CONTINGENCY AND RETIRMENT PLANNING FOR KANSAS ATTORNEYS

A resource and how-to guide created by the Office of the Disciplinary Administrator to support and encourage succession planning by Kansas lawyers. September 2023.

Office of the Disciplinary Administrator

DISCLAIMER

This handbook serves only as a resource. It is not a replacement for independent legal research, and nothing contained within is intended to address a specific inquiry. It remains the responsibility of the individual lawyer to ensure they are in compliance with the Kansas Rules of Professional Conduct (KRPC). **This handbook contains only general information, not legal advice.** If you have questions regarding the KRPC, please contact the disciplinary administrator's office at 785-435-8200 or at attydisc@kscourts.org.

ACKNOWLEDGEMENTS

This guide took inspiration from other states' guides and handbooks concerning succession planning and winding down a law practice. Specifically, the Office of the Disciplinary Administrator would like to acknowledge that portions of this handbook were adapted with permission from the Colorado Supreme Court Office of Attorney Regulation Counsel's handbook *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death,* Copyright 2019; the New York State Bar Association's *Planning Ahead Guide*: *How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*, Second Edition, Copyright 2015-2016; and the Oregon State Bar Professional Liability Fund's handbook *Planning Ahead*: *A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, Copyright 2015. All rights are reserved.

This handbook also used information from legal opinions published by the Kansas Bar Association and the American Bar Association.

Though the rules of professional conduct and estate planning laws vary from state to state, many basic principles regarding the steps to take to close a law practice are very similar.

Special thanks to Calvin Karlin for providing information and tips to include in this manual for attorneys appointed under Rule 235 to close the practice of another attorney.

FORWARD

From the Desk of:

Gayle B. Larkin
Disciplinary Administrator

September 25, 2023

Dear Kansas Lawyer:

It has been my pleasure working in our attorney disciplinary system for over two decades. Since becoming the disciplinary administrator in October 2021, I have been focusing on ways our office can better assist members of the Bar. Based on phone calls our office receives from attorneys seeking ethics advice, it became clear to me that there is a need for guidance on how to properly plan for and carry out the continuation or closing of a law practice due to the unexpected absence or planned departure of the law firm's principal attorney.

I tasked members of my staff to put together this Contingency and Retirement Planning Guide for use by Kansas lawyers, new and experienced, to help navigate what can be an overwhelming process of planning for the unexpected or winding down a successful legal practice. Chief Deputy Disciplinary Administrator Matthew J. Vogelsberg, Deputy Disciplinary Administrator Alice L. Walker, Assistant Disciplinary Administrator Katie M. McAfee, and Legal Intern Shelby Goetz were instrumental in culling and adapting material from other state handbooks and other resources and compiling it into this easy-to-read, informative guide. The information provided gives lawyers guidance on how to develop a contingency plan for their practice should an event arise that prevents them (temporarily or permanently) from practicing law. The guide also provides advice on how to properly wind down or transfer a law practice due to a planned retirement or change in employment.

The goal of my office is to ensure that Kansas lawyers practice law in a competent and ethical manner. To that end, our office provides continuing legal education programs and educational materials to lawyers and answers questions from attorneys regarding their duties under the rules. It is my hope that after reading this guide, Kansas lawyers will feel confident in developing a plan to ensure their clients are protected in case of an unplanned absence or planned departure from the practice of law. Should you have any questions regarding the advice provided in this guide or any other questions regarding your ethical duties, do not hesitate to contact our office at 785-435-8200 or at attydisc@kscourts.org.

Sincerely,

Gayle B. Larkin
Disciplinary Administrator

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INTRODUCTION

The information contained in this guide is intended to address three situations. First, the guide is intended to assist solo practitioners and owners of small firms with associates in designing and implementing a contingency plan to address an attorney's unexpected absence from the practice of law due to an accident, family emergency, illness, or untimely death. No one wants to think that these events can happen to them. But, based on the phone calls and email inquiries the disciplinary administrator's office receives from attorneys, judges, and family members affected by a deceased or disabled attorney, unexpected events happen all the time. Without a contingency plan in place to address unexpected events affecting your ability to practice law, your clients' interests may be unprotected, resulting in potential ethics complaints and malpractice claims against you, your firm, or your estate.

The second situation this guide addresses is the planned closure or transfer of your law practice due to your retirement or change in employment. This manual will help put a plan in place so that your law practice can be smoothly wound down or transferred to the hands of another attorney to carry on the practice.

The third situation is where an attorney has unexpectedly left the practice of law without a contingency plan in place and a subsequent attorney has been appointed by the local chief judge of the district court to protect the interests of the absent lawyer's clients under Rule 235. The guide provides steps the appointed lawyer can follow to move that process forward in an efficient manner.

The rules cited in this guide refer to the Kansas Supreme Court Rules in effect in 2023. Make sure to check the current rules for any alterations or changes. We hope this information is helpful to all Kansas lawyers, whether you are just starting out or have been practicing for decades.

RESOURCES

Office of the Disciplinary Administrator
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First Floor
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785-435-8200
attydisc@kscourts.org
www.kscourts.org/attorneys/office-of-disciplinary-administration

Kansas Lawyer's Assistance Program ("KALAP")
515 South Kansas Avenue
Topeka, Kansas 66603
785-368-8275
kalap@kscourts.org
www.KALAP.com

TERMINOLOGY AND FORMS

TERMINOLOGY

- The term *Triage Lawyer* is used throughout this manual to refer to either the lawyer named in your contingency plan who will operate your practice during your absence or the lawyer who has been appointed under Rule 235 to protect the interests of your clients.
- The term *Authorized Signer* refers to the person you have authorized as a signer on your lawyer trust account.
- The term *Appointed Attorney* refers to a person appointed by the chief judge of a district court to protect an attorney's clients' interests.
- The term *Planning Attorney* refers to you, your estate, or your personal representative.

FORMS

- The sample *Agreement – Full Form,* provided in **Chapter 6 of this guide,** authorizes the Triage Attorney to transfer client files, sign checks on your operating account, and close your practice. This form also provides for payment to the Triage Attorney for services rendered, designates the procedure for termination of the Triage Attorney's services, and provides the Triage Attorney with the option to purchase the law practice. In addition, the form provides for the appointment of an Authorized Signer on your lawyer trust account. The *Agreement – Full Form* is a sample only, reprinted with permission from the New York State Bar Association. You may modify it as needed.

- The sample *Agreement – Short Form*, also provided in **Chapter 6,** includes authorization to sign on your general account and consent to close your office. It also provides for the appointment of an Authorized Signer on your lawyer trust account. It does not include many of the terms found in the sample *Agreement –*

Full Form version, but it does include the authorizations most critical to protecting your clients' interests.

- Other forms to assist in preparing to close or in closing a law practice, including example engagement letter language, will provisions, and sample letters, can be found in **Chapter 6 of this guide.**
- The *Rule 235 Template Order*, **also provided in Chapter 6**, is to be utilized by the Chief Judge in the Judicial District in which an attorney's office is located in the event an appointment is necessary to protect the interests of an attorney's clients due to disability, death, disappearance, suspension, disbarment, or neglect by the attorney.

CHAPTER 1: DEVELOPING A CONTINGENCY PLAN

WHAT SHOULD BE INCLUDED IN A CONTINGENCY PLAN

A solo practitioner or an owner of a small firm with associates should develop a plan in the event of a sudden emergency, illness, or death. The plan should address the following essential elements which are discussed in detail in this chapter.

Contingency Plan Essentials

→ A designated Triage Attorney
→ Trust account provisions
→ Activation parameters
→ A client notification system
→ Centralized key office information
→ Estate planning documents

TRIAGE ATTORNEY

The first step in the planning process is for you to find someone who will be authorized to take over your practice and either maintain, close, sell, or transfer it in the event of your death, disability, impairment, or incapacity. You will need a detailed, written agreement defining your relationship with the Triage Lawyer and what their duties will be.

It is crucial that the agreement establish the scope of the Triage Lawyer's duty to you and your clients. If the Triage Lawyer represents you as your attorney, they may be prohibited from representing your clients on some, or possibly all, matters. Under this arrangement, the Triage Lawyer would owe their fiduciary obligations to you. For example, if the Triage Lawyer is your attorney, they could inform your clients of your legal malpractice or ethical violations only if you consented. However, if the Triage Lawyer is not your attorney, they may have an ethical obligation to inform your clients

of your errors. *See What If? Answers to Frequently Asked Questions*, Chapter 4 of this guide.

Whether or not the Triage Lawyer is representing you, that person must be aware of conflict-of-interest issues and must check for conflicts if they are (1) providing legal services to your clients or (2) reviewing confidential file information to assist with transferring client files.

The agreement should include a signed consent form authorizing the Triage Lawyer to contact your clients for instructions on transferring their files, authorization to obtain extensions of time in litigation matters when needed, and authorization to provide all relevant people with notice of your condition and the current plans for your office (*e.g.*, will the practice be maintained because your absence is expected to be temporary or will the practice be sold or otherwise transferred to another attorney). *See* sample agreements provided in Chapter 6 of this guide.

The agreement could also include provisions that give the Triage Lawyer authority to wind down your financial affairs, provide your clients with a final accounting and statement, distribute unearned fees, collect fees on your behalf, and liquidate or sell your practice. Arrangements for payment by you or your estate to the Triage Attorney for services rendered can also be included in the agreement. *See* sample full form agreement provided in Chapter 6 of this manual.

TRUST ACCOUNT

Your contingency plan must include provisions regarding who can access your trust account (*i.e.*, an Authorized Signer) in the event an incident occurs rendering you temporarily or permanently unable to practice law. If you do not make arrangements for an Authorized Signer, your clients' money will remain in the trust account until a court orders access. *See* Rule 235. For example, if you become physically or mentally unable to conduct your law practice and no access arrangements were made, your clients' money will most likely remain in your trust account until the court takes jurisdiction over your practice and your accounts. In many instances, the client needs the money they have on deposit in the lawyer's trust account to hire a new lawyer, and a delay puts the client in a difficult position. This will likely prompt an ethics complaint, Client Protection Fund claim, malpractice complaint, or other civil suit.

Deciding who will have access to your trust account during your absence from the practice of law is an important decision. You must carefully consider whom you give access to the account and under what circumstances. If someone has access to your

trust account and that person misappropriates money, your clients will suffer damages. In addition, you may be held responsible. Accordingly, the best practice (but not required) is to choose someone other than your Triage Lawyer to act as the Authorized Signer on your trust account during your absence. This provides for checks and balances, since two people will have access to your records and information. It also avoids the potential for any conflicting fiduciary duties that may arise if the trust account does not balance.

DECIDING HOW THE CONTINGENCY PLAN IS ACTIVATED

Planning ahead to protect your clients' interests in the event of your disability or death involves some difficult decisions, including the type of access your Triage Lawyer and/or Authorized Signer will have, the conditions under which they will have access, and who will determine when those conditions are met. These decisions are the hardest part of planning ahead.

If you are incapacitated, for example, you may not be able to give consent to someone to assist you. Under what circumstances do you want someone to step in? How will it be determined that you are incapacitated, and who do you want to make this decision?

One approach is to give the Triage Lawyer and/or Authorized Signer access only during a specific time period or after a specific event and to allow the Triage Lawyer and/or Authorized Signer to determine whether the contingency has occurred. Another approach is to have someone else (such as a spouse, trusted friend, or family member) keep the applicable documents (such as a limited power of attorney for the Triage Lawyer and/or the Authorized Signer) until they determine that the specific event has occurred. A third approach is to give the Triage Lawyer and/or Authorized Signer access to your records and accounts at all times.

Contingent Access

If you want the Triage Lawyer and/or Authorized Signer to have access to your accounts contingent on a specific event or during a particular time period, you have to decide how you are going to document the agreement. Depending on where you live and the bank you use, some approaches may work better than others. Some banks require only a letter signed by both parties granting authorization to sign on the account. **The sample agreements provided in Chapter 6 of this guide should be legally sufficient to grant authority to sign on your account.** However, you and the Triage Attorney and/or the Authorized Signer may also want to sign a limited power of

attorney. *See* sample limited power of attorney provided in Chapter 6 of this guide. Most banks prefer a power of attorney. Signing a separate limited power of attorney increases the likelihood that the bank will honor the agreement. It also provides you and the Triage Attorney and/or the Authorized Signer with a document limited to bank business that can be given to the bank. (The bank does not need to know all the terms and conditions of the agreement between you and the Triage Lawyer and/or the Authorized Signer.) If you choose this approach, consult the manager of your bank. When you do, be aware that power of attorney forms provided by the bank are generally unconditional authorizations to sign on your account and may include an agreement to indemnify the bank. Get written confirmation that the bank will honor your limited power of attorney or other written agreement. Otherwise, you may think you have taken all necessary steps to allow access to your accounts, but, when the time comes, the bank may not allow the access you intended.

If the access is going to be contingent, you may want to have someone (such as your spouse, family member, personal representative, or trusted friend) hold the power of attorney until the contingency occurs. This can be documented in a letter of understanding, signed by you and the trusted friend or family member. *See* sample letter of understanding provided in Chapter 6 of this guide. When the event occurs, the trusted friend or family member provides the Triage Lawyer and/or the Authorized Signer with the power of attorney.

If the authorization will be contingent on an event or for a limited duration, the terms must be specific, and the agreement should state how to determine whether the event has taken place. For example, is the Triage Lawyer and/or the Authorized Signer authorized to sign on your accounts only after obtaining a letter from a physician that you are disabled or incapacitated? Is it when the Triage Lawyer and/or the Authorized Signer, based on reasonable belief, say so? Is it for a specific period of time, for example, a period during which you are on vacation? You and the Triage Lawyer and/or Authorized Signer must review the specific terms and be comfortable with them. These same issues apply if you choose to have a family member or friend hold a general power of attorney until the event or contingency occurs. All parties need to know what to do and when to do it. Likewise, to avoid problems with the bank, the terms should be specific, and it must be easy for the bank to determine whether the terms are met.

Total Access

The third approach is to allow the Triage Lawyer and/or Authorized Signer access to your records and accounts at all times. With respect to your bank accounts, this approach requires going to the bank and having the Triage Lawyer and/or

Authorized Signer sign the appropriate cards and paperwork. When the Triage Lawyer and/or Authorized Signer are authorized to sign on your account, they have complete access to the account. This is an easy approach that allows the Triage Lawyer and/or Authorized Signer to carry out office business even if you are just unexpectedly delayed returning from vacation. Adding someone as an Authorized Signer on your accounts allows him or her to write checks, withdraw money, or close the account at any time, even if you are not dead, disabled, impaired, or otherwise unable to conduct your business affairs. Under this arrangement, you cannot control the Authorized Signer's access, absent the revocation of the authority. The authorization of such unfettered access makes it an extremely important decision and requires an analysis of the risks associated with choosing this approach. If you decide to give another person full access to your accounts, your choice of Authorized Signer is crucial to the protection of your clients' interests, as well as your own.

