

What Happens To Your Clients If Something Happens To You?

The Ethics and Risk Management of Leaving the Practice of Law

One of the best aspects of practicing law is that you can improve with age. A long career with a slow exit into retirement as an of counsel or practicing part-time is a familiar pattern for many lawyers. Unfortunately, the exit can come much more abruptly than anticipated. Death, disability, impairment, and forced retirement are the primary causes of unplanned termination of practice. Sometimes lawyers simply disappear. More benign causes are elevation to the bench and voluntary retirement.

The one thing all these causes for leaving practice have in common is the risk that the interests of clients will suffer. This, in turn, creates the risk of bar complaints and malpractice claims at a time when an ex-lawyer or his survivors are least prepared to cope with these problems. While a sudden departure presents more problems for sole practitioners, it is a professional responsibility issue for firms of all sizes. All lawyers have a duty to take steps to protect their clients' interests when they leave practice regardless of the reason.

The intent of this article is to inform you of the professional responsibility and risk management considerations that a sudden departure by a lawyer creates. It begins with a description of the current Kentucky guidance. It then shifts to consideration of the planning lawyers should do to meet their duty to clients and the duties of the practice closing lawyer. The article includes three checklists from the Oregon State Bar Professional Liability Fund handbook, *Planning Ahead: A Guide To Protecting Your Clients' Interests In The Event Of Your Disability Or Death*, by Barbara Fishleder, copyright 1999. They are adapted to Kentucky's situation and reprinted here with the permission of the Oregon State Bar Professional Liability Fund with all rights reserved except that Kentucky lawyers have permission to use the checklists in their practices or to assist other attorneys with the closure of their practice.

Kentucky Guidance for Sudden Departures from Practice

The authority in Kentucky covering sudden departures from practice is found in Supreme Court Rule 3.395, Appointment of Special Commissioner to Protect Clients' Interests, and KBA Ethics Opinion 405 (1998).

The key provisions of SCR 3.395 for purposes of this article are:

(1) When it comes to the attention of the [KBA] Director that: ... (c) an attorney has resigned ... and has failed to notify his... clients of his... resignation as required by Court order; or (d) an attorney dies; or (e) an attorney abandons his... law practice or his... whereabouts are unknown, and no law partner, personal representative of the deceased attorney's estate, or other responsible person capable of conducting the

attorney's business affairs is known to exist, the Director may petition the [*Supreme*] Court, and the Court for good cause may order the appointment of one or more members of the Association to serve as Special Commissioners of the Court.

....

(2) A Special Commissioner appointed under this rule may be authorized by the Court to take possession of the files and records of an attorney described in subsection (1) above, to make an inventory of the files, to give notice to the attorney's clients of the unavailability or inability of the attorney to continue to represent the clients, to deliver to the clients all papers and other property to which the clients are entitled, to take any other action which the clients are entitled and to take any other action which the Court deems necessary to protect the interests of the clients.

The clear policy of the rule is that appointing special commissioners is a last resort – to be done only when all other options to close the practice are exhausted. The rule's appointment procedures are time consuming, and given the inevitable time lag between the occurrence of a sudden departure and notice to the KBA, an appreciable period of time will elapse before a special commissioner can be appointed. The risk for clients during this period is obvious. Adding to the complexity of the situation is that Kentucky, unlike Oregon and North Carolina, does not have a written guide for special commissioners or others to facilitate closing a practice. Under these circumstances, the need for lawyers in Kentucky to have a client protection plan for sudden departures could not be clearer. Bar procedures are simply not designed to cover more than the most desperate situations.

KBA Ethics Opinion 405 is of some help for sudden lawyer departures. It concerns the unusual situation of the death of a sole practitioner whose practice included employed lawyers with no proprietary interest in the practice. These lawyers sought advice on their professional duty to firm clients. Of primary interest for this article is the adoption in the opinion of the guidance of ABA Formal Opinion 92-369, *Disposition of Deceased Sole Practitioner's Client Files and Property*.

In the ABA opinion sole practitioners are urged to develop a plan for the protection of client interests in the event of their death to include designation of a lawyer to assume responsibility for closing the practice. It identifies two primary duties for the lawyer assuming responsibility for the practice – (1) the duty to inspect files and protect client confidentiality and (2) the duty to maintain client files and property:

The duty to inspect files and protect client confidentiality involves a determination of which files need immediate attention, notification of all clients of the death of their lawyer, and a request for instructions on safekeeping client property. Since the lawyer making the inspection does not represent the clients, care must be taken to review files only to the extent necessary to identify clients and determine matters that require immediate attention. Client confidentiality must be observed to the maximum extent feasible while protecting the clients' immediate interests.

