twelve years. The original members of the Committee on Law Practice Continuity, which was responsible for the original *Planning Ahead Guide* and many continuing legal education programs around the State, included David R. Pfalzgraf (Committee Chair); James M. Altman (the original thinker behind the project), Francis X. Carroll (who has helped many lawyers in New York cope with personal and professional disasters), Anthony E. Davis, James F. Dwyer, Jeffrey M. Fetter, Susan F. Gibralter, S. Jeanne Hall (one of the chief authors of the original *Guide* and a leading light in the profession), Paul M. Hassett, Douglas C. Johnston, Kim

Steven Juhase, Anne B. Keenan (to whom the original Guide was dedicated), Steven C. Krane, Anne Maltz, Sarah Diane McShea, Mark S. Ochs, Robert L. Ostertag, Timothy J. O'Sullivan, Anthony R. Palermo, Michael Philip, Jr., the Honorable Eugene F. Pigott (then a justice of the Appellate Division, Fourth Department, and a consistent source of wisdom and practical guidance), Barbara F. Smith (one of the best draftsmen and most thoughtful Committee members participating in the project) and Leroy Wilson, Jr. Special thanks and gratitude must go to former NYSBA staff member Terry Brooks, whose fortitude and dedication insured the publication and excellence of the original *Planning Ahead Guide*.

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

Sarah D. McShea

Chair, Subcommittee on Law Practice Continuity

The Planning Ahead Guide

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

Revised and updated by the
New York State Bar Association
Law Practice Management Committee
Subcommittee on Law Practice Continuity

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

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

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

Following this introduction and overview are materials and model forms to assist you in this process. The *Guide* will help you to properly protect your clients and your practice if you personally are unable to act. To assist you in designing your Advance Exit Plan, this introduction refers by name to the forms and documents that are included in the attached Appendices. Appendices 1 to 2G in this *Guide*, for example, provide you with some frequently asked questions (FAQs) and checklists which raise issues that should be considered in making plans to protect clients' interests in the case of the sudden unavailability of a sole practitioner to manage his or her practice, or in closing one's own office or that of another attorney, or in temporarily assuming responsibility for another attorney's practice.

Note: *The Planning Ahead Guide* refers to three categories of lawyers: (1) the lawyer whose disability, incapacity, retirement or death is the occasion for actions, is referred to as the "Planning Attorney," the "Terminating Attorney," the "Affected Attorney," the "Absent Attorney," or "Principal"; (2) the lawyer called upon to respond to the disability, incapacity, retirement or death of another lawyer, is referred to variously as the "Caretaker Attorney," the "Assisting Attorney," the "Responsible Attorney," the "Closing Attorney," or "Agent" (as appropriate); and (3) the "Acquiring Attorney" refers to the lawyer who buys a law practice under the circumstances described in this *Guide*.

Establish an Advance Exit Plan

STEP 1: Designate an Assisting Attorney to manage or close your practice in the event of your disability, incapacity, retirement or death. This may be accomplished by a limited power of attorney, a comprehensive agreement with detailed powers, or a short form authorization and consent form to close or manage a law practice. Samples of such forms are set forth in Appendices 3, 4, and 5. If you are a professional corporation, resolutions may be necessary authorizing you, as sole shareholder and director, to appoint another attorney to manage or close your practice (See Appendix 6).

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

- General information and guidance to minimize uncertainty, confusion and possible oversights;
- Authorizations to release medical information (required by the Health Insurance Portability and Accountability Act) that may be needed to determine your incapacity (see HIPAA release form at Appendix 23);
- Specific and detailed information and authorizations needed to close your law practice;
- Steps to be taken to assure that your written instructions are updated and reviewed periodically for completeness and accuracy.

See "Checklist for Lawyers Planning to Protect Clients' Interests in the Event of the Lawyer's Death, Disability, Impairment or Incapacity" and "Checklist for Closing Your Own Office," set forth as Appendices 2A-2G. See also Appendix 8, a form that lists your Law Office contacts, which should be kept up to date and given to your family, staff, and/or Assisting Attorney.

STEP 3: Discuss your Advance Exit Plan with the appropriate persons (*e.g.*, your family, designated Assisting Attorney, nominated executor, and key office staff) to avoid confusion or delay in the event of your disability, incapacity, retirement or death. For example, your executor should be aware of your wishes with respect to your practice in the event of death, including any instructions you may have given to an Assisting Attorney. Not only will this protect your practice, it will also save considerable time and expense that may be incurred in the administration of your estate. Appendices 8 and 9 provide you with a checklist for your executor, and a sample provision that can be used in your will giving instructions to your executor regarding your law practice.

STEP 4: Your Advance Exit Plan should describe arrangements you enter into with your designated Assisting Attorney (see Appendices 3, 4, and 5, which are sample forms that could be used to accomplish this objective). They should cover the following:

- Authorization to obtain medical information to assist the Assisting Attorney (or other designated person, *e.g.*, family member) in determining your incapacity to continue in practice (see HIPAA release form at Appendix 23);
- Authorization to provide all relevant people with notice of closure of your law practice;
- Authorization to your Assisting Attorney to contact your clients for instructions on transferring their files;
- Authorization to obtain extensions of time in litigation matters, where needed.

Your Advance Exit Plan might also include sample letters notifying clients of your inability to continue in practice, and arranging for transfer or return of files. See "Letter Advising That Lawyer Is Unable to Continue in Practice" (Appendix 7B) and "Authorization for Transfer of Client File," "Request for File," and "Acknowledgment of Receipt for File" (Appendices 7D, 7E, and 7F).

At Appendix 17, you will find a helpful list of questions and answers on the subject of file retention and preservation, providing you with guidance on file disposition. If you are retiring, you should prepare a letter to your clients advising them of your retirement, the need to obtain new counsel, and a procedure for transfer of their files. See "Letter from Planning Attorney Advising that Lawyer Is Closing Office" (Appendix 7A). If there are other attorneys in your firm who would be available to represent the clients in the event of your own inability to practice, your Advance Exit Plan should include a letter from your colleague(s) to your clients advising them of your disability and their availability to continue handling their matter (see Appendix 7B).