CLIENT NOTIFICATION

Once you have made arrangements with a Triage Lawyer and/or Authorized Signer, the next step is to provide your clients with information about your plan. The easiest way to do this is to include the information in your retainer agreements and engagement letters. This provides clients with information about your arrangement and gives them an opportunity to object. Your client's signature on a retainer agreement can provide written authorization for the Triage Lawyer to proceed on the client's behalf, if necessary. *See* sample retainer agreement, contingent fee agreement, and engagement letter provided in Chapter 6 of this guide.

KEY OFFICE INFORMATION

You can take a number of steps while you are still practicing law and managing your business to make the execution of your contingency plan go smoothly and inexpensively, should the need arise. This includes gathering key office information in one location. *See* sample list of contacts and important information provided in Chapter 6 of this guide.

CHECKLIST OF KEY OFFICE INFORMATION

This file should contain details about the day-to-day operation of your law practice and should include:

→ A current client list with contact information or provide information on how such a list can be produced.

→ Trust account and operating account information, including signature cards for bank accounts. This may require you to go to the bank and take a picture of them.

→ Written instructions on how and where client information is stored.

→ All leases and contracts for your office space, office equipment, and utilities.

→ Names and contact information for vendors used on a regular basis and information on how to end the service.

→ Policies for your malpractice and other business insurance.

→ Information on payment of current liabilities.

→ Staff names, contact information, and information on each staff member's job duties.

→ Instructions on how to gain access to computer and voicemail passwords.

In addition to gathering and organizing the information needed to operate the business side of your practice, you need to make sure the *legal* side of your practice is organized. Steps you can take to organize your law practice include (1) keeping your calendaring system up-to-date with case deadline, hearings, client meetings, and other important dates, (2) thoroughly documenting client files, (3) keeping your time and billing records up-to-date, (4) familiarizing your Triage Attorney and/or Authorized Signer with your office systems, (5) renewing your written agreement with the Triage Attorney and/or Authorized Signer each year, and (6) making sure you do not maintain clients' original documents, such as wills or other estate plans. *See* Checklist for Succession Planning to Protect Clients' Interests provided in Chapter 5 of this guide.)

ESTATE PLANNING DOCUMENTS

If your office and legal practice are in good order, the Triage Lawyer's work will be reduced and the cost to your estate will be minimized. Your law office will then be an asset that can be sold and the proceeds remitted to you or your estate. *See* KRPC 1.17 and KRPC 5.4. An organized law practice is a valuable asset. In contrast, a disorganized practice requires a large investment of time and money and is less marketable.

If you authorize another lawyer to administer your practice in the event of your disability, impairment, or incapacity, that authority terminates when you die. The personal representative of your estate has the legal authority to administer your practice. *See* K.S.A. 59-1402 and KRPC 5.4. The personal representative must be told about your arrangement with the Triage Lawyer and/or Authorized Signer and about your desire to have the Triage Lawyer and/or Authorized Signer carry out the duties of your agreement. The personal representative can then authorize the Triage Lawyer and/or Authorized Signer to proceed.

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

For many solo practitioners, the law practice will be the only asset subject to probate. Other property may pass outside probate to a surviving joint tenant. This means that unless you keep enough money in your law firm's operating account, there may not be adequate funds to retain the Triage Lawyer and/or Authorized Signer or to continue to pay your administrative staff, rent, and other expenses during the transition period. It will take some time to generate statements for your legal services and to collect the accounts receivable. Your accounts receivable may not be an adequate source of income during the time it takes to close your practice. Your Triage Lawyer and/or Authorized Signer may be unable to advance expenses or may be unwilling to serve without pay. One solution to this problem is to maintain a small insurance policy, with your estate as the beneficiary. Alternatively, your surviving spouse or other family

members can be named as beneficiary, with instructions to lend the funds to the estate, if needed.

Kansas law gives broad powers to a personal representative to continue a decedent's business to preserve its value, to sell or wind down the business, and to hire professionals to help administer the estate. *See* K.S.A. 59-1402. However, for the personal representative's protection, you may want to include language in your Will that expressly authorizes that person to arrange for closure or sale of your law practice. The appropriate language will depend on the nature of the practice and the arrangements you make ahead of time. *See* sample Will provisions provided in Chapter 6 of this guide.

It is important to allocate sufficient funds to pay a Triage Attorney and/or Authorized Signer and necessary administrative staff in the event of disability, incapacity, or impairment. To provide funds for these services, consider maintaining a disability insurance policy in an amount sufficient to cover these projected office closure expenses.

HELPFUL TIP

START NOW. We encourage you to select an attorney to assist you; and follow the procedures outlined in this handbook. This is something you can do now, at little or no expense, to plan for your future and protect your assets.

Do not put it off – start the process today.

CHAPTER 2: PLANNING YOUR EXIT FROM YOUR LAW PRACTICE

Unlike Chapter 1, which addresses a lawyer creating a contingency plan to address their sudden and unexpected absence from the practice of law, this chapter addresses the situation where an attorney, specifically a solo practitioner or owner of a small firm, decides the attorney wants to retire or make a career change and needs to create a plan for achieving a smooth exit from their current practice.

What follows is guidance on making the decision to leave your practice, deciding what you want to happen to your practice after you retire (*e.g.*, closed, sold, transferred to a new firm), and achieving a smooth exit from the practice of law.

MAKING THE DECISION TO RETIRE

The right time to retire is going to be different for everyone. You may retire as soon as you are financially able to. Or you may not want to ever retire.

Here are three signs that it may be time for you to retire:

1. You want to retire – you find yourself daydreaming more and more about retirement. Instead of focusing on your clients' interests, you are imagining yourself on a beach with your toes in the sand, hiking a trail in a national park, or sitting poolside with a good book.

2. Your family wants or needs you to retire – the health of a family member, your family's happiness, and other family considerations are more important than continuing to work.

3. The law wants you to retire – if you have lost interest in the law or if the law has lost interest in you, it is time to retire. Like old boxers, every lawyer should hang up the gloves before it is too late because no one likes to see a former champ get knocked out.

STEPS TO HELP MAKE A SMOOTH TRANSITION TO RETIREMENT

Step 1: Decide what you want to happen to your firm upon retirement.

When a solo practitioner or an owner of a small firm with associates is planning for retirement, there are basically four options:

- **Close the firm**. This is the easiest option, but you will not reap much financially by simply closing the firm you have spent years building. If you choose to close your firm, you must take reasonable steps to protect your clients' interests, including providing sufficient time to secure new counsel. You will need to provide your clients or their new counsel with all the relevant case files and data.

- **Create a partnership with another solo or small firm**. This is a great option as your chosen partner or firm can help you gradually transition out of your practice. For lawyers who do not mind maintaining client relationships, you may also choose to have an "of counsel" arrangement. This means you will continue to be involved with clients during the transition period, which may take a few years. The extent and length of your involvement depends on your specific agreement. Be sure to make the compensation structure clear.

- **Pick a successor.** Your chosen attorney will need to be trained to take over your law firm. This will be the person you will entrust your clients' legal matters to. You can offer this lawyer a partnership concerning your exit strategy and arrange appropriate compensation for yourself.

- **Sell your practice.** To sell your law firm, you will need to value it based on what you are selling and what someone would want to pay. If you would like to sell your law firm, it is a good idea to get a professional to value your firm properly to maximize your potential gains. *See* KRPC 1.17.

Step 2: Create a timeline for your retirement with interim deadlines for when tasks will be completed.

Your timeline may include the following key dates:

- ✓ When you plan to retire.
- ✓ When you will stop accepting new matters.
- ✓ When you will announce to your employees your planned retirement.
- ✓ When you will announce to your current clients your planned retirement.
- ✓ By when you will have reviewed all your closed case files and made arrangements to return, store, or destroy the files.
- ✓ When you will notify your landlord and other vendors that you will not be renewing your leases and/or subscriptions (or, that the buyer of your law practice will be taking over the service).
- ✓ When you will meet with your malpractice carrier to discuss tail coverage and termination of your insurance policy.
- ✓ When you will cancel your advertising.
- ✓ When you announce and/or note your retirement on your law practice's social media pages.
- ✓ When you will take down your website (or replace your website with a banner announcing your retirement).

Step 3: Create a file retention policy NOW.

In your engagement letter or fee agreement, include a provision on how long you will retain your client files and what you will do with original documents when the time listed in the agreement or engagement letter has expired. This will reduce the work necessary at the time of retirement. *See* KBA Legal Ethics Opinion No. 15-01, provided in the Appendix, for guidance on creating a file retention policy.

Step 4: Complete a review of all closed client files.

- Make reasonable attempts to locate clients and return their files to them. Obtain receipts when returning files to clients. *See* sample receipt for file provided in Chapter 6 of this guide; *see also* ABA Formal Opinion 471 and KBA Legal Ethics Opinion No. 92-5, both provided in the Appendix, for guidance on providing a client file to a former client.
- If you are unable to locate a client, maintain the client file for the period of time set forth in your fee agreement or engagement letter. After the period of

time set forth in your fee agreement or engagement letter has expired, you may destroy the client file. *But see* the Note below.

- If you do not have a file retention policy in your written fee agreement or engagement letter, you must retain your files for a reasonable time. *See* KBA Legal Ethics Opinion No. 15-01, provided in the Appendix for guidance on creating a file retention policy.
    - Note, however, that you should not destroy original client documents, for example, original wills or other estate planning documents. If you are unable to locate a client and the client's file has original documents, you should continue to maintain original documents even after the time set forth in your fee agreement or engagement letter has expired.
- Be sure to keep your contact information with the Office of Attorney Registration up to date so your former clients can locate you when they need their original documents. *See* Rule 206(o).

Step 5: Complete a review of all active files.

When you are getting close to retirement, review all active client files to determine matters you will be able to complete prior to retirement.

- **Matters You Will Complete**.
    - After completing the representation, if your file contains original documents or other materials, return the originals to your client and retain a copy for your records. Obtain a receipt when returning original documents to your client. *See* sample receipt in Chapter 6; *see also* ABA Formal Opinion 471 and KBA Legal Ethics Opinion No. 92-5 in the Appendix.
    - If the matter you completed remains open (*e.g.*, divorce case with minor children), file a motion to withdraw or, if the client agrees to be represented by an attorney who is taking over your practice, file a substitution of counsel.
- **Uncompleted Matters.**
    - Be sure to review KRPC 1.16 carefully.
    - If there are matters you will not be able to complete, inform the affected clients that you will not be able to complete the representation prior to your departure from the practice of law.
    - Discuss with clients how they would like to proceed. When appropriate, request extensions of time and continuances. Send written confirmation of the extensions of time and continuances.

- Depending on your client's desires, assist the client in securing new counsel or introduce them to the attorney who is taking over or purchasing your practice.
- Transfer your client file to subsequent counsel or provide the file to your client. Obtain a receipt when transferring your file to subsequent counsel or returning your file to your client. *See* sample receipt in Chapter 6; *see also* ABA Formal Opinion 471 and KBA Legal Ethics Opinion No. 92-5 in the Appendix.
- If necessary, file a motion to withdraw or a substitution of counsel in cases that remain open after your departure.

Step 6: Resolve Remaining Funds Held in Trust Account.

Hopefully, on the date you close your practice, you will not be holding any funds in trust on behalf of clients or third parties because you have already distributed the funds to the individuals entitled to receive them. But, if you do have funds in your trust account belonging to clients or third parties, properly distribute all funds held on behalf of a client or third person prior to retirement. *See* KRPC 1.15.

If you have funds in your trust account belonging to an individual you have been unable to contact, determine whether you can transfer the funds to the Kansas State Treasurer's office under the Disposition of Unclaimed Property Act. If you have funds in your trust account that are unidentifiable, contact the disciplinary administrator's office for assistance in transferring the funds to the Client Protection Fund. *See* Rule 235(a)(2)(C) and Rule 241(c)(4).

After all funds have been properly distributed to clients and third persons, you must close your attorney trust account. Be sure to maintain complete trust account records for a period of five years. *See* KRPC 1.15(a).

Step 7: Meet with your Malpractice Insurance Carrier.

When you decide to retire, be sure to consult with your malpractice carrier regarding tail coverage. Discuss with your carrier what you need to do to ensure coverage for actions that occurred during your practice. Also, discuss with your carrier how long you should maintain coverage.

CHANGING YOUR LAW LICENSE FROM ACTIVE TO RETIRED

If you have reached age 65 prior to the beginning of the annual licensing period on July 1 and have retired from the practice of law, you may register your license as "retired." Attorneys registered as retired are not required to pay the annual registration fee or meet annual continuing legal education requirements. *See* Rule 206(b).

If you have not reached the age of 65, you may change your status to "inactive." Registering as an inactive attorney requires payment of an annual fee. Inactive attorneys, however, are not required to meet the annual continuing legal education requirements.

If you change your address, telephone number, or email address, you are required to update your contact information with the Office of Attorney Registration within 30 days. *See* Rule 206(o). Doing so provides former clients a way of contacting you should the need arise.

PRACTICING LAW AFTER REGISTERING AS RETIRED OR INACTIVE

Attorneys registered as retired or inactive may provide pro bono or low-cost direct legal services through an accredited law school clinic, a nonprofit program, or a nonprofit provider of legal services. *See* Rule 1404.

Kansas Legal Services sponsors events utilizing retired and inactive attorneys to provide access to justice. This is a great way to stay active but limit the amount of work that you do.

CHAPTER 3: CLOSING THE PRACTICE OF ANOTHER ATTORNEY

This chapter addresses the situation where an attorney has unexpectedly left the practice of law and a subsequent attorney has been appointed by the local chief judge of the district court under Rule 235 to protect the interests of the absent attorney's clients.

RULE 235 (APPOINTMENT OF COUNSEL TO PROTECT CLIENT INTERESTS)

Under Rule 235, if an attorney has been transferred to disabled status by the Supreme Court, disappeared or died, been suspended or disbarred and failed to comply with Rule 231, or has neglected client affairs, then the chief judge of the judicial district where the absent lawyer's office is located, may appoint counsel to protect the interests of the attorney's clients.

AUTHORIZED ACTIONS

Under Rule 235(a)(2)(A), the chief judge may authorize the Appointed Attorney to take the following actions:

1. Review and inventory the attorney's client files;
2. Access the attorney's trust account; and
3. Take any other action necessary to protect the interests of the attorney and the attorney's clients.

NOTE: Counsel appointed under Rule 235 must keep information confidential and must not disclose information unless necessary to carry out the duties stated in the order. *See* sample Rule 235 order provided in Chapter 6 of this guide.