The duty to maintain client files and property is governed ultimately by a rule of reasonableness. While a lawyer does not have a duty to maintain all client files indefinitely, items that likely belong to the client, original documents, and information which pertains to cases in which the statute of limitations has not expired should be maintained or returned to the client. Particular care is required with the disposition of unclaimed funds in the deceased lawyer's client trust account.¹

A helpful addendum to this ABA guidance for lawyers closing a practice is the following checklist from *Planning Ahead: A Guide To Protecting Your Clients' Interests In The Event Of Your Disability Or Death*, copyright 1999. It is adapted to Kentucky's situation and reprinted here with permission.

Checklist For Closing Another Attorney's Office

The term "Affected Attorney" refers to the attorney whose office is being closed.

1. Check the calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, etc.
2. Contact clients for matters that are urgent or immediately scheduled for hearing, court appearances, or discovery. Obtain permission for reset. (If making these arrangements constitutes a conflict of interest for you and your clients, retain another attorney to take responsibility for obtaining extensions of time and other immediate needs.)
3. Contact courts and opposing counsel for files that require discovery or court appearances immediately. Obtain resets of hearings or extensions where necessary. Confirm extensions and resets in writing.
4. Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate files.
5. Look for an office procedures manual. Determine if there is a way to get a list of clients with active files.
6. Send clients who have active files a letter explaining that the law office is being closed and instructing them to retain a new attorney and to pick up the open file. Provide clients with a date by which they should pick up copies of their files. Inform clients that new counsel should be chosen immediately.
7. For cases before administrative bodies and courts, obtain permission from the clients to submit a Motion and Order to withdraw the Affected Attorney as attorney of record. Review SCR 3.130 (1.16).
8. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.

9. Pick an appropriate date and check to see if all cases have either a motion and order allowing withdrawal of the Affected Attorney or a Substitution of Attorney filed with the court.

10. Make copies of files for clients. Retain the Affected Attorney's original file. All clients should either pick up a copy of their files (and sign a receipt acknowledging that they received it) or sign an authorization for you to release a copy to a new attorney. If the client is picking up a copy of the file and there are original documents in it that the client needs (such as a title to property), return the original documents to the client and keep copies for the Affected Attorney's file.

11. All clients should be advised on where their closed files will be stored, and who they should contact in order to retrieve a closed file.

12. Send the name, address, and phone number of the person who will be retaining the closed files to the Director of the Kentucky Bar Association at 514 W. Main Street, Frankfort, Kentucky 40601-1883.

13. If the attorney whose practice is being closed was a sole practitioner (the Affected Attorney), try to arrange for his or her phone number to have a forwarding number. This eliminates the problem created when clients call the Affected Attorney's phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.

14. Contact the lawyer's professional liability insurer about extended reporting coverage.

15. *(optional)* If you have authorization to handle the Affected Attorney's financial matters, look around the office for checks or funds that have not been deposited. Determine if funds should be deposited or returned to clients. (Some of the funds may be for services already rendered.) Get instructions from clients concerning any funds in their trust accounts. These funds should either be returned to the clients or forwarded to their new attorneys. Prepare a final billing statement showing any outstanding fees due, and/or any money in trust. (To withdraw money from the Affected Attorney's accounts, you will probably need to be an authorized signer on the accounts, you will need a written agreement, or you will need a limited power of attorney. If this has not been done and is not obtainable from the Affected Attorney due to death, disability, impairment, or incapacity, you may have to request the Director of the Kentucky Bar Association to petition the Supreme Court to take jurisdiction over the practice and the accounts pursuant to SCR 3.395.

16. *(optional)* If you are authorized to do so, handle financial matters, pay business expenses, and liquidate the practice.

17. *(optional)* If your arrangement with the Affected Attorney or estate is that you are to be paid for closing the practice, submit your bill.

18. (optional) If your arrangement is to represent the Affected Attorney's clients on their pending cases, obtain each client's consent to represent the client and check for conflicts of interest.

Client Protection Planning

Planning Ahead: A Guide To Protecting Your Clients' Interests In The Event Of Your Disability Or Death, copyright 1999, includes two excellent checklist covering client protection planning and practice closing. They are adapted to Kentucky's situation and reprinted here with permission.

Checklist For Lawyers Planning To Protect Clients' Interests In The Event Of The Lawyer's Death, Disability, Impairment, Or Incapacity

1. Use retainer agreements that state you have arranged for an Assisting Attorney to close your practice in the event of death, disability, impairment, or incapacity.
2. Have a thorough and up-to-date office procedure manual that includes information on:
 - a. How to check for a conflict of interest;
 - b. How to use the calendaring system;
 - c. How to generate a list of active client files, including client names, addresses, and phone numbers;
 - d. Where client ledgers are kept;
 - e. How the open/active files are organized;
 - f. How the closed files are organized and assigned numbers;
 - g. Where the closed files are kept and how to access them;
 - h. The office policy on keeping original documents of clients;
 - i. Where original client documents are kept;
 - j. Where the safe deposit box is located and how to access it;
 - k. The bank name, address, account signers, and account numbers for all law office bank accounts;
 - l. The location of all law office bank account records (trust and general);
 - m. Where to find, or who knows about, the computer passwords;
 - n. How to access your voice mail (or answering machine) and the access code numbers; and
 - o. Where the post office or other mail service box is located and how to access it.
3. Make sure all of your file deadlines (including follow-up deadlines) are on your calendaring system.
4. Document your files.
5. Keep your time and billing records up-to-date.