Your Advance Exit Plan also should include instructions as to:

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

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

- Wind down your business financial affairs;
- Provide your clients with a final accounting and statement of work done by you/your office;
- Collect fees on your behalf;
- Liquidate or sell your practice. (See Appendices 3, 4, and 5 for sample language authorizing the foregoing):

- Act on behalf of your PC or your PLLC in the event of your death or disability. (See Appendix 6 for sample "Waiver of Notice of Special Joint Meeting of the Sole Shareholder and Sole Director of Corp." and "Minutes of the Special Joint Meeting of the Sole Shareholder and Sole Director of Corp.")

Compensation to Your Assisting Attorney and Staff

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

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

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

Conflicts of Interest and Confidentiality

Although the designation of an Assisting Attorney to assume responsibility for client files raises issues of client confidentiality, it is reasonable to read the Rules of Professional Conduct as authorizing such access and disclosure under these circumstances. (RPC 1.6, RPC 1.17, RPC 1.18). Remember that if an Assisting Attorney discovers evidence of legal malpractice or ethical violations, he or she may have an ethical obligation to take appropriate action. (See "What If? Answers to Frequently Asked Questions" set forth in Appendix 1).

Your Assisting Attorney also must be aware of conflict of interest issues and do a conflicts check if he or she is either providing legal services to your clients or reviewing confidential file information to assist with referral of your clients' files. Your Assisting Attorney should be prepared to delegate to another attorney those files with which he or she has a conflict of interest, while being careful to protect materials and information that may be subject to attorney-client privilege or duty of confidentiality (See Appendix 1).

Trust Accounts

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

ents and you in a difficult position if you are unable to conduct your practice. On the other hand, allowing access to your trust account is a serious matter. If you give access to your trust account to another attorney and that lawyer misappropriates money, then your clients will suffer, and you may be held responsible. There is no simple answer to this dilemma and other important decisions which you must make regarding your trust account (See Appendix 1).

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

Another option is to give your Assisting Attorney access to your trust account in an agreement or consent and authorization form. (See Appendices 3, 4, and 5). Again, the power may be conditioned upon the occurrence of a specified event. However, unlike a power of attorney, which ceases upon death, the agreement can authorize your Assisting Attorney to operate your trust account upon and after your death. In such case, this power may be used by your Assisting Attorney in winding up your practice.

Whichever method you choose, remember to check with the bank that holds your trust account to ensure that your power of attorney or agreement is acceptable to it and to sign additional documents that may be required. New York Rules of Professional Conduct have detailed procedures which should be reviewed carefully by you and your Assisting Attorney to ensure that the appropriate steps are taken to safeguard all trust funds and to have the funds delivered to the appropriate parties on a timely basis. (See RPC 1.16(e), RPC 1.15 and NYSBA publication *Attorney Escrow Accounts, Rules, Regulation and Related Topics, 4th Ed.*).

Include Family and Staff

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

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

Guidance to your staff should include directions as to:

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

In effect, you must create a system for the orderly winding up of your law practice and the settlement of your own estate. See "Checklist for the Fiduciary of a Solo Practitioner" (Appendix 2F); "Law Firm Master List of Contacts and Important Information" (Appendix 8); and "Special Provisions for Attorney's Will Regarding My Law Practice" (Appendix 9).

Other Steps

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

- Making sure that your office procedures manual explains how to produce a list of client names and addresses for open files;
- Keeping a calendaring system with all deadlines and follow-up dates;
- Thoroughly documenting client files;
- Keeping your time and billing records up to date;
- Familiarizing your Assisting Attorney with your office systems;
- Reviewing and updating on a regular basis your written agreement with your Assisting Attorney;
- Periodically purging old and closed files (see Appendix 17);
- Periodically communicating with clients for whom wills or other original documents are held by your firm to confirm that addresses are up to date and what documents are still relevant.

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

Special Considerations in the Event of Death

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

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

If you have not designated an Assisting Attorney in advance of your death, your executor may appoint an attorney to manage and close (or assist in selling) your practice. You may want to include language in your will that provides guidelines to your executor and any attorneys that your executor may retain regarding the management or closing of your practice. For example, you may want to name specific attorneys to take over certain of your files and enumerate powers to close your practice similar to those set forth in an Advance Exit Plan. If your nominated executor is not an attorney, it is important that he or she avoid inappropriate access to client files and information and rely instead on an attorney or office staff to attend to these matters. (See "Special Provisions for Attorney's Will" (Appendix 9) and "Checklist for the Fiduciary of a Solo Practitioner" (Appendix 2F)).

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

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

Sale of a Law Practice

Your practice also may be an asset that can be sold to benefit you and/or your family or estate if you are no longer able to practice. Taking the appropriate steps as outlined above will not only protect your clients, but also may be necessary to preserve the value of your practice so that it may be transferred to another attorney or firm. Included in these materials are guidelines for the transfer of a practice (including an overview of RPC 1.17), detailed suggestions for structuring such a sale, and a sample agreement and forms that would be relevant if your practice is sold. (See "Transfer of a Law Practice" (Appendix 10); "Valuing a Law Practice" (Appendix 11); "Sample Asset Purchase Agreement" (Appendix 12); and "Confidentiality and Non-Disclosure Agreement" (Appendix 13)). The Confidentiality Agreement would be signed before a prospective seller provides the prospective buyer with confidential client information and other confidential information about the seller's practice, such as financial information.

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

The Assisting Attorney designated to manage or close another attorney's office will face myriad responsibilities, some of which will require immediate action. Where a detailed plan is in place (as described in these

guidelines), the job of the Assisting Attorney will be easier. If no such plan is in place, the "Checklist for Closing Another Attorney's Office" (Appendix 2C) and the checklists for concerns when assuming responsibilities of another attorney's practice (Appendices 2D and 2E), and the sample letters and forms regarding notification to clients and transfer of files (Appendices 7A to 7F) will be helpful to you. The checklists at Appendices 2A and 2B also may be useful for the Planning Attorney to review prior to designing his or her own Advance Exit Plan and to ensure that the issues raised in those checklists are dealt with in the plan the attorney develops.