STEPS TO TAKE AS THE APPOINTED ATTORNEY

Step 1: Generate a List of Open Cases. Hopefully, the Appointed Attorney will be able to generate a list of the attorney's active client matters from the records within the attorney's office or with the assistance of the attorney's administrative staff. A list of open cases can also be generated from contacting local court clerks (*e.g.*, municipal, district) and/or performing an online search of the Kansas District Court Public Access Portal.

Step 2: Inventory and Review Client Files. The Appointed Attorney should review files, identify active matters, and alert clients of the need to find substitute counsel. If a court appointed the attorney to provide representation to indigent clients, the Appointed Attorney should contact the presiding judge to request substitute counsel be appointed.

After the Appointed Attorney has made initial contact with each client and with each court where the attorney practiced law, the Appointed Attorney can then work to forward the client file to the client or to new counsel. The Appointed Attorney should obtain a receipt when returning the file to the client or transferring it to new counsel. *See* sample receipt in Chapter 6; *see also* ABA Formal Opinion 471 and KBA Legal Ethics Opinion No. 92-5 in the Appendix.

Step 3: Trust Account. The Appointed Attorney will need to gather all the trust account records including the trust account ledger, individual client ledgers, the monthly bank statements (going back at least two years), and the attorney's check register. As long as the trust account remains open, the Appointed Attorney should make arrangements to receive the monthly bank statements from the bank.

Presenting the Rule 235 order to the bank should provide the Appointed Attorney the appropriate authority to access the attorney trust account records and distribute the funds held in trust.

If the Appointed Attorney can determine the names of the owners of the funds held in trust with reasonable certainty, the Appointed Attorney should distribute the funds to the owners.

Any identifiable funds and/or property not claimed by the owner can be transferred to the Kansas State Treasurer's office under the Disposition of Unclaimed Property Act. In this event, the chief judge may issue an additional order to transfer the funds. *See* Rule 235(a)(2)(B).

If, after reasonable efforts have failed to identify the owner of excess funds in the trust account, the funds can be transferred to the Client Protection Fund. The disciplinary administrator's office is available to assist in making application to the chief judge for an appropriate order. *See* Rule 235(a)(2)(C) and Rule 241(c)(4).

If a client contacts the Appointed Attorney and makes a claim for funds held in trust but the records do not establish with reasonable certainty that the client's funds remain in the trust account, the Appointed Attorney should inform the client to contact the disciplinary administrator's office for information regarding how to file a claim for

reimbursement from the Client Protection Fund. Please note that a one-year statute of limitations is in place for claims made to the Client Protection Fund.

Step 4: Outstanding Invoices. Invoices or records showing amounts due to the attorney should be turned over to someone authorized to protect the financial interests of the attorney or in the event of the attorney's death, to the attorney's estate. This may include time records for work that has been done but not yet billed.

CHAPTER 4: WHAT IF? ANSWERS TO FREQUENTLY ASKED QUESTIONS

QUESTIONS FOR THE RETIRING ATTORNEY

Question: What can I do to plan ahead for a sudden exit from the practice of law due to an emergency, illness, or death?

Answer: A solo practitioner or an owner of a small firm with associates should develop a plan in the event of a sudden emergency, illness, or death. The plan should include:

1. A Triage Lawyer who is authorized to close, sell, or transfer your legal practice.
2. An Authorized Signer on your trust account to distribute funds in the event of your disability, death, or disbarment.
3. Key office information including client lists, trust account and operating account information, leases and contracts for office space, policies for malpractice insurance, staff names and contact information, and instructions on how to gain computer, email, and voicemail passwords.
4. Estate planning documents that include information about your law firm's succession plan.

Question: Who is going to do the work of closing the practice?

Answer: Any of the following individuals independently or together may be involved in winding down the practice.

1. The lawyer, if alive and competent, and available.
2. The executor of the lawyer's estate.
3. The conservator or guardian of the lawyer.
4. A Triage Attorney with whom prior arrangements have been made.
5. The lawyer's widow, widower, or next of kin.
6. The purchaser of the practice.
7. An Appointed Attorney appointed by a chief judge of a judicial district to protect clients' interests under Rule 235.

Question: What do you do with funds held in trust at the time you retire?

Answer: Ideally, you will not be holding any funds in trust on behalf of clients or third parties at the time you retire because you would have already distributed the funds your clients and third parties were entitled to receive. However, if you do have funds in your trust account, properly distribute all funds held on behalf of clients or third parties prior to retirement**.** *See* KRPC 1.15. If funds remain in your account, see Chapter 3. After all funds have been properly distributed to clients and third parties, you may close your attorney trust account. Be sure to maintain complete trust account records for a period of five years. *See* KRPC 1.15(a).

Question: What to do with active client files when you retire?

Answer: When you are getting close to retirement, review all active case files to determine which cases you will be able to complete prior to retirement.

- Cases that **CAN** be completed and closed out prior to retirement.
  - After the representation is completed, return any original documents you may have back to your client and retain a copy for your records. Notify your clients how long you will retain your copy before destroying it.
  - If necessary, file a motion to withdraw or be sure the attorney who is taking over the client's case has filed a substitution of counsel.
- Cases that **CANNOT** be completed prior to retirement.
  - Inform your client(s) that you will be retiring and that you will not be able to complete the representation prior to your retirement.
  - Discuss with the client how to proceed. When appropriate, request extensions of time and continuances.
  - Assist the client in securing new counsel or introduce the client to the attorney taking over/purchasing your practice.
  - Transfer your complete file to subsequent counsel or return your file to your client.
  - File a motion to withdraw or make sure the attorney taking over the case files a substitution of counsel.

HELPFUL TIP

If you change your address, telephone number, or email addresses, you must update the Office of Attorney Registration. *See* Rule 209(o). That way, if a client is looking for a file that you continue to maintain, the client will be able to contact you.

Question: When can you take retired status in Kansas?

Answer: If you have reached age 65 prior to July 1, you may change your registered status to retired at the time of registration. Attorneys registered as retired are not required to pay an annual fee or meet the continuing legal education requirements. *See* Rule 206(b)(4).

If you have not reached the age of 65, you may change your status to inactive. Inactive attorneys are not required to meet the continuing legal education requirements but must pay an annual fee.

Question: Can you practice law after you register as retired?

Answer: Under Rule 1404, attorneys registered as inactive or retired may provide *pro bono* work through an accredited law school clinic, a nonprofit program, or a nonprofit provider of legal services. Kansas Legal Services sponsors events utilizing retired and inactive attorneys to provide access to justice, which is a great way to practice in a limited way when retired or inactive. Prior to providing *pro bono* work make sure to comply with the requirements under Rule 1404.

QUESTIONS FOR THE ATTORNEY ASSISTING ANOTHER IN CLOSING THE LAW PRACTICE

Question: When is it necessary to close a law practice?

Answer: A law practice may have to be closed permanently or temporarily for any of the following reasons:

- The lawyer dies.
- The lawyer is physically or mentally unable to practice.
- The lawyer wants to retire.
- The lawyer is disabled.
- The lawyer is disbarred.
- The lawyer is suspended.
- The lawyer is elected or appointed to public office.
- The lawyer is leaving the state.
- The lawyer accepts an employment opportunity which requires leaving the practice.
- The lawyer walks out the door due to burn out.
- The lawyer suffers temporary or permanent problems with stress, drugs, alcohol, or money.

Question: I represent an attorney who is closing their practice. As such, I am familiar with sensitive information about the attorney. The attorney's former client is asking questions. What information can I give the former client?

Answer: If you represent the attorney who is closing their practice, you would be limited to disclosing only information that the attorney, your client, wished you to disclose. You would, however, want to make clear to the attorney's clients that you do not represent them and that they should seek independent counsel. If the attorney suffered from a condition of a sensitive nature and did not want you to disclose this information to the client, you could not do so.

If you do not represent the attorney who is closing their practice, consider what information may be necessary for the client to know and whether there are any obligations under substantive law or the Kansas Rules of Professional Conduct that either require or prohibit disclosure.

Question: I am a Triage Attorney. In addition to transferring files and closing the practice, am I permitted to represent the attorney's former client?

Answer: Whether you are permitted to represent the former client of the attorney closing their office depends on (1) whether the client wants you to represent them and (2) who else you represent.

If you are representing the attorney who is closing their office, you cannot represent their former clients on any matter against the attorney. You are prohibited from representing the attorney's former client on a malpractice claim against the attorney, representing the attorney's former client in a claim about the attorney fee, and counseling the attorney's former client to file a complaint with the disciplinary administrator's office.

If you do not represent the attorney closing their office, you are limited by conflicts arising from your other cases and clients. You must conduct a conflict check before undertaking representation or reviewing confidential information of a client of the attorney closing their office.

Even if a conflict check reveals that you are permitted to represent the client, you may prefer to refer the case to another attorney. A referral is advisable if the matter is outside your area of expertise or if you do not have adequate time or staff to handle the case.

In addition, if the attorney closing their office is a friend, agreeing to represent a client in a legal malpractice claim or fee claim against the attorney closing their practice may make you vulnerable to allegations that you did not zealously advocate on behalf of your new client. To avoid this potential exposure, you should consider providing the client with names of other attorneys to represent them.

Question: If there is an ethical violation found when closing the practice, am I required to tell the attorney's former clients?

Answer: If you are representing the attorney closing their office and find they violated an ethical rule, you are not obligated to inform the attorney's former clients of any ethical violations. Nor are you required to report any ethical violations to the disciplinary administrator's office if your knowledge of the

misconduct is a result of the confidential information obtained from your client, who is the attorney closing their office.

If you are an Authorized Signer on the trust account, you are not representing the attorney whose office is closing, and you are not representing any of the former clients of the attorney, you may still have a fiduciary obligation to notify the clients of any shortfall, and you may have an obligation to report the attorney to the disciplinary administrator's office.

If you are representing a former client of the attorney who is closing their office, you have an obligation to inform the client about any ethical rules violated and advise the client of available remedies. These remedies may include (1) filing a complaint with the disciplinary administrator's office and (2) filing a claim with the Client Protection Fund.

Question: Does the attorney still have malpractice insurance if the attorney is now out of practice?

Answer: When attorneys leave private practice, the attorney may extend their coverage for claims that arise after they leave private practice. This extension of coverage is called Extended Reporting Coverage (ERC) or tail coverage. It is generally available to all attorneys when they leave private practice.

Question: If the attorney stole client funds and I serve as the Triage Attorney or as new counsel for the client, will I face discipline for the attorney's conduct?

Answer: You will not face discipline for the attorney's conduct unless you assisted the attorney in the misconduct.

Whether you have an obligation to inform the attorney's former clients of the misappropriation depends on your relationship with the attorney and the attorney's former client.

If you are representing a former client of the attorney closing their office, and you fail to advise the client of their former attorney's ethical violations, you may be exposed to the allegations that you have violated your ethical responsibilities to your new client.

Question: The attorney closing their office wants me to serve as an Authorized Signer. Am I permitted to represent the attorney on issues related to the closure of their practice?

Answer: Although this generally works out fine, the arrangement may result in a conflict of fiduciary interests. As an Authorized Signer on the attorney's trust account, you would have a duty to properly account for the funds belonging to the former clients of the attorney. This duty could conflict with your duty to the attorney closing their office if (1) you were hired to represent them on issues related to the closure of their law practice and (2) there were misappropriations in the trust account and the attorney did not want you to disclose the misconduct to the clients. To avoid this potential conflict of fiduciary interests, the most conservative approach is to choose one role or the other.

CHAPTER 5: CHECKLISTS TO PREPARE TO CLOSE YOUR LAW PRACTICE

In this Chapter you will find checklists to utilize when creating a succession plan or preparing for retirement. Two checklists are included: a Checklist for Succession Planning and a Checklist for Closing Your Law Office. For information on how to close your trust account, please request a copy of the Kansas Lawyer Trust Account Handbook from the disciplinary administrator's office.

The following checklists are meant as guides to help you start this process. Depending on the circumstances surrounding your need to prepare for or close your law practice, additional considerations may be necessary outside of what is listed in these checklists.

CHECKLIST FOR SUCCESSION PLANNING

- ✓ Use retainer agreements that state you have arranged for a Triage Attorney to close your practice in the event of death, disability, impairment, or incapacity.
- ✓ Have a thorough and up-to-date office procedure manual that includes information on:
  - How to check for a conflict of interest;
  - How to use the calendaring system;
  - How to generate a list of active client files, including client names, addresses, and phone numbers;
  - Where client ledgers are kept;
  - How the open/active files are organized;
  - How the closed files are organized and assigned numbers;
  - Where the closed files are kept and how to access them;
  - The office policy on keeping original client documents;
  - Where original client documents are kept;
  - Where the safe deposit box is located and how to access it;
  - The bank name, address, Authorized Signer, and account numbers for all law office bank accounts;
  - The location of all law office bank account records (trust and general);
  - Where to find, or who knows about, the computer passwords;

  - How to access your voicemail (or answering machine) and the access code numbers; and
  - Where the post office or other mail service box is located and how to access it.

- ✓ Make sure all your file deadlines (including follow-up deadlines) are calendared.
- ✓ Document your files.
- ✓ Keep your time and billing records up to date.
- ✓ Avoid keeping original client documents, such as wills and other estate planning documents.
- ✓ Have a written agreement with a Triage Attorney who will close your practice that outlines the responsibilities involved in closing your practice. Determine whether the Triage Attorney will also be your personal attorney. Choose a Triage Attorney who is mindful of conflicts-of-interest.
- ✓ If your written agreement authorizes the Triage Attorney to sign general account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event.
- ✓ If your written agreement provides for an Authorized Signer for your trust account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event.
- ✓ Familiarize your Triage Attorney with your office systems and keep him or her apprised of office changes.
- ✓ Introduce your Triage Attorney and/or Authorized Signer to your office staff. Make certain your staff knows where you keep the written agreement and how to contact the Triage Attorney and/or Authorized Signer if an emergency occurs before or after office hours.
- ✓ 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 Triage Attorney and/or Authorized Signer.
- ✓ Renew your written agreement with your Triage Attorney and/or Authorized Signer annually.

- ✓ Review your retainer agreement each year to make sure that the name of your Triage Attorney is current.

