

WINDING DOWN, CLOSING UP OR SELLING OUT

BY BETTY M. SHAW

There are many reasons why an attorney may decide to wind down, close or sell his or her practice. The attorney may be moving, retiring or entering a new line of work. There is also the possibility that the need to wind down, close up or sell the practice may not be voluntary. An attorney's unexpected death or disability may require others to handle closing the practice.¹

PLANNING FOR THE UNEXPECTED

Rule 1.3, Minnesota Rules of Professional Conduct (MRPC) (diligence), requires attorneys to make reasonable preparations to protect clients in the event of their unexpected inability to practice law.² Attorney partnership agreements or assisting attorney agreements for solo practitioners should be negotiated to designate who will wind down and close up the practice. The agreements should define the nature and scope of that attorney's responsibilities and determine the amount and method for compensation.

A well-organized practice with documented procedures is critical to a smooth and easy closing up of a practice by another. A written office manual should contain key details such as: (a) names, addresses, phone numbers and job descriptions of support and other key personnel (office sharers, of counsel attorneys, office manager, secretary, bookkeeper, accountant, landlord, malpractice carrier and other insurance brokers — disability, life and property), the personal representative and other important contacts; (b) location, account numbers and signatory name(s) for business and trust accounts; (c) location and access information for safety deposit box and/or storage facilities; (d) computer and voice mail access codes; and (e) location of important business documents such as leases, maintenance contracts, business credit cards, client ledgers and other books and records relating to the business and trust accounts,³ etc.

The office manual should also have an explanation and description of the conflicts system, calendaring system and back-up, time billing records, accounts receivable/payable, active client file inventory,

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and closed file storage location and inventory. The manual should be complete enough for the attorney closing up the practice to be able to promptly identify those client matters needing immediate attention and any matter on which the attorney might have a conflict of interest. If an attorney does not plan for unexpected practice interruption the court may have to appoint a trustee to windup and close out the practice.⁴

SELLING A PRACTICE

If an attorney or the representative of a deceased, disabled or disappeared lawyer is selling a practice Rule 1.17, MRPC, will be of particular importance. An attorney may not sell only the most lucrative matters and leave the remaining clients unrepresented. The buyer must accept all of the currently active files except those in practice areas that deal with matters that the buying lawyer or firm of lawyers would not be competent to handle, those that the buying lawyer or firm of lawyers would be barred from handling because of a conflict of interest, or those from which the selling lawyer is denied permission to withdraw by a tribunal in a matter subject to Rule 1.16(c), MRPC. The buying lawyer may not increase attorney fees charged to the selling attorney's clients for a period of at least one year from the date of the sale.

When negotiating the sale of a practice, an attorney should note that the amount and type of information the selling lawyer may give to a potential buyer is

limited by the client confidentiality requirements of Rule 1.6, MRPC. A prospective buyer may not see the client file unless the selling lawyer has obtained a waiver of confidentiality from the affected client. After the sale, the selling attorney must send written notification to all clients with active or inactive files to be taken over by the buying lawyer or firm of lawyers. That notification must include (1) a statement that the practice, including the client's file has been sold, (2) a summary of the buying lawyer's or law firm's professional background, including education and experience and the length of time that the buying lawyer or members of the buying law firm have been in practice, and (3) a statement that the client has the right to continue with the new firm under the same fee arrangement as with the selling attorney or the right to have the complete file returned to the client or forwarded to another attorney of the client's choosing. If the notification is sent by certified mail or personally served, the notification may state that if the client does not contact the buying attorney within 90 days, the client's silence may be considered a waiver of confidentiality and consent to representation. The buying attorney should obtain a new representation agreement and file an appropriate substitution of counsel. The selling lawyer should consider extending malpractice insurance for some reasonable period of time following the sale to insure against losses arising from errors that might come to light after the sale.

GENERAL OBLIGATIONS

An attorney winding down, closing up or selling the practice has an obligation

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PROFESSIONAL RESPONSIBILITY

to return or properly refer all unsold active files and to dispose of all remaining inactive files appropriately. An attorney may not, without client consent, simply turn a client matter over to another attorney. The Director's Office issued an admonition to an attorney who failed to properly close down her practice. Instead of refunding the client a portion of the fee and providing the client with the opportunity to retain new counsel, the attorney retained the fee and transferred the file without the client's consent. By doing this, the attorney remained responsible for the new attorney's neglect of the matter.

DISPOSING OF CLOSED FILES

It is a good practice to explain the firm's file retention/destruction policy in an engagement letter, retainer agreement or letter at the close of the representation. A lawyer should not destroy or dispose of a client file without screening it. Before archiving a file the attorney should make sure that all client property of any value such as stock certificates, abstracts, executed but unfiled documents, original wills, unrecorded deeds, etc., has been returned or permanently safeguarded.

Clients and former clients have a reasonable expectation that useful information in the lawyers' files, and not otherwise readily available to them will not be prematurely and carelessly destroyed. An attorney should obtain a client's consent before destroying items that clearly or probably belong to the client such as those items furnished to the lawyer by or on behalf of the client that the client might reasonably want returned.⁵ The attorney should also retain any information in the file that may have future utility to the client.⁶ The remainder of the closed files should be retained for a reasonable time. What is reasonable will depend in part on the nature of the representation. It is probably prudent for an attorney to keep client files at least until the applicable statute of limitations on malpractice has run. Settlement documents and trust account books and records must be kept for six years after completion of the representation.⁷

An attorney may dispose of the files at the end of the retention period by shredding (sensitive materials) or bagging (non-sensitive) files in heavy duty opaque bags. □

NOTES

1. Rule 1.16(a), Minnesota Rules of Professional Conduct (MRPC), provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where

representation has commenced, shall withdraw from the representation of a client if:

* * *

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

2. A new proposed comment to Rule 1.3 provides:

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement.

3. Rule 1.15(h), MRPC, requires, "Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis, books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f). The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients or third persons, for at least six years after completion of the employment to which they relate."

4. Rule 27, Rules on Lawyers Professional Responsibility, provides: "(a) Upon a showing that a lawyer is unable to properly discharge responsibilities to clients due to disability, disappearance or death, or that a suspended, disbarred, or resigned or disabled lawyer has not complied with Rule 26, and that no arrangement has been made for another lawyer to discharge such responsibilities, this Court may appoint a lawyer to serve as the trustee to inventory the files of the disabled, disappeared, deceased, suspended, disbarred or resigned lawyer and to take whatever other action seems indicated to protect the interests of the client and other affected parties. (b) The trustee shall not disclose any information contained in any inventoried file without the client's consent, except as necessary to execute this Court's order appointing the trustee."

5. ABA Informal Opinion 1384 (03/14/77).

6. "Some files must be retained longer than others, such as those relating to will preparation, which may include materials that may need to be referred to 20 years after the will is prepared." New Mexico Opinion 1988-1 (undated).

7. Rule 1.15(h), MRPC.

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