Other Considerations

You will find in the *Guide* suggestions relating to file destruction or retention (Appendix 17). The *Guide* also provides information on how to provide for practice continuity issues when the law practice of a partner or associate becomes interrupted because of issues related to his or her alcoholism, drug addiction or other impairment. A firm must be aware of the principal employment and disability laws involved, as well as the resources available to members of the firm in their efforts to assist their colleague (Appendices 14, 15, and 16).

Should a law office suffer a complete failure due to unforeseen disaster, a suggested checklist and plan is included to help in planning for orderly transition and resumption of practice (Appendix 2G).

The *Guide* sets forth the relevant statutes, rules of professional conduct, and ethics opinions relevant to advanced planning issues (Appendices 18, 19, 20, and 21).

Finally, the *Guide* reproduces an article (also included in the original *Planning Ahead Guide*) by David Kee, a Maine attorney, listing the "do's" and "don'ts" of retirement (Appendix 22).

Start Now

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

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

The State Bar of California

Guidelines for Closing or Selling a Law Practice

Closing a Law Practice

These guidelines were written because there is a need for them. Many anecdotal stories have been written by surviving spouses and others describing how no one was prepared to close the office and there was nowhere to get help.

Hopefully this checklist will help the lawyer who is voluntarily retiring or who has the time to do many of the things on the list in advance. The checklist may also be of help to those who are called upon to close down a law practice of another where there was no preparation for closing.

When it is Necessary to Close a Law Practice

A law practice may have to be closed permanently or temporarily, completely or partially when a lawyer:

- dies.
- is physically or mentally unable to practice law.
- wants to retire.
- is disbarred.
- is suspended.
- is elected or appointed to public office.
- accepts an employment opportunity, which requires leaving practice
- is drafted or activated into military service.
- is leaving the state.
- is merging practice with another firm and withdraws from certain types of cases (plaintiff lawyer is joining defense firm for example).
- is selling part or all of the practice.
- walks out the door due to "burn out."
- suffers temporary or permanent problems with drugs or alcohol addiction (stress, drugs, alcohol, or money problems).

There may be hundreds or thousands of necessary communications to and from clients, opposing counsel and courts. Staff has to be retained or terminated. Occupancy of the office premises must be dealt with. Record and file disposition must be accomplished.
Final tax returns must be prepared and filed and taxes paid.

A. Who is going to do the work?

1. The lawyer, if alive, competent and available.
2. The executor of the lawyer's estate.
3. The conservator or guardian of the lawyer.
4. Another lawyer or firm with whom prior arrangements have been made.
5. The lawyer's surviving spouse, if licensed.
6. Other attorneys, as appointed through the superior court under the auspices of Business & Professions Code sections 6180 and 6190, which lists procedures for the assumption over a law practice.
7. The purchaser of the practice.

B. Why is closing down a law practice any different than closing down any other business?

The major differences are the ethical considerations superimposed on the task that can make the tasks difficult.

Most of the ethical conditions are designed to either protect the confidentiality of client information and/or to prevent other lawyers from offering to help the clients because of solicitation concerns. (See Rules of Professional Conduct, rule 1-400 - Advertising and Solicitation; rule 2-300 – Sale or Purchase of a Law Practice of a Member, Living or Deceased; rule 3-310 – Avoiding the Representation of Adverse Interests; 4-100 Preserving Identity of Funds and Property of a Client; and Business & Professions Code section 6068(e) – confidentiality.

C. Procedurally, what has to be done?

If an attorney dies or is disabled resulting in either the cessation of the law practice or the incapacity to attend to the law practice, Business & Professions Code section 6180 (cessation) or 6190 (incapacity) can come into play if there are unfinished client matters for which no other active member of the State Bar has (with the consent of the client) agreed to assume responsibility.

These two sections authorize the assumption by the superior court of jurisdiction over the law practice and allow for the appointment of attorneys to act under its direction with broad powers granted in order to wind down the practice.

D. Specifically, what has to be done?

8. Get a set of keys to the premises and to interior locked file cabinet and offices. If there is a safe, try to locate the combination.

   Make sure to check for "satellite" offices. Ask the landlord for help. Ask the most recent employee for help. Change the locks and combinations to protect the office files and assets.

9. Contact the current or most recent staff to arrange for their employment, (if available) on a full, part time or temporary basis, to help in the closing down process.
10. Open all mail as it arrives to look for information on pending client matters, bills that have to be paid, tax returns that have to be filed, income that may come in, etc.
11. Arrange with the landlord or other entity for both a cancellation of the old lease or tenancy arrangement and the creation of a new arrangement.
12. If there is a known CPA or bookkeeper or file system, try to locate all existing insurance policies, including malpractice, workers compensation, medical, life, general liability, etc.
13. Arrange with the insurance agents or companies involved for a termination of the policies or the issuance of new policies to protect the person(s) or entities closing down the practice.
14. Determine if a "tail" malpractice policy can be obtained to protect the lawyer's estate.
15. Look for checkbooks, canceled checks, bank statements and incoming mail for information on existence of checking accounts, savings accounts and safe deposit boxes. Notify banks. Determine if old accounts must be closed and new accounts opened.
16. Determine which "final" and new tax returns must be filed. Consider federal, state and local payroll, occupancy and sales taxes. Identify federal and state Employer Identification Numbers.
17. Ask local court clerks to run a computer search to determine if attorney is attorney of record on any open matters.
18. Examine all incoming mail to determine open client matters. Be especially alert for documents indicating the possible existence of a successor attorney.
19. Determine if attorney had an arrangement with another attorney (sometimes called a successor attorney) who previously agreed to assume practice of deceased or disabled attorney.
20. Check with surviving spouse or office staff if attorney had a close friend who might have agreed to be a successor attorney.
21. Ask local bar association(s) to send e-mail alerts to members and place a public notice in bar publications announcing death or disability of attorney. The notices should ask for information as to any assuming attorney or attorneys with client matters with the deceased or disabled attorney.
22. Take possession and protect all computers. Get technical assistance if necessary to make a back-up disk or tape in the event something happens to the computer(s).
23. Check to see if there are back up tapes or discs and where they would be located. Take possession of them.
24. Look for desk calendars, computer calendars and secretarial calendars to seek information on cases in process and due dates.
25. There may be lists of clients divided into active files and closed files. These people will have to be notified.
26. Closed files may be kept in more than one location. Closed files may be stored in public warehouses, the attorney's garage or basement, or in the attorney's home or

even with a client. All staff and family members should be quizzed to determine if they know of out of office locations.