CHECKLIST FOR CLOSING YOUR LAW OFFICE

- ✓ Calculate accounts receivable. Ensure sufficient cash is on hand or ensure that a sufficient amount will be coming in to sustain you through the announcement and closure of your practice.
- ✓ Stop taking new matters.
- ✓ Consult with potential successor attorneys. *See* KRPC 1.17.
- ✓ Inform your staff, in person and in writing. Provide them with a "script" as to the closure so that (1) they will know the true reasons for the closure and (2) they will accurately inform others.
- ✓ Finalize as many active files as possible or position them for a smooth transition.
- ✓ 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. Be prepared to make recommendations as to successor attorneys. Review KRPC 1.16, ensuring the withdraw can be accomplished without a material adverse effect on the client's interest. *See* letter advising that lawyer is closing practice provided in Chapter 6.
- ✓ Inform judges, court personnel, court reporters, and expert witnesses of your retirement.
- ✓ Inform other key professionals or service providers used by you and your office. (*e.g.*, CPAs, office supplier, computer, and electronics vendors).
- ✓ Give notice and terminate leases and rental agreements. Begin closing your business accounts.
- ✓ For cases with pending court dates, depositions, or hearings, discuss with your clients how to proceed. When appropriate, request extensions,

continuances, and resetting of hearing dates. Send written confirmation of the new appearance date or deadline to your client and to opposing counsel.

- ✓ Transfer client files to lawyers as your clients instruct and keep copies as needed.
- ✓ If litigation is still pending, be certain you have filed a motion to withdraw or that new counsel has filed a substitution of counsel. Later, review the court file to ensure that an order allowing you to withdraw or an order substituting new counsel has been entered.
- ✓ Return closed files and original documents to clients as they direct. Get receipts for all files returned to clients and keep copies of originals as needed.
- ✓ Prepare retained files for storage and later disposition or destruction pursuant to your document retention policy. *See* KRPC 1.15. Tell all clients where their closed files will be stored and whom they should contact to retrieve them. *See* KBA Legal Ethics Opinion No. 15-01, provided in the Appendix, for guidance on creating a file retention policy.
- ✓ Prepare and keep a master log of all files and their disposition, destruction, or storage.
- ✓ Send out final bills.
- ✓ Send out closing letters to current and former clients with thanks and final instructions. Provide them your new contact information.
- ✓ Collect final payments from clients.
- ✓ Settle, reimburse, and distribute trust account proceeds.
- ✓ Retain your financial documents. Even if you can hand off all client files, a lawyer still needs to retain financial records relating to their trust accounts and handling of other property for five years. Return any unearned fees to the client. Review KRPC 1.5 and 1.15 to ensure compliance.
- ✓ Close your trust account as specified in the Kansas Lawyer Trust Account Handbook by the disciplinary administrator's office.
- ✓ Notify insurance carriers (e.g., professional liability, premises liability) and consider "tail" coverage, which is coverage that continues to cover you for claims that arise after you terminate your practice.
- ✓ If applicable, cancel other memberships and office subscriptions.

- ✓ Prepare computer and data for long term storage and possible retrieval. Be consistent with your document retention policy.
- ✓ Determine disposition of furniture and other office property.
- ✓ Notify postal service and provide forwarding address.
- ✓ Notify the Office of Attorney Registration of any address change within 30 days.
- ✓ Review Rule 206 to ensure proper attorney registration based on your age and circumstances.
- ✓ For a reasonable time, put a message on your telephone system, website, and email reply indicating the office has been closed and that former clients may reach you at a particular number or email address.
- ✓ Send the name, address, and phone number of the person who will be retaining your closed files to the Office of the Disciplinary Administrator, 701 Southwest Jackson Street, First Floor, Topeka, Kansas 66603 or attydisc@kscourts.org. This allows the office to assist clients or other attorneys who may be looking for a file after the close of your law practice.

CHAPTER 6: SAMPLE FORMS AND LETTERS

The sample letters and forms provided in this chapter are to be a guide for attorneys as they plan for or navigate the closing of a law practice. Prior to utilizing a form contained in this chapter, attorneys must review the current Kansas Rules of Professional Conduct and substantive law to ensure documents comply with all relevant rules and law.

Retainer Agreement, Contingent Fee Agreement, and Engagement Letter Sample language

It is suggested that you include language in your retainer agreement, contingent fee agreement, or engagement letter notifying clients that you have a succession plan in place. Doing so provides them with the knowledge and assurances that you have their interests in mind and have even planned for the unexpected. Something as simple as the following can provide clients with the information they need:

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

Will Provision Examples
(Sample-Modify as appropriate)

Short Form:

With respect to my law practice, my personal representative is expressly authorized and directed to carry out the terms of the Agreement to Close Law Practice I have made with [insert attorney's name] on [date agreement executed]; if that [these] Agreement[s] are not in effect, my personal representative is authorized to enter into a similar agreement[s] with other attorneys that my personal representative, in their sole discretion, may determine to be necessary or desirable to protect the interests of my clients and dispose of my practice.

OR

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

Special Provisions For Attorney's Will: Instructions Regarding my Law Practice

Long Form:

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 the Kansas 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.

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

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

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

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

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

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

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

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

(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 reasonable period of time in accordance with applicable ethics and court rules, best professional practice, and relevant substantive law.

(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 employment 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 Kansas, 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.

My Executor shall notify the Office of the Disciplinary Administrator, 701 Southwest Jackson Street, First Floor, Topeka, Kansas 66603, Phone: 785-435-8200, of the sale of my law practice or the hiring of an attorney(s) to close down my law practice. If my Executor is unable to sell my law practice, or hire an attorney to close it down, my Executor will request assistance from the disciplinary administrator's office to work with the Chief Judge in my judicial district to enter an order under Rule 235 to protect my client(s) interest.

AGREEMENT TO CLOSE LAW PRACTICE IN THE FUTURE

If you chose to implement a long form Agreement to Close Law Practice in the Future, you need to consider including the following paragraphs:

1. Purpose
2. Parties
3. Effective Date
4. How a determination of death, disability, or incapacity will be made. This paragraph should comply with relevant substantive Kansas law dealing with disability or incapacitation.
5. Power of Attorney. You should also consider if a separate and distinct power of attorney document needs to be executed.
6. Consent to Close practice
7. General powers granted to the attorney closing the practice.
8. Specific powers granted to the attorney closing the practice, including:
    a. Access to Planning Attorney's Office
    b. Designation as Signatory on Financial Accounts
    c. Opening of mail and/or emails
    d. Possession of Property
    e. Access to and Inventory/Examination of Files
    f. Notification to Clients
    g. Transfer of Files
    h. Storage of Files and Attorney's Records
    i. Transfer of Original Documents
    j. Extensions of Time
    k. Litigation
    l. Notification to Courts and Others
    m. Collection of Fees and Return of Client Funds
    n. Payment of Business Expenses to Creditors
    o. Personnel
    p. Termination of Obligations
    q. Insurance
    r. Taxes
    s. Settlement of Claims
    t. Execution of Instruments
    u. Attorney as Fiduciary
    v. Power of Sale and Disposition

   w. Representation of Planning Attorney's Clients
   x. Access to Safe Deposit box
9. Preservation of Attorney-Client Privilege and Confidences and Secrets of Clients
10. Sale of Planning Attorney's Practice
11. Compensation/Payment for services
12. Resignation of Closing Attorney and Appointment of Successor Closing Attorney
13. Liability and Indemnification of Closing Attorney
14. Revocation, Amendment and Termination
15. Miscellaneous Provisions
    a. This should include notifying the disciplinary administrator's office of the implementation of the agreement to close the law practice and who clients should contact to locate files.

Examples of agreements to close a law practice can be found on the following pages. These examples come from Colorado and New York. Prior to adopting one of these examples, a Kansas licensed attorney would need to modify provisions to comply with current Kansas law. You may choose to consult with an attorney who practices in the area of estate planning to ensure your agreement is in compliance and will properly protect you and your clients' interests.

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 solo 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.

[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.

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 yet become effective. This release and authorization apply 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 institutionhas 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 toprepare 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 personnel 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 Attorney 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]

AUTHORIZATION AND CONSENT TO CLOSE LAW OFFICE

SHORT FORM

This Authorization and Consent is entered into this_____day of_____, 20____, by and between_____and_____.

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

1. Entering my office and utilizing my equipment and supplies as needed to close my law practice;
2. Opening and processing my mail;
3. Taking possession and control of all property in my law office, or incidental to my law practice including client files and records;
4. Examining files and records of my law practice and obtaining information concerning any pending matters that may require attention, except for those files in which Closing Attorney has a conflict of interest;
5. Notifying clients, potential clients, and others who appear to be clients that I have given this authorization and that it is in their best interest to obtain other legal counsel;
6. Scanning or copying my files;
7. Obtaining clients' consent to transfer files and clients' property to new counsel;
8. Transferring client files and property to clients or their new counsel;
9. Obtaining client consent to obtain extensions of time and contacting opposing counsel and courts/administrative agencies to obtain extensions of time;
10. Applying for extensions of time pending engagement of other counsel by my clients;
11. Filing notices, motions, and pleadings on behalf of my clients where their interests must be immediately protected and other legal counsel has not yet been retained;
12. Contacting all appropriate persons, entities and professional organizations that may be affected by my inability to practice law and notifying them

that I have given this authorization;

13. Signing checks to draw funds from or making deposits to my bank, attorney trust or escrow account and providing an accounting to my clients of funds held in trust; and
14. Contacting my professional liability insurer concerning claims and potential claims.

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

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

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

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

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

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

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

Closing Attorney may revoke this acceptance at any time prior to my death or

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

_____ _____

Planning Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

_____ _____

Closing Attorney Date

[INSERT ADDRESS & OTHER CONTACT INFO]

AGREEMENT TO CLOSE LAW PRACTICE

(Document courtesy of the Colorado Supreme Court Office of Attorney Regulation Counsel)

Between_____, hereinafter referred to as "Planning Attorney;" and_____, hereinafter referred to as "Assisting Attorney;" and_____, hereinafter referred to as "Authorized Signer."

1. **Purpose**.

   The purpose of this Agreement to Close Law Practice (hereinafter "this Agreement") is to protect the legal interests of the clients of Planning Attorney in the event Planning Attorney is unable to continue Planning Attorney's law practice due to death, disability, impairment, or incapacity.

2. **Parties**.

   The term *Assisting Attorney* refers to the attorney designated in the caption above or the Assisting Attorney's alternate. The term *Planning Attorney* refers to the attorney designated in the caption above or the Planning Attorney's representatives, heirs, or assigns. The term *Authorized Signer* refers to the person designated to sign on Planning Attorney's trust account and to provide an accounting for the funds belonging to Planning Attorney's clients.

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

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

4. Consent to Close Practice.

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

a. Entering Planning Attorney's office and using Planning Attorney's equipment and supplies, as needed, to close Planning Attorney's practice;

b. Opening Planning Attorney's mail and processing it;

c. Taking possession and control of all property comprising Planning Attorney's law office, including client files and records;

d. Examining client files and records of Planning Attorney's law practice and obtaining information about any pending matters that may require attention;

e. Notifying clients, potential clients, and others who appear to be clients that Planning Attorney has given this authorization and that it is in their best interest to obtain other legal counsel;

f. Copying Planning Attorney's files;

g. Obtaining client consent to transfer files and client property to new attorneys;

h. Transferring client files and property to clients or their new attorneys;

i. Obtaining client consent to obtain extensions of time and contacting opposing counsel and courts/administrative agencies to obtain extensions of time;

j. Applying for extensions of time pending employment of other counsel by the clients;

k. Filing notices, motions, and pleadings on behalf of clients when their interests must be immediately protected and other legal counsel has not yet been retained;

l. Contacting all appropriate persons and entities who may be affected and informing them that Planning Attorney has given this authorization;

m. Arranging for transfer and storage of closed files;

n. Winding down the financial affairs of Planning Attorney's practice, including providing Planning Attorney's clients with a final accounting and statement for services rendered by Planning Attorney, return of client funds, collection of fees on Planning Attorney's behalf or on behalf of Planning Attorney's estate, payment of business expenses, and closure of business accounts when appropriate;

o. Advertising Planning Attorney's law practice or any of its assets to find a buyer for the practice;and

p. Arranging for an appraisal of Planning Attorney's practice for the purpose of selling Planning Attorney's practice.

Planning Attorney authorizes Authorized Signer to sign on Planning Attorney's lawyer trust account(s).

Assisting Attorney and Authorized Signer will not be responsible for processing or payment of Planning Attorney's personal expenses. Planning Attorney's bank or financial institution may rely on the authorizations in this Agreement, unless such bank or financial institution has actual knowledge that this Agreement has been terminated or is no longer in effect.

5. **Payment For Services.**

   Planning Attorney agrees to pay Assisting Attorney and Authorized Signer a reasonable sum for services rendered by Assisting Attorney and Authorized Signer while closing the law practice of Planning Attorney. Assisting Attorney and Authorized Signer agree to keep accurate time records for the purpose of determining amounts due for services rendered. Assisting Attorney and Authorized Signer agree to provide the services specified herein as independent contractors.

6. **Preserving Attorney Client Privilege.**

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

7. **Assisting Attorney Is Attorney for Planning Attorney.** (Delete one of the following paragraphs as appropriate.)

   While fulfilling the terms of this Agreement, Assisting Attorney is the attorney for Planning Attorney. Assisting Attorney will protect the attorney client relationship and follow the Colorado Rules of Professional Conduct. Assisting Attorney has permission to inform the Office of Attorney Regulation Counsel/Client Protection Fund of errors or potential errors of Planning Attorney.

   While fulfilling the terms of this Agreement, Assisting Attorney is the attorney for Planning Attorney. Assisting Attorney has permission to inform Planning Attorney's clients of any errors or potential errors and instruct them to obtain independent legal advice. Assisting Attorney also has permission to inform Planning Attorney's clients of any ethics violations committed by Planning Attorney.

   OR:

   Assisting Attorney Is Not Attorney for Planning Attorney.

   While fulfilling the terms of this Agreement, Assisting Attorney is not the attorney for Planning Attorney. Assisting Attorney has permission to inform the Office of Attorney Regulation Counsel of errors or potential errors of Planning Attorney. Assisting Attorney has permission to inform Planning Attorney's clients of any errors or potential errors and instruct them to obtain independent

legal advice. Assisting Attorney also has permission to inform Planning Attorney's clients of any ethics violations committed by Planning Attorney.

8. **Authorized Signer Is Not Attorney for Planning Attorney.**

   While fulfilling the terms of this Agreement, Authorized Signer is not the attorney for Planning Attorney. Authorized Signer has permission to inform Planning Attorney's present and former clients of any misappropriations in Planning Attorney's trust account and instruct them to obtain independent legal advice and/or to contact the Office of Attorney Regulation Counsel.

9. **Providing Legal Services.**

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

10. **Informing Colorado Supreme Court.**

    Assisting Attorney agrees to inform the Colorado Supreme Court Office of Attorney Regulation Counsel where Planning Attorney's closed files will be stored and the name, address, and phone number of the contact person for retrieving those files.