6. Avoid keeping original documents of clients, such as wills and other estate planning documents.
7. Have a written agreement with an attorney who will close your practice (the “Assisting Attorney”) that outlines the responsibilities involved in closing your practice. Determine whether the Assisting Attorney will also be your personal attorney. Choose an Assisting Attorney who is sensitive to conflict of interest issues.
8. If your written agreement authorizes the Assisting Attorney to sign trust or general account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only upon the happening of a specific event. In some instances, you and the Assisting Attorney will have to sign bank forms authorizing the Assisting Attorney to have access to your trust or general account. Choose your Assisting Attorney wisely—he or she may have access to your clients' funds.
9. Familiarize your Assisting Attorney with your office systems and keep him or her apprised of office changes.
10. Introduce your Assisting Attorney to your office staff. Make certain your staff knows where you keep the written agreement and how to contact the Assisting Attorney if an emergency occurs before or after office hours. If you practice without regular staff, make sure your Assisting Attorney knows who to contact (the landlord, for example) to gain access to your office.
11. Inform your spouse or closest living relative and the personal representative of your estate of the existence of this agreement and how to contact the Assisting Attorney.
13. Renew your written agreement with your Assisting Attorney each year. If you include the name of your Assisting Attorney in your retainer agreement, make sure it is current.

Checklist For Closing Your Own Office

1. Finalize as many active files as possible.
2. Write to clients with active files, advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this.
3. For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.

4. For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record. Review SCR 3.130 (1.16).
5. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
6. Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as attorney of record or have a Substitution of Attorney filed with the court.
7. Make copies of files for clients. Retain your original files. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys. If a client is picking up the file, original documents should be returned to the client and copies should be kept in your file.
8. All clients should be told where their closed files will be stored and whom they should contact in order to retrieve them. Obtain all clients' permission to destroy the files after approximately 10 years. Lawyers Mutual recommends that closed files be kept for 10 years or longer. If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number.
9. Send the name, address, and phone number of the person who will be retaining the closed files to the Director of the Kentucky Bar Association at 514 W. Main Street, Frankfort, Kentucky 40601-1883. Also send your name, current address, and phone number.
10. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.

Special Considerations When Closing A Practice

Space does not permit covering in detail several questions that can arise when a lawyer assumes responsibility for closing a practice. They are listed here to alert you to them:

(1) If the reason for closing a practice is the death of a sole practitioner, planning agreements designating a closing lawyer may become void. It will probably be necessary for the estate's executor to authorize the designated lawyer to close the practice. For this reason, part of the planning process should include making sure there is a provision in the lawyer's will directing the executor to appoint the designated lawyer to close the practice.

(2) If the lawyer closing a practice discovers malpractice or ethics violations, the question arises whether this should be reported to clients. The answer turns on whether the lawyer is representing the departed lawyer or is acting in some other capacity.

(3) Clients of the departed lawyer may ask the lawyer closing a practice to take over the matter. This is usually permissible provided there is no solicitation by the closing lawyer, the clients understand that the closing lawyer does not currently represent them, clients

understand that they may change to any other lawyer they wish, and that the closing lawyer has no conflicts of interest as a result of accepting the matter.

(4) Sudden departures from practice sometimes involve a failed lawyer. This often means that malpractice claims will be made. The closing lawyer early in the process must review any professional liability insurance covering the practice. It may be prudent to put the insurance carrier on notice of the situation and seek assistance in preventing claims.

(5) Consideration should be given to purchasing from the professional liability insurer an extended reporting period for malpractice claims. Some policies grant automatic extended reporting periods without additional premium in death and disability situations. For example, Lawyers Mutual's policy provides for an automatic extended reporting period at no additional premium upon the death of an insured lawyer and for disabled lawyers if they were insured with Lawyers Mutual for three consecutive years prior to the current policy.

Conclusion

It appears to be almost as hard to leave the practice of law as to get into it. Careful planning by firms, however, can make the transition routine instead of chaotic. While sole practitioners have the greatest need for planning for client protection in the event of a sudden departure, firms of all sizes need to anticipate client needs when a lawyer leaves the practice suddenly or otherwise. The checklists that the Oregon State Bar Professional Liability Fund generously allowed me to use in this article provide a practical approach for accomplishing this important professional duty and avoiding malpractice claims.

ⁱ These two paragraphs are slight modifications of paragraphs from my article Post Mortem Professional Responsibility, *Ky. Bench & Bar*, Vol.57, No. 2, Spring 1993, p.41.