27. Closed files must be examined before destruction or returned to clients. The examination of closed files (and open files) raises questions of attorney-client confidence and possible violation of confidence.

    In some states only an attorney or someone working under the direct supervision and control of an attorney can look into the file.

    In other states a non-attorney spouse or relative or personal representative of the attorney's estate may be able to examine the files.

    In some states the attorney for the executor or personal representative can cause the files to be examined. The rules concerning confidentiality vary from state to state.

28. Anything in the closed file that is the property of the client should be returned to the client. Any original document should be removed from the file for return to the client.

    Typical items found in files include wills, stock certificates, original signed contracts, promissory notes, deeds, mortgages and other items returned to the attorney's office from a county recorder or governmental filing office.

29. Determine if there is a provision concerning destruction of files in the fee agreement or on closing the file or at any time in the file.

30. Determine if the attorney had a file retention - destruction policy that had been communicated to the clients. There may be special rules for the files of minors. If there are no clear published rules ask for guidance from both the malpractice carrier and the State Bar.

31. The safest way to destroy closed files is simply to shred them or get them shredded. Unfortunately this can be an expensive process. Often lawyers just dump closed files into the trash. This is a risky procedure as many people before destruction handle the trash and the file contents may be of interest to one or more of these people.

32. Depending on the price of paper, some paper recyclers will buy old files by weight. Paper used in law firms has high scrap value. The buyer will both buy the files and haul them away. The files get torn apart as they move down a conveyer belt. The paper is then sorted by type of paper and processed. Take precautions to make sure no client confidences would be violated.

33. Files of unlocated clients pose a special problem. If the applicable statutes of limitations have run and no one has responded to notices, the files probably can be destroyed. Determine if the deceased lawyer's jurisdiction has a place to send unclaimed files.

34. In most jurisdictions, the superior court will have a system for deposit of nonreturnable client wills.

35. Law books may have little or no value unless they are a complete up to date set, and are simply a disposal problem. The law school from which the deceased graduated may accept law books as donations from their alumni.

    Other suggestions:

    - Check with your local law librarian.
    - Contact your local bar association.

- Your public library's "Friends of the Library" may accept them as a donation to its
- Annual book sale.
- Ask your local used bookstore.
- A company that rents stage props may be interested.
- Do a Web search for used law book dealers.
- Use an online auction to sell them.

36. With rare exceptions, used law office equipment has relatively little value. You might consider offering the equipment to the staff and give the balance to a charity that will haul it away.
37. Determine who can sign checks on the attorney's client trust account(s). Inform the bank that the account should be frozen. Determine if a non-lawyer can audit the account. Give a sense of urgency to determine which clients are entitled to the money and make distribution to the clients as rapidly as possible. If the superior court has assumed jurisdiction over the practice, get approval through the court for disbursements.
38. For closed offices, notify post office, building management and some nearby offices. Post office forwarding will prevent mail from being delivered and left at an empty office. Request building management and nearby office to collect mail, express deliveries and anything else that might be important.
39. In smaller communities and where appropriate, post a notice on the door for clients who may drop by to seek their file or status of their matter. In the notice inform the client of when and where and with whom contact should be made. Do not do this if you feel the notice would serve as an invitation for a burglar or disappointed client to return and steal or vandalize the office.
40. You might consider placing appropriate notifications on the attorney's Web site.
41. If you can obtain passwords, clear all voice mails that may contain client or other important communications. If passwords are not available disconnect all voice mails for which there is no password and consider using a simple answering machine instead.
42. Arrange for automatic forwarding of all e-mails to a mailbox of the responsible person. It is also possible to reject or answer all e-mails with a notice instructing the sender whom to contact.
43. If a database of client e-mails is monitored, consider notifying clients and others by e-mail notifications. Bad e-mail addresses can be quickly spotted. It may be possible to program e-mails to be notified when the e-mail has been read.
44. Immediately upon making arrangements for a successor lawyer or firm notify all courts, agencies, opposing counsel, etc., of the change in representation by appropriate substitution or other documents. Some court or agencies might require a motion to make the change.
45. If arrangements for a successor lawyer or firm have not been made, it may be necessary to file an appropriate document or letter to the court to prevent a default proceeding or to otherwise protect the client.

46. Non-client records such as: books of account, bank statements, paid bills, etc. can usually be trashed after the necessary time for income tax or malpractice or other laws.

47. Retiring lawyers or successors in interest may not want to devote the time or money to reviewing old client and office files with the attendant expenses of contacting clients.

    Many lawyers just dump the files into boxes with the file names on the outside of the box. The boxes containing the files are then stored in a garage or basement with the hope that the files will never be requested.

    This system seems to work although it would still seem necessary to remove original client documents from files before doing so.

48. Delivering an active file to a client or attorney may be necessary to protect the client's interests. Some consideration must be given to photocopying what is given for malpractice protection. Active files delivered directly to clients must be carefully examined before delivery. Misfiled paper relative to other clients must be recovered. A receipt for the file must be obtained.

49. Examine incoming mail to determine what subscriptions must be canceled. Newsletters, magazines, lawyer listings, legal supplements, yellow pages, web and Internet services, etc. must be canceled.

50. Credit card and check authorizations periodic charges. Many publications and memberships continue unless canceled. Monthly or other periodic charges might automatically be made to a credit card or by charges to a bank account. These must be canceled.

51. Make appropriate notifications to bar associations, professional associations and other organizations. In addition to ending dues billing, the organization may wish to notify others of the death of the member.