11. **Contacting the Colorado Supreme Court.**

    Planning Attorney authorizes Assisting Attorney to contact the Office of Attorney Regulation Counsel concerning any legal malpractice claims or potential claims. (Note to Planning Attorney: Assisting Attorney's role in contacting the Office of Attorney Regulation Counsel will be determined by Assisting Attorney's arrangement with Planning Attorney. See Section 7 of this Agreement.)

12. **Providing Clients with Accounting.**

    Authorized Signer and/or Assisting Attorney agree[s] to provide Planning Attorney's clients with a final accounting and statement for legal services of Planning Attorney based on Planning Attorney's records. Authorized Signer agrees to return client funds to Planning Attorney's clients and to submit funds collected on behalf of Planning Attorney to Planning Attorney or Planning

Attorney's estate representative.

13. **Assisting Attorney's Alternate.** (Delete one of the following paragraphs as appropriate.)

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

    OR:

    If Assisting Attorney is unable or unwilling to act on behalf of Planning Attorney, Assisting Attorney may appoint an alternate (hereinafter "Assisting Attorney's

    Alternate"). Assisting Attorney shall enter into an agreement with any such Assisting Attorney's Alternate, under which Assisting Attorney's Alternate consents to the terms and provisions of this Agreement.

14. **Authorized Signer's Alternate.** (Delete one of the following paragraphs as appropriate)

    If Authorized Signer is unable or unwilling to act on behalf of Planning Attorney, Planning Attorney appoints as Authorized Signer's alternate (hereinafter "Authorized Signer's Alternate"). Authorized Signer's Alternate is authorized to act on behalf of Planning Attorney pursuant to this Agreement. Authorized Signer's Alternate shall comply with the terms of this Agreement. Authorized Signer's Alternate consents to this appointment, as shown by the signature of Authorized Signer's Alternate on this Agreement.

    OR:

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

15. Indemnification.

Planning Attorney agrees to indemnify Assisting Attorney and Authorized Signer against any claims, loss, or damage arising out of any act or omission by Assisting Attorney and Authorized Signer under this Agreement, provided the actions or omissions of Assisting Attorney and Authorized Signer were made in good faith, were made in a manner reasonably believed to be in Planning Attorney's best interest, and occurred while Assisting Attorney and Authorized Signer were assisting Planning Attorney with the closure of Planning Attorney's law practice. Assisting Attorney and Authorized Signer shall be responsible for all acts and omissions of gross negligence and willful misconduct.

This indemnification provision does not extend to any acts, errors, or omissions of Assisting Attorney as attorney for the clients of Planning Attorney.

16. Option to Purchase Practice.

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

17. Arranging to Sell Practice.

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

18. Fee Disputes to be Arbitrated.

Planning Attorney, Assisting Attorney, and Authorized Signer agree that all fee disputes among them will be decided by the Colorado Bar Association Fee Arbitration Program.

19. Termination.

This Agreement shall terminate upon: (1) delivery of written notice of termination by Planning Attorney to Assisting Attorney and/or Authorized Signer during any time that Planning Attorney is not under disability, impairment, or incapacity, as established under Section 3 of this Agreement; (2) delivery of written notice of termination by Planning Attorney's representative upon a showing of good cause; or (3) delivery of a written notice of termination given by Assisting Attorney and/or Authorized Signer to Planning Attorney,

subject to any ethical obligation to continue or complete any matter undertaken by Assisting Attorney and/or Authorized Signer pursuant to this Agreement.

If Assisting Attorney and/or Authorized Signer or their respective Alternates for any reason terminate this Agreement, or are terminated, Assisting Attorney and/or Authorized Signer or their respective Alternates shall (1) provide a full and accurate accounting of financial activities undertaken on Planning Attorney's behalf within 30 days of termination or resignation and (2) provide Planning Attorney with Planning Attorney's files, records, and funds.

[Planning Attorney]

Date: _____

STATE OF COLORADO)

) ss.

COUNTY OF_____)

This instrument was acknowledged before me on_____(date) by_____(name of person).

(SEAL)

_____
Notary Public

My commission expires:

[Assisting Attorney]

Date: _____

STATE OF COLORADO)

) ss.

COUNTY OF_____)

This instrument was acknowledged before me on_____(date) by_____(name of person).

(SEAL)

_____
Notary Public

My commission expires:

Assisting Attorney Alternate]

Date: _____

STATE OF COLORADO)

) ss.

COUNTY OF_____)

This instrument was acknowledged before me on_____(date) by_____(name of person).

(SEAL)

_____
Notary Public

My commission expires:

[Authorized Signer]

Date: _____

STATE OF COLORADO)

) ss.

COUNTY OF_____)

This instrument was acknowledged before me on_____(date) by_____(name of person).

(SEAL)

_____
Notary Public

My commission expires:

[Authorized Signer's Alternate]

Date: _____

STATE OF COLORADO)

) ss.

COUNTY OF_____)

This instrument was acknowledged before me on_____(date) by_____(name of person).

(SEAL)

_____
Notary Public

My commission expires:

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 apply 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.[1]

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:[2]

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;

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[1] 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.

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

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;

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 of 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

LETTER OF UNDERSTANDING

TO: _____

I am enclosing a Power of Attorney in which I have named_____as my attorney-in-fact. You and I have agreed that you will do the following:

1. Upon my written request, you will deliver the Power of Attorney to me or to any person whom I designate.

2. You will deliver the Power of Attorney to the person named as my attorney-in-fact (if more than one person is named, you may deliver it to either of them) if you determine, using your best judgment, that I am unable to conduct my business affairs due to disability, impairment, incapacity, illness, or absence. In determining whether to deliver the Power of Attorney, you may use any reasonable means you deem adequate, including consultation with my physician(s) and family members. If you act in good faith, you will not be liable for any acts or omissions on your part in reliance upon your belief.

3. If you incur expenses in assessing whether you should deliver this Power of Attorney, I will compensate you for the expenses incurred.

4. You do not have any duty to check with me from time to time to determine whether I am able to conduct my business affairs. I expect that if this occurs, you will be notified by a family member, friend, or colleague of mine.

_____

[Trusted Family Member/Attorney-in-Fact] [Date]

_____

[Planning Attorney] [Date]

LETTER ADVISING THAT LAWYER IS CLOSING LAW OFFICE

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

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

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

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

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

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

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

SAMPLE LIST OF CONTACTS AND IMPORTANT INFORMATION

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

ATTORNEY NAME:
Social Security #:

FIRM NAME:
OCA Registration #:
Federal Employer ID #:
CAF #:
Date of Birth:
Office Address:
Office Phone:
Office Box:
Home Address:
Home Phone:
Cell Phone:
Password:
E-mail Address:
Password:
URL:
Internet Service Provider:

SPOUSE/PARTNER:
Name:
Work Phone:
Cell Phone:
Employer:

FORMER EMPLOYER WITHIN PREVIOUS FIVE YEARS:
Name:
Office Address:
Office Phone:

OFFICE MANAGER:
Name:
Home Address:
Home Phone:
Cell Phone:

COMPUTER AND TELEPHONE PASSWORDS:
(Name of person who knows passwords or location where passwords are stored) Name:
Home Address:
Home Phone:
Work Phone:
Cell Phone:

SECRETARY/ADMINISTRATIVE ASSISTANT:
Name:
Home Address:
Home Phone:
Cell Phone:

BOOKKEEPER:
Name:
Home Address:
Home Phone:
Cell Phone:

LEGAL ASSISTANT:
Name:
Home Address:
Home Phone:
Cell Phone:

LANDLORD:
Name:
Address:
Phone:

LOCATION OF OFFICE LEASE:

DATE LEASE EXPIRES:

NAMED EXECUTOR:
Name:
Address:
Phone:

ATTORNEY FOR SPECIAL MATTERS:
Name:
Office Address:

Office Phone:

ACCOUNTANT:
Name:
Office Address:
Office Phone:

ATTORNEY ENGAGED TO CLOSE PRACTICE:
Name:
Office Address:
Office Phone:

LOCATION OF AGREEMENT ENGAGING ATTORNEY TO CLOSE PRACTICE: ATTORNEYS TO ASSIST WITH PRACTICE CLOSURE (if none appointed):
First Choice:
Office Address:
Office Phone:
Alternate Choice:
Office Address:
Office Phone:

LOCATION OF WILL AND/OR TRUST:
Access Will and/or
Trust by
Contacting:
Address:
Phone:

PROCESS SERVICE COMPANY:
Name:
Address:
Phone:
Email/fax:
Contact:

OFFICE-SHARER OR "OF COUNSEL":
Name:
Address:
Office Phone:

OFFICE PROPERTY/LIABILITY COVERAGE:
Insurer:
Address:

Phone:
Email/fax:
Policy No.:
Broker or other contact person:

LEGAL MALPRACTICE COVERAGE:
Insurer:
Address:
Phone:
Email/fax:
Policy No.:
Broker or other contact person:

HEALTH INSURANCE:
Insurer Name:
Address:
Phone:
Email/fax:
Policy No.:
Persons Covered:
Contact Person:

DISABILITY INSURANCE:
Insurer Name:
Address:
Phone:
Email/fax:
Policy No.:
Broker or other contact person:

LIFE INSURANCE:
Insurer Name:
Address:
Phone:
Email/fax:
Policy No.:
Broker or other contact person:

WORKERS' COMPENSATION INSURANCE:
Insurer Name:
Address:
Phone:
Email/fax:
Policy No.:

Contact Person:

PENSION:
Administrator:
Address:
Phone:
Institution:
Address:
Phone:
Account #:

STORAGE LOCATION:
Storage Company for Location:
Locker or Room #:
Address:
Phone:
Institution:
Address:
Phone:
Items Stored:

SAFE DEPOSIT BOXES (BUSINESS):
Institution:
Address:
Phone:
Obtain Key From:
Address:
Contact Person:

SAFE DEPOSIT BOXES (PERSONAL):
Institution:
Box No.:
Address:
Phone:
Obtain Key From:
Address:
Contact Person:

LEASES:
Item Leased:
Lessor:
Address:
Phone:
Expiration Date:

Item Leased:
Lessor:
Address:
Phone:
Expiration Date:
Item Leased:

LAWYER TRUST ACCOUNT:
IOLTA:
Institution:
Address:
Phone:
Account Number:
Other Signatory:
Address:
Phone:
Password:

OTHER CLIENT ACCOUNTS:
Name of Client:
Institution:
Address:
Phone:
Account:
Number:
Other Signatory:
Address:
Phone:
Password:

GENERAL OPERATING ACCOUNT:
Institution:
Address:
Phone:
Account Number:
Password:

OTHER ATTORNEY ACCOUNTS:
Institution:
Address:
Phone:
Account Number:
Other Signatory:
Address:

Phone:
Password:

BUSINESS CREDIT CARDS:
Institution:
Address:
Phone:
Account Number:
Other Signatory:
Address:
Phone:
Password:
Institution:
Address:
Phone:
Account Number:
Other Signatory:
Address:
Phone:
Password:

MAINTENANCE CONTRACTS:
Item Covered:
Vendor Name:
Address:
Phone:
Expiration Item:
Covered:
Vendor Name:
Address:
Phone:
Expiration:
Item Covered:
Vendor Name:
Address:
Phone:
Expiration:

OTHER IMPORTANT CONTACTS:
Name:
Address:
Phone:
Reason for Contact:

Name:
Address:
Phone:
Reason for Contact:

Name:
Address:
Phone:
Reason for Contact:

PROFESSIONAL MEMBERSHIP ORGANIZATIONS:
Name:
Address:
ID #:

ALSO ADMITTED TO PRACTICE IN THE FOLLOWING STATES, JURISDICTIONS, AND BEFORE THE FOLLOWING COURTS:
State of:
Bar Address:
Phone:
Bar ID #:

State of:
Bar Address:
Phone:
Bar ID #:

SAMPLE RULE 235 ORDERS

IN THE [INSERT DISTRICT #] JUDICIAL DISTRICT OF KANSAS

ADMINISTRATIVE ORDER [INSERT ORDER #]

Re: [Disabled Status] [Disappearance] [Death] [Suspension] [Disbarment] [Neglect] of [insert attorney's name]

NOW ON this_____date of_____202___, the court has been duly advised of facts demonstrating that Kansas attorney [insert attorney's name and bar number] of [insert city/town], Kansas, has [transferred to disabled status under Rule 234] [disappeared] [died] [been suspended from the practice of law] [been disbarred from the practice of law] [neglected client affairs] and that there is a need for the appointment of an attorney to protect the interests of [his/her] clients.

Wherefore, the court appoints [insert Appointed Attorney's name], Kansas Bar Number [insert bar #], pursuant to Rule 235 to review and inventory the attorney's client files and the attorney's trust account and take such action, including the distribution of funds, as may be necessary to protect the interests of the attorney or [his/her] clients.

[Insert Appointed Attorney's name] is authorized to seek orders to gain access to premises or accounts as deemed necessary to give effect to this order. The immunity set forth in Rule 238 shall be afforded to [insert Appointed Attorney's name] in the performance of the responsibilities set forth in this order. [Insert Appointed Attorney's name] is further authorized to access the attorney's trust account and to take any action deemed to be necessary to protect the interests of the clients.

[Insert Appointed Attorney's name] is authorized to delegate various legal duties to other attorneys with the approval of the client and/or the court. Pursuant to Rule 235(b), the attorneys shall not disclose any information contained in the client files except as necessary to carry out the order of the court.

IT IS SO ORDERED.

Dated this the_____day of_____, 202_.

_____

Chief Judge [insert Chief Judge's Name)

[Insert District #] Judicial District

SAMPLE RULE 235 ORDER WITH TRUST ACCOUNT INFORMATION

IN THE [INSERT DISTRICT #] JUDICIAL DISTRICT OF KANSAS

ADMINISTRATIVE ORDER [INSERT ORDER #]

Re: [Disabled Status] [Disappearance] [Death] [Suspension] [Disbarment] [Neglect] of [insert attorney's name]

NOW ON this_____date of_____202___, the court has been duly advised of facts demonstrating that Kansas attorney [insert attorney's name and bar number] of [insert city/town], Kansas, has [transferred to disabled status under Rule 234] [disappeared] [died] [been suspended from the practice of law] [been disbarred from the practice of law] [neglected client affairs] and that there is a need for the appointment of an attorney to protect the interests of [his/her] clients. This order is being submitted under seal to protect the financial account information contained within.

Wherefore, the court appoints [insert Appointed Attorney's name], Kansas Bar Number [insert bar #], pursuant to Rule 235 to review and inventory the attorney's client files and the attorney's trust account and take such action, including the distribution of funds, as may be necessary to protect the interests of the attorney or [his/her] clients.

[Insert Appointed Attorney's name] is authorized to seek orders to gain access to premises or accounts as deemed necessary to give effect to this order. The immunity set forth in Rule 238 shall be afforded to [insert Appointed Attorney's name] in the performance of the responsibilities set forth in this order. [Insert Appointed Attorney's name] is further authorized to access the attorney's trust account [trust account number], located at [bank name and address] and to take any action deemed to be necessary to protect the interests of the clients.

[Insert Appointed Attorney's name] is authorized to delegate various legal duties to other attorneys with the approval of the client and/or the court. Under Rule 235(b), the attorneys shall not disclose any information contained in the client files except as necessary to carry out the order of the court.

IT IS SO ORDERED.

Dated this the_____day of_____, 202_.

_____

Chief Judge [insert Chief Judge's Name)

[Insert District #] Judicial District

APPENDIX

Kansas Ethics Opinion

1992.

92-5.

July 30, 1992

KBA Legal Ethics Opinion No. 92-5

Date of Release: July 30, 1992

TOPIC: The financial burden to photocopy the client's file; is it the attorney's or the client's responsibility?

DIGEST: When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine "client's property" under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to under stand and interpret documents highlighted above. Such documents, being "client property" must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of "client property" may be copied at a reasonable expense tot he client, such "expense" to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.

REF: MRPC 1.16

The function of the Kansas Bar Association's ethics advisory service to respond to inquiries from Kansas lawyers concerning proposed conduct. The limitations on the service do not allow us to render an opinion regarding past conduct or the conduct of someone other than the inquirer. Any opinion approved for release by the Ethics-Advisory Committee of the Kansas Bar Association will be limited to interpretation of the Rules of Professional Conduct, as augmented by clear judicial case law statement. It is not within the committee's province to conduct extensive decisional research or express an opinion as to any question of law applicable to the contemplated conduct which is the subject of an inquiry.

The following constitutes only the opinion of the Committee on Ethics-Advisory Services, and is not in any way intended to be a guarantee of a particular result or a conclusion by appropriate authorities. Further, this letter constitutes the Committee's opinion based upon the facts and information contained in correspondence dated June 12, 1992 and attachments. It is based upon a review of the disciplinary rules, model rules of professional responsibility and conduct, and applicable case law. This opinion is not a grant of immunity from any form of legal or disciplinary proceeding.

The Kansas Bar Association expressly disclaims any liability in connection with the issuance of this opinion.

FACTS

After judgment was entered and monies distributed in personal injury litigation, Attorney "A"'s employment was terminated by client. All fees and expenses have been paid by client to "A". A 24-inch thick file was created during litigation. Per instructions, client's new attorney, "B" requested the file be transferred from former counsel. "B" asked "A" to photocopy whatever documents "A" felt necessary for his retention purposes, but at "A"'s expense, and the file be forwarded without cost to the client. "A" responded the file contains no documents or property originally brought in by the client, and that "B" may photocopy any part of the file at client's expense. "B" responds that MRPC 1.16(d) requires the surrender of papers and property to which the client is entitled.

FORWARD

Generally, KBA ethics opinions involve resolution of issues involving future conduct of requesting attorneys, no an ongoing dispute. Due to the timeliness of this situation and the fact the issue involved is of first impression for a KBA ethics opinion and of such importance to the Bar generally, we have decided to render an opinion in this matter for whatever value the parties may assign to it.

"A" has asked for construction of MRPC 1.16. As of the request, no litigation is known to be pending to which this opinion directly applies.

QUESTIONS

1. What is the definition of "client's property" under MRPC 1.16?

2. Under these facts, especially the fact that the litigation is concluded and all fees have been paid, must "A" make photocopies of the file for retention purposes at "A"'s expense?

3. If a photocopying fee may be allowed, what is the proper basis for that fee?

Appendix

ANALYSIS

Under the prior Model Code, this committee rendered an opinion that while a lawyer can retain his/her work product in some situations, such counsel cannot hold papers in such a manner to prejudice his client's rights in litigation. [1] That opinion deals with a charging lien, however, in that counsel was holding client's papers in order to get paid, which is allowed by statute to some degree, [2] but obviously applies to counsel who have not been paid. The correspondence requesting this opinion indicates that situation does not apply here. Fees and expenses of "A" have been paid. Thus we do not believe this prior opinion controlling to the original questions raised herein, especially construction of MRPC 1.16(d).

MRPC 1.16(d) allows lawyers to retain papers relating to the client "to the extent permitted by other law." The purpose of MRPC 1.16(d) is protection of the client's interests, and the attorney's interests are incidental thereto. Comment to the Kansas rule indicates lawyers may retain papers as security for a fee only to the extent permitted by law, even if unfairly discharged. "Fee" as used in the Rule is ambiguous but we believe applies to the attorneys fee, not fees for photocopying. "Permitted by law" means statutory law for Supreme Court rules, since they are the equivalent of law. [3]

Is the entire client "file" the attorney's property or the client's? If the latter, MRPC 1.16 requires return of that property to the client, and any cost of making photocopies of pertinent documents for attorney's records are the responsibility of the attorney. If the former, then documents the client wants copied that are not the client's property must be copied at client expense.

Under MRPC 1.16(d), lawyers discharged by clients have a duty to promptly surrender all papers and other property belonging to the client and to refund any unused advances for costs and any unearned fees. [4] One must first look to the fee agreement between "A" and the client or other documents indicating what documents in the file are considered "property belonging to the client." Assuming no provision In the fee contract resolves this issue in advance - a suggestion for future consideration but which must comport with MRPC 1.16 - "A" could argue that if it is proper under a fee agreement to have client reimburse "A" the cost of photocopying documents that are sent to other litigants in a dispute, absent duplication of costs why is it not appropriate for a client to pay the cost of photocopying a file before transfer after client has discharged counsel?

Case law indicates clients have a conditional right of access to attorney's files. Lawyers have a duty to grant clients access to information in their files needed by client to interpret the documents requested be prepared, or to otherwise provide access to the information in order for him to understand the services performed. The right of access is conditional in that it is enforceable by the client only to the extent information is needed. [5]

In this Missouri case the court held that without regard to property rights, construction of MRPC 1.16 imposes a duty to take steps to protect former client's interests by surrendering papers "to which the client is entitled." [6] The client, the Court held, is entitled to any documents "for which the client has bargained and paid." Moreover, the client has a right of access to the attorney's work product for information needed to understand those documents. Likewise, if the attorney is hired to represent the client in processing or defending a claim, the client must be entitled to those papers required by law to be filed in an appropriate tribunal (pleadings) and those related papers essential or necessary to make the former papers meaningful. [7]

Similarly, Massachusetts has virtually abolished its charging lien and has gone to a new interpretation or MRPC 1.16(d). [8] Massachusetts lawyers must always honor a client's request for return of all materials the client has supplied to the lawyer. In addition, lawyers must turn over all papers that have been filed in court as well as every investigatory or discovery document paid for by the client. The new rule also sets forth that lawyers can charge photocopying costs to the client fore requested materials, but caveats they cannot withhold any materials of any kind on grounds of nonpayment if to do so unfairly prejudices the client. [9] As to workproduct, the rule is unclear.

In the case in question, the litigation for which "A" was hired and paid is finished appeal times have run. Client simply wants to transfer the entire file to other, retained counsel. While further legal action may be on the horizon for this client on matters similar to what is contained in client's file, none is yet commenced. Further action on the central file itself is not contemplated. Thus there appears to be no client interest in need of immediate protection, thus requiring payment for photocopying does not unfairly prejudice the client. MRPC 1.16(d) requires attorneys to "take steps to the extent reasonably practicable to protect a client's interests," an independent duty existing by virtue of the Rules even if counsel is unreasonably discharged. While "A" must grant client access to "A"'s files - and apparently remains willing to do so - if an entire copy of the file is requested, the question is where should the cost for such reproduction lie?

First, the fact the litigation on which the attorney-client relationship was based is complete and fees have been paid is highly important to this opinion. That fact makes a statutory or common law charging lien inapplicable. In such situations, it is our opinion it is not unreasonable for client to pay the cost of the reproduction or unethical for "A" to

seek such reimbursement on that portion of the file which is not "client property." There is case law that client's files, thus photocopied, must be sent to new counsel at client's expense even if the unpaid fee question is left unresolved, and the fees were incurred through quasi-fraudulent activities of the client. [10] Further, the failure to protect a client's interests upon termination of representation by violating MRPC 1.16(d) may subject attorneys to discipline. [11]

In this instance, client rights are not prejudiced at this point. Client can review the file in "A"'s office and decide which documents, if any, he wants photocopied. Client can determine whether to make arrangements with "A" to photocopy the records, or arrange a situation whereby client takes files under counsel's supervision to a printing shop for reproduction.

Having stated the general concept, and absent case law in Kansas, we believe the Massachusetts rule has general merit. We suggest that a reasonable definition of what constitutes "client property" under MRPC 1.16(d) is : (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent tot he case for which pleadings and other court papers and such other documents as are necessary to understand and interpret documents highlighted above. [12] Such documents, being "client property" must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents appears inconsistent with MRPC 1.16(d).

Former counsel may photocopy "client property" documents, but at counsel's expense. Other non workproduct documents in the file not amounting to client property may be copied if requested, but at a reasonable expense to the client.

Attorney Work-product

One preeminent publication on legal ethics indicates it is not unethical for a lawyer to retain that portion of a file labeled "work-product," unless other law in the jurisdiction is clearly to the contrary. [13] We believe inclusion of this factor into the definition of client property under MRPC 1.16(d) is appropriate, since we find nothing in the ABA coverage of that rule indicating a contrary holding. It further is consistent with out previous Legal Ethics Opinion 85-36. Work product is variously described in the literature, but generally includes recorded mental impressions, research notes, legal theories, and unfiled pleadings included in client's file. [14] Workproduct has been held to be the attorney's property and may be retained even when the client has paid the outstanding fee. [15]

Reasonable Expense

We caution that any cost assessed per photocopy to a client should be bled dry of any "profit," and should reimburse counsel only for the approximate actual cost of such items. We find nothing in the Model Rules which permit unusually high photocopying charges. [16]

OPINION

When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine "Client's property" under MRPC 1.16(d) means counsel may charge a reasonable photocopy fee on that portion of a file which does not constitute "client's property," and which is requested to be photocopied by the client. "Client's property" includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent tot he case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand and interpret documents highlighted above. Such documents, being "client property" must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of "client property" may be copied at a reasonable expense to the client such "expense" to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.

If counsel wants to retain copies of client's property for his file, such is done at counsel's expense, not the client's.

[1] Kansas LEO 85-36.

[2] K.S.A. 7-108. No opinion is rendered herewith as to whether MRPC 1.16 conflicts with this statute.

[3] State v. Mitchell, 234 Kan 185, 672 P.2d 1, 9 (1983).

[4] ABA/BNA Lawyers Manual on Professional Conduct, p. 31-1202 (1991 Ed.).

[5] Corrigan v. Armstrong, Teasdale, Schlafly, Davis and Dicus, (Mo. Ct.App. E.Dist., No. 59165, 1/7/92).

[6] Id.

[7] See digested case at ABA/BNA Lawyer's Manual on Professional Conduct, Current Reports, January 29, 1992, p. 430.

[8] We shall not delve into the constitutional question of whether a statutory charging lien regulating attorney conduct is superseded by later Model Rules, as answering

such questions gets into Separation of Powers issues.

[9] ABA/BNA Lawyer's Manual on Professional Conduct, Current Reports, November 20, 1991, p. 359.

[10] In Frenkel v. Frenkel, Landi & Kessler, intervenor, 252 N.J. Super. 214, 599 A.2d 595 (1991), in a case where a divorce file was transferred between former counsel and newly retained counsel, the New Jersey Appeals Court interpreted a Supreme Court professional ethics rule to mean that even if a lawyer is not fully paid, there is no justification for refusing to deliver to the client whatever the client was entitled to receive. See Opinion 554, 115 N.J.L.J. 565, 579 (1985). In Frenkel, the Court held that the file must be transferred but a photocopying charge was appropriately paid by client and this was true even when the client ran up legal fees on Landi & Kessler after taking out bankruptcy.

[11] Arizona has been particularly tough on attorneys who violate MRPC 1.16(d), including suspension or disbarment. See In re James Henry, 811 P.2d. 1078 (Az., 1991); In re Nefstead, 789 P.2d. 385 (Az. 1990), for representative cases. For a pre-MRPC case involving Kansas law, see State v. Smith, 228 Kan. 343, 614 P.2d. 439 (1980), which deals with neglect to return case files to client for transfer to new counsel. No indication was made in Smith whether the attorney had been paid, or whose responsibility it was for photocopy charges.

[12] Other states like Minnesota which does not allow a retaining lien indicates the documents include papers the property clients provide the lawyer, litigation materials such as pleadings, motions, discovery and legal memorandums that have been executed, served or filed; all correspondence; and all items for which the lawyer has advanced costs and expenses, including depositions, expert opinions, business records and witness statements. Minnesota Formal Ethics Opinion 13 (1989).

[13] Hazard & Hodes, The Law of Lawyering, pp. 485-86 (2nd. ed., 1990).

[14] Bounsel should check the Kansas caselaw for a better Kansas Supreme Court definition.

[15] ABA/BNA Manual, p. 41:2104: See Arizona Ethics Opinion 81-32 (1981); also see Federal Land Bank of Jackson v. Federal Intermediate Credit Bank of Jackson, 127 FRD 473, 5 Law. Man. Prof. Conduct 284 (DC SMiss 1989), and Annotation; Rights and Remedies of Client as Regards Papers and Documents on Which Attorney has Retaining Lien, 3 ALR2d 148 (1949).

[16] An "inconvenience fee," as our medical brethren like to term it when providing medical records.

KBA Legal Ethics Opinion No. 15-01

September 28, 2015

TOPIC: Destruction or retention of client files.

DIGEST: How long to retain client files or to destroy them must be considered on a case-by-case basis, but generally it is acceptable to destroy client files after ten years.

Date of Request: September 15, 2015.

REFERENCES: Rule 1.15 (client property); Rule 1.6 (confidentiality), KRPC.

FACTS:

Counsel has possession of client files going back several decades, and inquires how long client files must be retained before they can be destroyed.

QUESTIONS:

1. What considerations must be used when deciding how long to retain client files?

2. What steps should be taken in the return, retention or destruction of client files?

3. How long must a lawyer retain client files before they can be destroyed? Can a specific period be set?

ANALYSIS:

Counsel advises that her firm has retained client files going back several decades, and has requested an opinion on the length of time client files must be retained before being destroyed. Unfortunately, this is not a question to which there is an easy answer. Instead, it requires a number of considerations.

Rule 1.15, Kansas Rules of Professional Conduct ("KRPC") provides in pertinent part as follows:

> (d) . . . (2) The lawyer shall: . . . (iv) Promptly . . . deliver to the client as requested by a client the . . . properties in the possession of the lawyer which the client is entitled to receive.