Selling A Law Practice - in Whole or in Part

These guidelines are just that - guidelines. Every practice situation is different. The urgency or lack of urgency in buying or selling may affect the price. You must also consider the ethical ramifications such as the previously listed Rules of Professional Conduct and Business & Professions Code sections. Hopefully, the lawyer will have begun the process of selling the practice to another lawyer or law firm as part of a retirement plan while there is time for give and take negotiation with a potential buyer.

There are many different techniques used by professionals. An appraiser hired by a seller may consciously or unconsciously use a method designed to set a high price.

Conversely, an appraiser hired by the buyer may try for as low a price as possible. Many of the methods used are intended for large firms, for mergers, or for a divorce court or estate taxes rather than the real world of a lawyer or firm buying or selling a practice.

Since few, if any lawyers regularly buy or sell practices, the lawyer rarely has any expertise or experience in setting the price or terms for his or her own practice. A lawyer buying or selling a law practice is well advised to get help.

It may be helpful to examine Internet listings and descriptions of practices for sale. A visit to http://www.SeniorLawyers.org may be helpful.

A Multiple of Fee Income. This is relatively simple and reflects what is really happening in the world, but there are other methods used by professional appraisers that are not described in this checklist.

1. Average the fee income over the previous five years by category of fees. A five-year average will hopefully balance out the highs and lows. It is necessary to classify the type of fees. Fee income from trusts and a safety deposit crammed full of original wills may be much more valuable than fee income from criminal law cases which depended on the selling attorney who personally had the skill and reputation that caused the phone to ring.
2. Examine the sources of the clients. Do the clients come from referrals to a specific lawyer? Do the clients come due to the firm, the firm's expertise or the expertise of a specific lawyer in a particular area of law? Do the clients come from institutions that are likely to continue referring clients when the selling lawyer closes or retires? Do they come from yellow pages or the Internet?
3. Examine the areas of law that are the sources of the fees. Are they in growth areas such as mediation, arbitration and elder law as opposed to medical malpractice or other areas that could likely be capped by legislatures?
4. Determine if the selling attorney can remain during a time period of from 6 months to 1 year or more.
5. Determine if the support staff with knowledge of the clients and matters will remain.
6. Look at the net income after expenses. Typically, net income after expenses will run 40 to 50 percent of the income. If the income percentage is lower, the practice may possibly not support higher fees and may depend on high volume and turnover. If the percentage is higher, it is possible that the lawyer is working long, hard hours without adequate support, staff or equipment.
7. Start with a figure of six times the average monthly gross fees. Increase the multiple or decrease the multiple, keeping in mind all of the various factors. A corporate or business or probate practice with the departing lawyer staying on for three to six months to meet and introduce clients may be worth 12 - 15 times the monthly average. The criminal law practice of a deceased lawyer may only be worth as little as one or two months the average income, or may have to be given away to avoid ongoing expenses.
8. Determine if the seller is willing to guarantee an amount of fee income from existing and previous clients and referrals.
9. Determine an appropriate adjustment to price and terms if it should be made six months later, twelve months later or at any time based on going over or under the guarantee income figure.
10. Return on investment, or capitalizing net profit is another method used.
11. "Hard" assets including books, computers, computer systems, telephone systems and office furniture may have little or no value beyond their book value. Liabilities on rentals or contract payments must be taken into account. This amount is in addition to the multiple amounts.
12. "Soft" assets including cases in process with partially earned or contingent fees must also be valued. This amount is also in addition to the multiple amounts.

13. Contingent fees based on results. It will probably be impossible to ethically divide actual fees between a successor lawyer and an executor or spouse or non-lawyer. This is a major incentive for a lawyer to sell before death or disability. Sometimes a system of dividing fees on earnings can be effectuated.

Get Help. This checklist will help you get started. Get help from a lawyer and appraiser. You can't be objective enough alone.

There are several Web sites that can assist you in finding the help you need. One such site is www.SeniorLawyers.org.

Every practice and situation will be unique to the facts of the situation. There are hundreds of possible factors that could affect a price of a practice. There will be many expert appraisers, accountants, lawyers and others who will find fault with what is set forth here and who will feel they have a better system, or method, or formula.

Other Contract Terms to be Considered

The previous 13 points deal primarily with determining price. The following points are some of the terms that should be covered in the agreement between the parties.

14. List of "client accounts" to be used for determining price and price adjustment.
15. Warranty that every "client account" has a written fee agreement in the file.
16. List of assets being transferred.
17. List of assets NOT being transferred.
18. Obligations being assumed.
19. Obligations not being assumed
20. Lease status. Assumability or assignability
21. Status and treatment of deposits and prepaid expenses.
22. Basic purchase price before adjustments.
23. Definitions of "income" to be used in determining adjustments.
24. Adjustments based on actual income from client accounts at specific points in time.
25. Payment of purchase price. Down payment, monthly payments, adjustments to payments, retention or hold back if any.
26. Covenant(s) not to compete as permitted by law and agreed to by buyer and seller.
27. Guarantees by third parties.
28. Income not included as transfer (sublets investments, etc.).
29. Accounts receivable. Allocation between buyer and seller, and collection and pay over from collections. Charge backs of uncollectible accounts.
30. Work in process. Determine what amounts go to the buyer and seller.
31. Notices to clients. Agreed upon wording.
32. Responsibility for closed files and destruction of closed files.

33. Transition assistance. Compensation rates for specific assistance.
34. Status of errors and omissions, insurances and claims, and possible claims.
35. Identify employees who may not be selected. Penalty for hiring employees.
36. Manner of use of name(s) of attorney names.
37. Dispute resolution. Which items are to be resolved by mediation, arbitration, or litigation?
38. Specify which person or institution is to mediate or arbitrate disputes.
39. Consent of spouses where appropriate.
40. Review of terms by ethics attorney(s).

As indicated, these are just some of the possible terms to be included in an agreement of purchase and sale of a practice --- which should be expanded or contracted as appropriate to the practice and attorneys involved.