Further, any information pertaining to the representation of a client is confidential. Rule 1.6(a) and (c), KRPC, provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b). . .

> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
>
> And the Comment to Rule 1.6 clarifies this duty:
>
> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.
>
> In view of these requirements then, the following considerations apply.

First, because the file belongs to the client (Rule 1.15, KRPC), an effort should be made to return the file to the client. This also serves the beneficial purpose of decreasing the volume of files to be stored by the lawyer at the lawyer's expense. Returning the file to the client at the conclusion of the engagement would serve to bring closure and reduce the amount of files to be stored by the lawyer.

Second, the lawyer must determine what constitutes the "file" for purposes of retention or destruction. Some documents, such as wills, trusts, original loan documents, certificates, deeds, long-term leases and contracts, and engagement and closing letters, have intrinsic value and should be retained permanently. Others may be needed for a longer period of time after their generation than others. For this reason, no hard-and-fast rule can be declared as applicable to all documents retained by a lawyer at the conclusion of the representation.

Third, and most importantly, the lawyer must determine how long to retain the file before destroying it. State law or administrative regulations may require that particular types of documents be maintained for a specified period. Such issues are beyond the scope of this opinion, and lawyers are referred to those statutes or regulations before adopting a policy or taking any action. Typically, files on criminal matters should be maintained as long as the client or former client is alive, and files relating to claims by minor children should be maintained for a reasonable time after the children reach the age of majority.[1]

For those parts of the file not returned to the client, the firm must decide what to retain and for how long. Some states have adopted provisions within Rule 1.15 to specify a stated time period after which destruction is permitted.[2] Missouri Rules require lawyers to store client files for ten years after a representation terminates, absent other arrangements.[3] At the end of the ten-year period, the Missouri lawyer may destroy the file, except for items with intrinsic value, unless the lawyer knows or reasonably should know that a disciplinary complaint, government investigation, or litigation that relates to the representation is pending.[4]

Kansas has not adopted such a provision in its Rules. In those states without a specific rule, the state bar ethics opinions state that, when a representation is concluded, if a client advises that he does not want all or part of its file or provides no direction, the firm must maintain the file for a "reasonable" time.

> In determining the length of time for retention of 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 than can be expected to arise.[5]

According to a California federal court, under California Rule 4-100(B)(3) lawyers are required to keep client documents for five years, but that Rule does not permit a lawyer to keep copies of confidential records provided by the opposing party.[6]

The ethics opinions from other states which have considered this issue are inconsistent, but generally have concluded that a reasonable period is between five and ten years. See, e.g., See also Ohio Informal Ethics Opinion 00-02 (April 25, 2000)(**five years**);[7] Nebraska Opinion 12-07 (2012) (**five years**); Arizona Opinion 08-02 (discussing Arizona Opinion 91-01; **five years** is a safe "default option"); West Virginia Opinion 2002-01 (**five years**); Michigan Formal Opinion R-12 (Sept. 27, 1991) (**five years**); New Mexico Ethics Advisory Opinion 2005-01 (March 18, 2005) (**five years**); Pennsylvania Bar Association Formal Opinion 2007-100 (2007) (**five to seven years**); Iowa Opinion 08-02 (Mar. 4, 2008) (**six years** pursuant to written policy; **ten years** if no written policy); South Carolina Bar Ethics Adv. Op. #98-33 (1998) (**six years**, though files must be kept longer if destruction of the file would "prejudice the client;" SC Bar Ethics Adv. Op. #95-18 (1995)); Nassau County, New York Opinion 06-02 (June 28, 2006) (**seven years**); New Jersey Opinion 692 (Jan. 22, 2001) (**seven years**); Rhode Island Ethics Opinion 94-9 (1994) ("A lawyer may dispose of closed client files after **seven years**."); Washington State Bar Association, Guide to Best Practices for Client File Retention and Management, March 2010, available online at http://www.wsba.org/~/media/Files/Resources_Services/Ethics/Guide%20to%20Best%20Practices%20for%20Records%20Management%20310.ashx (**seven to ten years**).

The foregoing summary from other states is consistent with other research on the subject:

> The grand total for the file retention has been put by experts at anywhere from seven to fifteen years; clearly, there is much room for subjective judgment, although a conservative interpretation is probably called for. In addition, files for some case types are generally retained permanently. These include reorganizations, Chapter 11 bankruptcies, and estate planning files.[8]

The American Bar Association counsels "discretion," and declines to specify an appropriate period of time.

> 1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. . . .
>
> 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 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 except will be preserved by the lawyer.
>
> 4. In determining the length of time for retention of 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.[9]

Thus, based on the Committee's research, it appears that most of the ethics opinions have found an appropriate document retention period to be between five to ten years to preserve files and to protect client interests. Firms also should consider their own interests in determining a reasonable retention period, especially because lawyers may be exposed to professional liability claims more than five years after a representation ends. Generally speaking, records should be kept long enough to preserve evidence in the event it is needed in defense of a professional liability claim. The initial retention period therefore should be long enough to cover most professional liability limitations periods, including statutes of repose. With a statute of repose applicable to legal malpractice claims, a firm's general retention period should be at least as long as the statute of repose, with some additional time to allow a prospective claimant to file and serve process in an action against the firm. Kansas provides a period of repose no longer than eight years after the act giving rise to the cause of action in cases where the plaintiff is under a disability.[10]

While it is impossible to predict with certainty the applicable limitations period for each and every client matter handled by the firm, a good rule of thumb for an initial retention period for most files is ten years, since that span exceeds the statutes of limitations and repose applicable to most professional liability claims.

Estate and trust files are somewhat different and should be returned to the client, or retained indefinitely. Again, this can be addressed in the engagement letter and at the conclusion of the representation, including a warning that the files will be destroyed at the end of ten years unless claimed by the client sooner.[11] In part, one would need estate information to determine the tax basis value of assets going forward, and some of that information may be needed for the spouse's estate. If things are handled through a probate proceeding, then all records and valuations (although not necessarily all appraisals) should be recorded in the court file. In a trust setting, this information would not be easily available, and should be maintained indefinitely if not returned to the client.

In most instances, the firm will need to take reasonable steps to notify the client that it intends to destroy the documents before doing so.[12] The firm might be required to mail the notice to the client's last known address by regular or certified mail and wait a reasonable time for a response (e.g., 60 – 180 days).[13] This obligation may be satisfied in the engagement letter[14] or in a file closing letter. If a firm cannot locate a client, and has not otherwise advised the client of its retention and destruction policy, the lawyer may treat the file as abandoned property and

retain it for the time required by the state's abandoned property law, and then turn it over to the State Treasurer under the Kansas Unclaimed Property Act.[15]

Fourth, once the decision has been made to destroy files, steps must be taken to ensure that the files are totally destroyed. Confidential client information protected by Rule 1.6, KRPC is likely contained in those files, and the lawyer should take reasonable steps to make sure that such information cannot be received or read by anyone else. [16] This likely means the documents should be shredded or burned, and not just thrown out with the trash.

The Nebraska Bar's conclusion on this issue is apropos:

> The retention or destruction of client files is primarily a matter of good judgment, weighing the clients' interests and expectations in the retention of file materials, the reasonably expected future usefulness of the file contents, the careful preservation of confidentiality, and the availability of storage space.[17]

Similarly, the Vermont Ethics Advisory Opinion Committee declines to express a stated period, but counsels thoughtful consideration:

> A lawyer must exercise discretion in determining the necessary length of time for the subsequent retention or disposition of a client's file. The contents of certain files may indicate the need for a longer retention period than do the contents of files of similar age based on their relevance and materiality to situations which may foreseeably arise. Moreover, in disposing of a client's files, a lawyer should protect the confidentiality of its contents. If possible, notice may be given the client as to the date of disposition, affording the client the opportunity to take possession of all or part of the material in the file.[18]

CONCLUSION.

In conclusion, the Committee offers the following guidance.

1. Without prior notice and client consent, a lawyer should not destroy or discard items that clearly belong to the client, the return of which could reasonably be expected by the client, including original records. Prior notice can be provided in the engagement letter or the disengagement letter.[19]

2. Care should be taken not to destroy or discard any materials that may still be necessary or useful in the assertion or defense of the client's position, or of the lawyer's position adverse to the client, where the applicable statute of limitations, including the statute of repose, has not expired. Other than documents where originals must be maintained (e.g. where original signatures must be proven), file materials may be digitized and stored electronically.

3. Attention should also be paid to governmental or law-imposed requirements, e.g., federal tax preparation requirements.[20]

4. A file should not be destroyed without being screened so as to determine that consideration has been given to the matters set forth above.

5. In disposing of a file, a lawyer should always protect the confidentiality of its contents, as prescribed by Rule 1.6, KRPC. Destruction of such files should be complete.

6. An index of destroyed files should be retained by the lawyer.

7. Files on the administration of estates and trusts should be kept indefinitely, unless returned to the client.

8. Within these guidelines, it would generally be safe to destroy remaining client files ten years after the conclusion of the representation.

J. Nick Badgerow, Chairman, for the Committee

September 28, 2015

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[1] See generally New Jersey Opinion 692 (Supp.) (Oct. 28, 2002); Arizona Opinion 98-07 (June 3, 1998).

[2] Alabama, Alaska, Colorado, Florida, Georgia, North Dakota, and South Carolina have a **six-year** records retention period. Illinois, Mississippi, and Nevada use a **seven-year** records retention period. Connecticut defers to applicable law as to the length of the retention period. New Hampshire's rule incorporates the New Hampshire Supreme Court's rules with respect to required recordkeeping, and uses a retention period of **six years** after final distribution, rather than measuring the period from the date of the conclusion of the representation. New Jersey uses a records retention period of **seven years** after the event recorded, rather than measuring the period from the date of the conclusion of the representation. New York specifies seven kinds of records that must be maintained, and uses a **seven-year** retention period. Production of records is required in certain enumerated circumstances, specifying that all books and records so produced shall be kept confidential, and members of dissolving firms are directed to make arrangements for maintaining the required records. Wisconsin uses a **six-year** record retention period, and specifies six classes of required records. The records must be submitted to the Board of Attorneys Professional Responsibility at its request or upon direction of the state supreme court. ABA, *Materials On Client File Retention,* available online at http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch/materials_on_client_file_retention.html

[3] Rule 4-1.22, Rules of the Missouri Supreme Court.

[4] *Id*.

[5] ABA Informal Opinion 1384 (Mar. 14, 1977).

[6] *Cruz v. Dollar Tree Stores, Inc*., 2012 U.S. Dist. LEXIS 68685, at *6-9, 2012 WL 1745539, at *2 (N.D. Cal. May 16, 2012).

[7] In that case, files "closed for at least **five years** may be disposed of (subject to the caveat that original or important client papers be retained and that efforts to ascertain the clients' desires have been unavailing)" (emphasis added).

[8] Phelps and Olson, "When May I Destroy My Old Files?," Florida Bar Journal (January 1994), 58, at 62. See also, Bassingthwaighte, "What Do I Do With All These Old Files?," Kansas Bar Journal, February 2003, 15 (ALPS recommends holding files for seven to ten years).

[9] ABA Informal Ethics Op. 1384 (1977).

[10] K.S.A. 60-515(a), other than actions for the recovery of real property or a forfeiture.

[11] See discussion and a suggested form engagement letter at KBA Ethics Handbook, *Lawyer/Client Contract* §14.15 (2015).

[12] See, e.g., Nebraska Opinion 12-07 (undated); New Jersey Opinion 692 (Jan. 22, 2001); District of Columbia Opinion 283 (July 15, 1998).

[13] See also Missouri Informal Opinion 20000082 (Mar.–Apr. 2000) (30-day notice insufficient).

[14] See footnote 11, *supra*.

[15] K.S.A. 58-3934, *et seq*. See Kansas Ethics Opinion 98-5 (1998); see also Arizona Opinion 08-02.

[16] "In disposing of a file, a lawyer should protect the confidentiality of the contents." ABA Informal Ethics Op. 1384 (1977).

[17] Nebraska Ethics Opinion 88-3 (1988).

[18] Vermont Ethics Opinion 97-08 (1997).
[19] See footnote 11, *supra*.
[20] E.g., Internal Revenue Code §6107 (b).

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 471 **July 1, 2015**

Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

This opinion addresses the ethical duties of a lawyer pursuant to the ABA Model Rules of Professional Conduct, when responding to a former client's request for papers and property in the lawyer's possession that are related to the representation. The opinion does not address a client's property rights or other legal rights to these materials.

A lawyer has represented a local municipality for 10 years pursuant to a contract for legal services. The contract term expired. After publishing a request for proposals, the municipality chose a different lawyer to provide the municipality with future legal services. The municipality requested that the lawyer provide the municipality's new counsel with all files – open and closed. The lawyer has been paid in full for all of the work.[1] The lawyer asks what materials must be provided to the former client.[2]

The scope of a lawyer's ethical duty pursuant to the Rules of Professional Conduct to provide a former client with papers and property to which the client is entitled at the termination of the representation arises with regularity. Many jurisdictions, through case law on property rights, agency law, or ethics opinions under the jurisdiction's Rules of Professional Conduct, have examined the question and determined which papers and property a lawyer must return, reproduce, and/or provide to a client. There may be other obligations defined in a jurisdiction's case law or court rules.[3] Lawyers are cautioned to review the law in the jurisdiction in which

1. Because the lawyer has been paid in full, this opinion does not address retaining liens.

2. The ABA Model Rules of Professional Conduct do not directly address the length of time a lawyer must preserve client files after the close of the representation. Many jurisdictions provide guidance on this issue through court rule or ethics opinions.

3. *See*, Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92 (Mo. 1992) (client has a conditional right of access to a lawyer's notes, research, and drafts if the client needs the notes, research, and drafts to understand completed documents).

they practice because lawyers have been disciplined for failing to surrender to the client papers and property to which the client is entitled.[4]

ABA Informal Ethics Opinion 1376 (1977) addressed a lawyer's ethical duty to deliver files to a former client. The opinion interpreted Rule 9-102(B)(4) of the Model Code of Professional Responsibility that read, "A lawyer shall: [P]romptly pay or deliver to the client as requested by the client the . . . properties in the possession if the lawyer which the client is entitled to receive." It concluded: "The attorney clearly must return all of the materials supplied by the client to the attorney. . . . He must also deliver the 'end product' . . . On the other hand, in the Committee's view, the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purpose in working on the client's problem."

That opinion was issued prior to the adoption of the Model Rules of Professional Conduct and prior to advances in technology that have affected virtually all aspects of the practice of law, including how lawyers create, communicate, use, and store materials related to client representations. This opinion clarifies and updates a lawyer's ethical duty to provide a former client with papers and property pursuant to Model Rules of Professional Conduct 1.15 and 1.16, and addresses practical considerations attendant to those obligations.

Model Rule 1.15 provides that a lawyer must safeguard a client's property and promptly deliver it to the client upon the client's request.[5] By its terms, Rule 1.15 applies to a client's and third party's money and to "other property" that comes into a lawyer's possession in connection with a representation.[6] Although not specifically defined in the Rule, "other property" may be fairly understood to include, for example, (a) tangible personal property, (b) items with intrinsic value or that affect valuable rights, such as securities, negotiable instruments, wills, or deeds and (c) any documents provided to a lawyer by a client.[7] Therefore, as an initial matter, and in the absence of other law[8] or a valid dispute under Rule 1.15(e), the lawyer must return all property of the municipality that the municipality provided in connection with the representation. *See* ABA Informal Ethics Opinion 1376 (1977). This would necessarily include original documents provided by the client.

4. *See In re* Brussow 286 P.3d 1246 (Utah 2012). In Brussow, the respondent represented a client in post-dissolution matters and was publicly sanctioned for refusing to turn over the file to the client. Brussow argued that the client owed him money for the cost of deposition transcripts which the client's second husband agreed to pay. The Utah Supreme Court noted that Utah's Rule 1.16 "differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses." *Id.* at 1252. Brussow was also admonished for failing to account for fees paid in advance. *See also In re* Thai, 987 A.2d 428 (D.C. 2009). Thai delayed returning a client's file and "actively obstructed the efforts of his former client and the successor attorney to obtain the file." *Id.* at 430. Thai was disciplined for violating Rule 1.16 as well as for violations of Rules 1.1, 1.3, and 1.4 involving the same client matter.

5. ABA MODEL RULE 1.15, Safeguarding Property.

6. ABA MODEL RULE 1.15(a).

7. This obligation exists with respect to all materials whether in paper or electronic form. *See* ABA MODEL RULE 1.0(n) defining writing as "a tangible or electronic record of a communication . . . including audio or video recording, and electronic communications." *See also* N.H. Bar Ass'n Advisory Op. 2005-06/3 (2005).

8. *See* ABA MODEL RULE 1.15, cmt. [4] for a discussion of third party liens. *See* ABA MODEL RULE 1.16(d) and cmt. [9] and ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1520 (1986) for a discussion of lawyer retaining liens.

When a representation ends, ABA Model Rule 1.16(d) mandates that the lawyer take steps that are "reasonably practicable to protect a client's interests . . ."[9] "Reasonable," when used to describe a lawyer's actions "denotes the conduct of a reasonably prudent and competent lawyer."[10] These steps include, but are not limited to, "surrendering papers and property to which the client is entitled."[11]

The Model Rules do not define the "papers and property to which the client is entitled," that the lawyer must surrender pursuant to Rule 1.16(d). Jurisdictions vary in their interpretation of this obligation. A majority of jurisdictions follow what is referred to as the "entire file" approach.[12] In those jurisdictions, at the termination of a representation, a lawyer must surrender papers and property related to the representation in the lawyer's possession unless the lawyer establishes that a specific exception applies and that certain papers or property may be properly withheld.[13] Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person;[14] materials containing a lawyer's assessment of the client;[15] materials containing information, which, if released, could endanger the health, safety, or welfare of the client or others;[16] and documents reflecting only internal firm communications and assignments.[17] The entire file approach assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.

Other jurisdictions follow variations of an end-product approach.[18] These variations distinguish between documents that are the "end-product" of a lawyer's services, which must be surrendered and other material that may have led to the creation of that "end-product," which need not be automatically surrendered. Under these variations of the end-product approach, the lawyer must surrender: correspondence by the lawyer for the benefit of the client;[19] investigative reports and other discovery for which the client has paid;[20] and pleadings and other papers filed with a tribunal. The client is also entitled to copies of contracts, wills, corporate records, and

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9. ABA MODEL RULE 1.16, Declining or Terminating Representation.

10. ABA MODEL RULE 1.0(h), Terminology.

11. ABA MODEL RULE 1.16(d). This duty applies even when the lawyer believes the client's discharge is unfair. *See* ABA MODEL RULE 1.16, cmt. [9].

12. *See, e.g.,* Iowa Sup. Ct. Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (2007) (failure to return entire file to client violates disciplinary rules); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); Ariz. Formal Op. 04-01 (2004); Colo. Bar Ass'n. Formal Op. 104 (1999); D.C. Bar Op. 333 (2005); Or. Bar Ass'n Formal Op. 2005-125 (2005); Va. State Bar Op. 1399 (1990).

13. This approach is also advocated by the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. *See* RESTATEMENT (THIRD) LAW GOVERNING LAWYERS (2000) §46 ("On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.")

14. *See, e.g.,* Colo. Bar Ass'n Formal Op. 104 (1999) ("A lawyer has the right to withhold pleadings or other documents relating to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client."); *In re* Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP, 689 N.E.2d 879,883 (N.Y. 1997).

15. *See, e.g., In re* Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP, 689 N.E.2d 879, 883 (N.Y. 1997).

16. RESTATEMENT (THIRD) LAW GOVERNING LAWYERS (2000) §46, cmt. c.

17. *See, e.g.,* Colo. Bar Ass'n Formal Op. 104 (1999); D.C. Bar Op. 333 (2005).

18. Ala. Ethics Comm. Advisory Op. 1986-02 (1986); Ill. State Bar Ass'n Advisory Op. 94-13 (1995); Kan. Bar Ass'n Op. 92-5 (1992); Miss. Bar Formal Op. 144 (1988); Utah State Bar Ass'n Advisory Op. 06-02 (2006).

19. *See, e.g.,* Neb. Lawyer's Advisory Comm. Advisory Op. 12-09 (2012); Ill. State Bar Ass'n Advisory Op. 94-13 (1995).

20. *See, e.g.,* Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92, 98 (Mo. 1992); Neb. Lawyer's Advisory Comm. Advisory Op. 12-09 (2012).

other similar documents prepared by the lawyer for the client. These items are generally considered the lawyer's "end product."

Administrative materials related to the representation, such as memoranda concerning potential conflicts of interest,[21] the client's creditworthiness, time and expense records,[22] or personnel matters,[23] are not considered materials to which the client is entitled under the end-product approach. Additionally, the lawyer's personal notes,[24] drafts of legal instruments or documents to be filed with a tribunal,[25] other internal memoranda, and legal research[26] are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client under the end product approach.

Final documents supersede earlier drafts. Earlier drafts and lawyer notes are part of the process of completing the final draft and, when electronic documents go through a process of continuing changes, it can become difficult or impossible to determine what constitutes a distinct "draft."[27] Thus, drafts and other documents representing work by a lawyer are often of relatively small value to clients and can be burdensome for a lawyer to preserve, catalogue, and maintain.

In ABA Informal Ethics Opinion 1376 (1977), the Committee addressed, under the Code of Professional Responsibility, what properties a lawyer must provide to a client at the conclusion of the representation in a trademark matter. We advised that the lawyer must provide the client with "end product – the certificates or other evidence of registration of the trademark," searches conducted and paid for, "significant correspondence, applications and materials filed in aid thereof, receipts, documents received from third parties, significant documents filed in the administrative and court proceedings, finished briefs whether filed or not if they pertain to the right of the client to the use or registration of the mark in question." The Committee noted that the lawyer "need not deliver" to the client "internal notes and memos."

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21. Ohio Bd. Comm'rs on Grievances and Discipline Advisory Op. 2010-2 (2010); Colo. Bar Ass'n Formal Op. 104 (1999).

22. Saroff v. Cohen, No. E2008-00612-COA-R3-CV, 2009 WL 482498 , 2009 BL 39364 (Tenn. Ct. App. Feb. 25, 2009) (Invoices for legal work performed are a law firm's business records, not prepared for the client's benefit, and need not be turned over upon client request. Proper procedure for securing this information when client is suing firm is to make a discovery request.).

23. Colo. Bar Ass'n Formal Op. 104 (1999); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); D.C. Bar Op. 333 (2005).

24. Womack Newspapers Inc. v. Town of Kitty Hawk, 639 S.E.2d 96, 104 (N.C. 2007).

25. Miss. Bar Formal Op. 144 (1988); Utah State Bar Ass'n Advisory Op. 06-02 (2006).

26. Ill. State Bar Ass'n Advisory Op. 94-13 (1995); San Diego Cnty. Bar Ass'n Op. 1984-3 (1984).

27. This opinion does not address a lawyer's obligations to retain specific material relating to a representation in the first instance (whether in paper or electronic form). However, a lawyer's duty under Rule 1.16(d) to "surrender papers and property to which the client is entitled" at the termination of a representation necessarily requires some consideration of this issue. In general, a lawyer's ethical obligation to retain and safeguard material relating to a representation arises pursuant to a lawyer's duties of competence and diligence and will depend on the facts and circumstances of each representation. *See* ABA MODEL RULE 1.1 and ABA MODEL RULE 1.3. *See also* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2008-1 (2008); S.C. Bar Formal Op. 15 (2013). Further, a lawyer's decision whether to retain specific material related to a representation, in most cases, ultimately rests in the professional judgment of a lawyer consistent with his or her ethical and legal duties to the client. For example, in most instances, a lawyer will not need to retain non-substantive email communication to a client such as an email confirming a meeting or providing driving directions to the lawyer's office. By contrast, the lawyer likely would need to retain an email to the client in which the lawyer communicates and evaluates a settlement offer from an opposing party. Consistent with duties under the Model Rules, lawyers are encouraged to develop good document management policies.

The Committee affirms the position taken in Informal Ethics Opinion 1376 as it states the minimum required by the Rules. However, there may be circumstances in individual representations that require the lawyer to provide additional materials related to the representation. For example, when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose.

As noted above, Model Rule 1.16(d) requires a lawyer to take steps to the extent reasonably practicable to protect a client's interest. Such steps include "surrendering papers and property to which a client is entitled…" Comment [9] to Rule 1.16 further clarifies that the lawyer "must take all reasonable steps to mitigate the consequences [of withdrawal] to the client." Although surrendering papers and property which the client is entitled to receive does not necessarily give rise to a client's entitlement under the Rules of Professional Conduct to *all* materials in the lawyer's custody or control related to the representation, at a minimum a lawyer's obligation under the Rules reasonably gives rise to an entitlement to those materials that would likely harm the client's interest if not provided.[28] We agree with Colorado Ethics Opinion 104 (1999) that in this context, unless the law of the jurisdiction provides otherwise, "the ethical entitlement is based on the client's right to access the document related to the representation to enable continued protection of the client's interest."[29]

Therefore, on the facts presented, at a minimum, Rule 1.16(d) requires that the lawyer must surrender to the municipality:

- any materials provided to the lawyer by the municipality;
- legal documents filed with a tribunal - or those completed, ready to be filed, but not yet filed;[30]
- executed instruments like contracts;[31]
- orders or other records of a tribunal;
- correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy;

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28. The Committee recognizes that while Model Rule 1.16(d) specifies "papers and property," many lawyers have moved or are moving to a paperless practice in which few documents are available in tangible form. The use of the term "paper" in Rule 1.16(d) includes all communications noted above, whether tangible or electronic. *See* ABA MODEL RULE 1.0(e) defining writing as a "tangible or electronic record of a communication." While this opinion does not address whether and in what circumstances a lawyer must convert an electronic document into paper for a client or who will bear the cost of this conversion, the Committee agrees with the reasoning in D.C. Bar Op. 357 (2012) which explained, "Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings."

29. *See also* Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92, 97 (Mo. 1992) ("The purpose of the Rule, however, gives it meaning. The Rule is designed to protect a client's interest. It imposes a duty upon the attorney 'to take steps to protect' a former client's interest. 'Surrendering papers and property to which the client is entitled' is one example of a step an attorney must take to protect that interest. But, this duty 'to surrender papers and property' need not be supported or justified by any property concepts.")

30. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (1977).

31. Id.

- discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits;
- legal opinions issued at the request of the municipality; and
- third party assessments, evaluations, or records paid for by the municipality.

In contrast, under these facts, it is unlikely that within the meaning of Rule 1.16(d), the client is entitled to papers or other property in the lawyer's possession that the lawyer generated for internal use primarily for the lawyer's own purpose in working on the municipality's matters.[32] This is particularly true for matters that are concluded.

Therefore, under the facts presented, under Rule 1.16(d) the lawyer need not provide, for example, the following to the municipality:

- drafts or mark-ups of documents to be filed with a tribunal;
- drafts of legal instruments;
- internal legal memoranda and research materials;
- internal conflict checks;
- personal notes;
- hourly billing statements;
- firm assignments;
- notes regarding an ethics consultation;
- a general assessment of the municipality or the municipality's matter; and
- documents that might reveal the confidences of other clients.

The Committee notes that when a lawyer has been representing a client on a matter that is not completed and the representation is terminated, the former client may be entitled to the release of some materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter.[33]

In this fact scenario, if the lawyer has materials that are: (1) internal notes and memos that were generated primarily for the lawyer's own purpose in working on the municipality's matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the municipality's interest, then the lawyer must also provide the municipality with these materials. For example, if in a continuing matter a filing deadline is imminent, and as part of working on the municipality's matter the lawyer has drafted documents to meet this filing deadline, but no final document has emerged, then the most recent draft and relevant supporting research should be provided to the municipality.

32. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (1977).

33. A number of jurisdictions approve lawyer generated "summary of facts" or redacted memorandum that essentially provide the "useful" part of the documents to the client while preserving the internal thoughts/impressions of the lawyer as unnecessary for protecting the clients' interests. *See* Ohio Bd. Comm'rs on Grievances and Discipline Advisory Op. 2010-2 (2010).

Finally, as part of the lawyer's duty pursuant to Rule 1.4 to keep the client "reasonably informed about the status of the matter," a lawyer may already have provided much of this information to a former client during the course of the representation. As Comment [4] to Rule 1.4 explains, "A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation." The Committee encourages lawyers to regularly provide clients with information and copies of documents during the course of the matter and encourages lawyers to advise clients to maintain these documents. The fact that copies of certain materials may have been previously provided to a client is not dispositive of whether the lawyer must also provide such materials at the termination of a representation.[34] This fact may not, however, be dispositive of who – the lawyer or the client – should pay for the time and cost of duplication of such materials upon termination of the representation.[35]

Conclusion

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled such as materials provided to the lawyer, legal documents filed or executed, and such other papers and properties identified in this opinion. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

34. *See generally* Travis v. Comm. on Prof'l Conduct, 306 S.W.3d 3 (Ark. 2009) (the client has no duty to maintain a file on his or her own behalf).

35. Lawyers are encouraged to explain in their retainer letters who is responsible for the costs of copying and under what circumstances.