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ABA Study Committee on Solo and Small Firm Practice. Comment to Ethics 2000 proposals

RATIONALE FOR AMENDING PROPOSED ETHICAL RULE

Simply stated, the existing and proposed Rule 1.17 discriminate against solo and small firm practitioners. In either a large or medium sized law firm where more than one attorney is involved in a practice area, an attorney can be bought out (meaning the sale of all or only a portion of a practice and clients to the other partners, using a buy-sell agreement) while still remaining in the practice of law and either : 1) concentrating on other areas of law, 2) limiting the areas of practice or, 3) "slowing down" and becoming "of counsel". A solo or small firm where the partners are in different areas of practice do not have that ability under either the existing or proposed Rule.

Under both the existing and proposed Rules, a solo or small practitioner must sell his or her ENTIRE practice and CEASE the private practice of law. The proposed changes "level the playing field", and do so in a manner which is more protective of clients than what is either currently in effect or proposed. The Committee agrees that clients and matters should not be "cherry picked" by a proposed purchaser for the lucrative matters. The Committee's proposed amendments provide that to avoid "cherrypicking of clients or lucrative matters, the selling attorney may only sell, and the purchasing attorney may only purchase, an ENTIRE practice area, which would, by definition, would include all matters presently handled by that attorney in that practice area. The selling attorney must also cease private practice IN THAT PRACTICE AREA, either as counsel or co-counsel, and may not receive any referral fees for any existing or new matters in that area of practice sold after the sale. This method protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel. The selling attorney has an obligation to exercise competence in identifying a purchasing attorney qualified to assume the practice and the purchasing attorney has an obligation to undertake the representation competently. Both requirements are for the client's protection. Of course, a client may still elect to seek alternate counsel and not have his file transferred. Also included in this client protection provision is that the selling and purchasing attorneys duties are satisfied if the purchasing attorney has a conflict of interest in representing a client being transferred to the purchasing attorney.

Many sources contain lists of "areas of practice". Those sources include the American Bar Association, the Supreme Court of many of the states, the State Bar Associations and many others. By the rule, a state may adopt one or some combination of these sources or, in the alternative may elect to prepare its own list. This provision was included at the request of ABA Sections and others who stated they want a concrete "list of practice areas". In response to that request, Section e was added by the Committee.

This method of permitting the sale of a practice area is also more favorable to the existing or proposed rule in that it permits an attorney who wishes to "slow down" but not "stop" the practice of law to do so. Some examples are: an attorney may sell an entire practice area, such as litigation but remain in the practice of law as an arbitrator or mediator; or sell the family law portion of their practice and continue practicing bankruptcy or, sell the estate planning portion of their practice but remain probating estates. In large firms, where there are often

multiple attorneys in the same areas of practice, this can be accomplished by executing a "Buy-Sell Agreement" with the selling attorney and simply have that attorney's client base become part of the firm. This may not be accomplished in as easy a form in a small firm where each person practices in a different area of law or for the solo practitioner who wishes to "slow down" and reduce the types of matters handled. One might argue that the solo can either a) sell the entire firm to a single practitioner; or b) sell the entire practice to several practitioners in different practice areas. Neither option has merit. Solution a) may create problems since the single purchasing practitioner may not be proficient in every area of law practiced by the selling attorney. Solution b) is also a concern since an attorney should not be forced to cease the entire practice of law simply because the attorney wishes to reduce the areas of practice yet wants to remain a practicing attorney yet while still meeting his obligations by winding down his practice in a way that helps to make certain that the matters being transferred are handled by an attorney with competency in that area. Moreover, the Committee's proposal permits an attorney to slow down at his or her own speed rather than force him or her to remain working at a quick pace and allow some catastrophic event to occur to the attorney, and then try to find someone to "pick up the pieces".

The Committee's rationale is also set forth in several of its comments. See, for example, Committee Comments 2 and 5. These comments state the rationale for passage of the amendment. Professor Pierce, one of the reporters to Ethics 2000, wrote a memorandum dated December 21, 2000 where he removed the advocacy portions of the Committee's recommendations in the comments but left the thrust of the Committee's statements. Professor Pierce also states that he supports the Committee's proposal, although he also states that the other reporter, Professor Moore is opposed. The Committee is not "wedded" to particular language but rather concepts and therefore endorses the work of Professor Pierce; and quite appreciative of his work in this regard.

The Committee is appreciative of the time and consideration shown it by Ethics 2000 and is looking forward to dialogue and a resolution of these matters to the satisfaction of both groups.

Respectfully submitted,

James L. Schwartz
One of the Committee Members

APPENDIX 3

AGREEMENT TO CLOSE LAW PRACTICE IN THE FUTURE[1]

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

RECITALS

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

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

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

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

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

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

2. **Determination of Death, Disability, Incapacity.** Closing Attorney shall make the determination that Planning Attorney is dead, disabled, incapacitated or otherwise unable to practice law, and if disabled or incapacitated that such disability or incapacity is permanent in nature or likely to continue indefinitely. Closing Attorney shall base his determination on communications with the members of Planning Attorney's family, if available, and at least one written opinion of a licensed physician or other medical professional who either diagnosed, treated or was responsible for the medical care of Planning Attorney. As part of the process of determining whether Planning Attorney is disabled, incapacitated, or otherwise unable to continue the practice of law, all individually identifiable health information and medical records may be released to Closing Attorney, even though the authority of the Closing Attorney has not

1 To ensure compliance with HIPAA, the Planning Attorney, upon execution of the Agreement to Close Law Practice, should also sign two written authorizations, one to the health care provider, and the second with the provider line blank, identifying the Closing Attorney and authorizing the disclosure of information relating to the Planning Attorney's capacity to practice law upon request by Closing Attorney. See HIPAA release form at Appendix 23.

yet become effective. This release and authorization applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended 42 U.S.C. § 201 and 45 C.F.R. § 160. In reaching the reasonable determination that Planning Attorney is unable to practice law by reason of his death, disability, incapacity or other inability to act, Closing Attorney may also consider the opinions of colleagues, employees, friends or other individuals with whom Planning Attorney maintained a continuous and close relationship. In the event of Planning Attorney's death, Closing Attorney's authority to act under this agreement shall be confirmed in writing by the representative of Planning Attorney's estate. Closing Attorney shall sign an affidavit stating the facts upon which his determination is based, and such affidavit shall, for the purposes of this agreement, be conclusive proof that Planning Attorney is disabled, incapacitated, or otherwise unable to continue the practice of law.

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

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

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

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

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

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

   e. **Access to and Inventory/Examination of Files.** To enter any storage location where Planning Attorney maintained his files and to inventory and examine all client case files, including client wills, property and other records of Planning Attorney. If Closing Attorney identifies a conflict of interest with a specific file or client, he shall assign the file to the Successor Closing Attorney in accordance with paragraph 8(b). Any confidential information learned by the Closing Attorney must not be revealed by him and consideration must be given as to whether the Closing Attorney may continue to represent his own client.

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

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

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

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

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

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

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

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

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

o. **Personnel.** To continue the employment of Planning Attorney's employees and other personnel to the extent necessary to assist Closing Attorney in the performance of his duties, to compensate and to terminate such employees or other personnel, to employ new employees or other person-

nel if their employment is reasonably necessary to Closing Attorney's performance of his duties hereunder, to employ or dismiss agents, accountants, attorneys or others and to reasonably compensate them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. After the effective date of this Agreement, Planning Attorney may at any time remove or replace Closing Attorney or Successor Closing Attorney, or revoke, amend or alter this Agreement by written instrument delivered to Closing Attorney and Successor Closing Attorney, and such removal, replacement or revocation, as the case may be, shall be effective within three (3) days of the transmission of such written instrument to Closing Attorney and Successor Closing Attorney; provided, however, that any amendment modifying Closing Attorney's obligations hereunder or his compensation hereunder shall require Closing Attorney's prior written consent to be made effective.

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

11. **Miscellaneous.**

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

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

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

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

_____ _____

Planning Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

_____ _____

Closing Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

_____ _____

Successor Closing Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

APPENDIX 5

LIMITED POWER OF ATTORNEY TO MANAGE LAW PRACTICE AT A FUTURE DATE

I, _____ (Name of Principal), an attorney licensed and in good standing to practice law in the State of New York with offices located at _____, do hereby appoint _____ (Name of Agent), an attorney licensed and in good standing to practice law in the State of New York with offices located at _____, as my Agent and attorney-in-fact to act for me in my name and on my behalf as hereinafter provided. This Limited Power of Attorney shall become and remain effective, however, only upon and during managing my incapacity by reason of my disappearance, disability, or other inability to act which renders me incapable of managing my law practice or representing my clients in a competent manner. Determination of my incapacity shall be made by me or written certification by:

(i) a physician duly licensed to practice medicine who has treated me within one (1) year preceding the date of such certification [or consider two physicians]:

or

(ii) my Agent, who shall base his findings on reliable sources, including one or more members of my immediate family, a written opinion of one or more licensed physicians who diagnosed or treated me within one (1) year preceding the date of my incapacity, or my law firm colleagues and/or my office staff with whom I maintained a close and continuous relationship during the period immediately preceding my incapacity:

or

(iii) [name and address of other person(s) and statement of conditions, if any].

As part of the process in determining whether I am incapable of managing my law practice or representing my clients in a competent manner, all individually identifiable health information and medical records may be released to my Agent even though such Agent's appointment has not yet become effective [or, if the Planning Attorney has selected a person other than the Agent to make the determination of incapacity, insert such other person's name]. This release and authorization applies to any information governed by the Health Insurance Portability and Accountability Act of 1996, as amended (HIPAA) 42 U.S.C. § 201 et seq. and 45 C.F.R. § 160-164.[2]

I hereby appoint my Agent, for the sole and limited purpose and in my name and stead, to conduct all matters and manage my property, whether real or personal, related to or associated with my law practice in any way wherein I might act if I were present and both capable and competent, to the extent I am permitted by law to act through such an agent. These powers shall include, but shall not be limited to, the following:[3]

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2 To ensure compliance with HIPAA, the Planning Attorney should also sign two (2) written authorizations, one to his health care provider, and the second with the provider line blank, identifying Agent or other party who will be making the decision that the Principal is incapable of managing his law practice. See HIPAA release form at Appendix 23.

a. **Access to my Office**. To enter my office, take possession, custody and control of all my office property, real and personal, including client files, office equipment, supplies and records, and to use such property to service my clients or manage and/or close my law practice;

b. **Designation as Signatory on Financial Accounts**. To replace me as signatory on all my law office accounts with any bank or financial institution, including without limitation attorney trust, escrow or special accounts and checking or savings accounts, and my banks or financial institutions shall rely upon this authorization unless they have received notice or have knowledge that this instrument has been revoked or is no longer in effect;

c. **Opening of Mail and/or Email**. To receive, sign for and open and review my mail and emails, and to process and respond to same as necessary;

d. **Access to and Inventory/Examination of Files**. To enter any storage location where I maintain my files (whether in my office or off site), inventory and examine all my client case files, property and records and, should he identify a conflict of interest concerning a specific client, obtain consent of such client to transfer his files to my Successor Agent named herein or to such other attorney;

e. **Notification to Clients**. To notify my clients, potential clients and those who appear to be my clients of my inability to act, and to take whatever action he may deem necessary or appropriate to protect the interests of such persons or entities, including advising them to obtain substitute counsel;

f. **Transfer of Files**. To safeguard and return my clients' files upon request or as otherwise may be appropriate, or to obtain consent from them to transfer their files to new counsel, all upon written acknowledgment of receipt and acceptance thereof;

g. **Storage of Files and Records**. To arrange for the storage of those of my closed and unclaimed files and records required to be preserved pursuant to Rule 1.15(d) of the New York Rules of Professional Conduct;

h. **Transfer of Property and Original Documents**. To transfer to my clients where appropriate, or to their designees, all their property and original documents, including wills, trusts and deeds;

i. **Access to Safe Deposit Box**. To open my safe deposit box used for my law practice, to inventory same, and arrange for the return of any property contained therein to my clients.

j. **Notification to Courts and Others**. To advise all appropriate courts, agencies, opposing and other counsel, professional membership organizations such as the New York State Bar Association and/or local bar associations, the Office of Court Administration, and other appropriate individuals, organizations or entities, of my inability to act and of my Agent's authority to act on my behalf;

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3 Please note that the powers described in this sample Power of Attorney are broad and should be tailored to the Principal's preferences.

k. **Extensions of Time**. To obtain consent from my clients for extensions of time, contact opposing counsel and courts/administrative agencies to obtain extensions of time, and apply for such extensions, if necessary, pending my clients' retention of new counsel;

l. **Litigation**. To file pleadings, motions and other documents, appear before courts, at administrative hearings, offices and agencies, and take any and all other steps necessary to protect my clients' interests until their retention of new counsel;

m. **Collection of Fees and Return of Client Funds**. To dispatch invoices for my unbilled work, collect fees and accounts receivable on my behalf, or submit to arbitration or mediation all fees, claims, or disputes relating to the collection of any accounts receivable, to prepare accountings of clients on retainer, to return client funds where appropriate, prepare an accounting of client escrow accounts and arrange for transfer of escrow funds, including obtaining consent to transfer such funds to new counsel or to my clients as appropriate;

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

o. **Personnel**. To continue to employ such of my office staff as may be necessary to assist my Agent in the performance of his duties and to compensate them therefor; or terminate such employees or other personnel, or employ such assistants, agents, accountants, attorneys or others as may be appropriate;

p. **Termination of Obligations**. To terminate or cancel my business obligations, including office and equipment leases, whether substantial or de minimis;

q. **Insurance**. To purchase, renew, maintain, cancel, make claims for or collect benefits under any fire, casualty, professional liability insurance, or other office insurance and notify as appropriate all professional liability insurance carriers of my disability, incapacity or other inability to act, and cooperate with such insurance carriers regarding matters related to my coverage, including the addition of Agent as an insured under any such policies;

r. **Taxes**. To prepare, execute and file income, information or other tax returns, reports or other forms and act on my behalf in dealing with the Internal Revenue Service, the New York State Department of Taxation and Finance, or any other federal, state and local tax departments, agencies or authorities;

s. **Disposition of Debts and Claims**. To prosecute, settle, defend, compromise, or submit to arbitration or mediation all debts, taxes, accounts, claims, or disputes involving my law practice or any person or entity;

t. **Attorney as Fiduciary**. To resign any position which I hold as a trustee or fiduciary and notify all other affected trustees or fiduciaries and beneficiaries thereof, and whenever appropriate apply to any court of competent jurisdiction for the appointment of a successor fiduciary, and account for the assets, income and disbursements attendant upon each such resigned trustee or fiduciary appointment;

u. **Power of Sale and Disposition**. To sell or otherwise arrange for the sale or other disposition of my office furniture, books or other office property; and

v. **Representation of My Clients.** To provide legal services to my clients, provided that my Agent has no conflict of interest, obtains the consent of my clients, and does not engage in conduct that violates the New York Rules of Professional Conduct. If my clients engage my Agent to perform legal services, he shall have the right to compensation for such services.

I hereby reserve the right to revoke this Limited Power of Attorney by written instrument, which shall not affect the validity of any actions taken by my Agent prior to any such revocation.

To induce third parties to act hereunder, I hereby agree that any third party receiving a duly executed original copy of this instrument, or a copy certified in such manner as to make it valid and effective as provided by law; may act hereunder, and that the revocation or termination of this instrument shall be ineffective as to any such third party unless or until such third party has knowledge or receives notice of such revocation or termination I hereby agree to indemnify and hold harmless any such third party against any claim(s) that may arise against such third party by reason of such party having relied upon the provisions of this instrument.

If _____ (name of Agent) is unable or unwilling to serve as my Agent hereunder, or no longer practices law, I hereby appoint _____ (name of Successor Agent), an attorney licensed and in good standing to practice law in the State of New York with offices located at _____, to be my Agent for the limited purposes set forth herein.

This Limited Power of Attorney shall not be affected by my subsequent disability or incapacity, and shall be governed in all respects by the laws of the State of New York.

_____
(Name of Principal)

_____
(Insert Contact Information)

STATE OF NEW YORK)
)ss.:
COUNTY OF)

On this day of , 20__, before me, the undersigned, a notary public in and for said state, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, who acknowledged to me that (s)he executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of whom the individual acted, executed the instrument.

_____
Notary Public

APPENDIX 7B

LETTER FROM CLOSING OR ASSISTING ATTORNEY ADVISING THAT LAWYER IS UNABLE TO CONTINUE LAW PRACTICE

Re: [Name of File, Case or Matter]

Dear [Client Name]:

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

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

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

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

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

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

Thank you.

Sincerely,
[Assisting Attorney] [Firm]

APPENDIX 9

SPECIAL PROVISIONS FOR ATTORNEY'S WILL: INSTRUCTIONS REGARDING MY LAW PRACTICE

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Open and process my mail and email.

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

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

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

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

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

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

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

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

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

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

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

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

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

In performing the foregoing, my Executor is to preserve client confidences and secrets and the attorney-client privilege and to make disclosure only to the extent necessary for such purposes. For example: Client files are to be reviewed only by employees of my firm, to whom attorney-client privilege attaches (e.g., my secretary, my paralegal, my associates (if any), or attorneys retained by my Executor to assist him in closing the practice). It is for this reason that I have authorized my Executor to retain the services of these personnel, and to give them

sufficient incentives to remain in the employ of the firm through its wind-up. Though there are special rules permitting disclosure of certain client information in connection with the sale of a practice, my Executor is to abide scrupulously with such rules. My Executor may rely on employees of my firm to (i) supply data concerning the outstanding fees owed by my clients at the time of my death, and the unused retainers paid by clients for which services have not yet been rendered; (ii) to communicate with clients concerning the disposition of their files; and (iii) to review clients' files in response to any inquiries that arise in the course of my estate's administration.

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