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[Home](#) > [Publications](#) > [GP Solo](#) > [2012](#) > [July/August 2012: Buying, Selling, or Closing a Law Practice](#) > [Last Rites for Law Practices](#)

Last Rites for Law Practices

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By Peter Geraghty

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Scenario 1: Bill has been a sole practitioner concentrating in probate and real estate matters for his entire career of more than 35 years. During this time, he has accumulated thousands of client files, most of which are now inactive. For the past few months he has been considering retirement to spend more time with his grandchildren, and now seems to be the best time to do so. Bill plans to keep busy and will continue being active in his local bar association's pro bono activities.



Scenario 2: Susan has been a partner with two other lawyers in the ABC partnership for the past 30 years in a practice concentrating in family law and general litigation. She has long had an interest in real estate development and thinks that now is the time to launch her own business. Susan realizes that she will not be able to devote sufficient attention to her law practice and run the new business at the same time, so she has decided to withdraw from the partnership and cease practicing law.

In these scenarios, what are the retiring lawyers' obligations to their clients? What if any notice must the lawyers give them of the impending retirement? What are the lawyers' obligations with respect both to their closed and their active client files?

The primary ethical issues that can arise when a lawyer retires or

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winds down a practice include the lawyer's obligations to provide adequate notice to clients of the impending retirement (including the effect if any it will have on the clients' matters) and the lawyer's responsibilities with regard to the disposition of active and inactive client files.

Notice to Clients

Louisiana State Bar Opinion 2005-01 (2005) goes into considerable detail about various issues as they relate to a lawyer's winding down a law practice, including the types of notice that lawyers should give to their clients. With regard to matters that are active, the opinion states that the client should be given reasonable advance notice of the retirement:

If the case is in active litigation, we recommend that, in order to protect the client's interests, the client should be given reasonable notice of the impending retirement. In addition to written notice the lawyer should consider personal and telephonic communication. The client should be advised of any pending court dates and directed to obtain other counsel as soon as possible; and, if possible, the lawyer should assist the client in finding new counsel.

In the event that clients with active and open files do not provide instructions as to whom the files should be transferred, the Louisiana Committee states that the lawyer should analyze the file and provide the client with written instructions as to the steps the client needs to take to protect his or her interests. If the client cannot be located, the lawyer should send a letter to the client's last known address notifying the client that he or she may come to pick up the files or property from the lawyer or the lawyer's representative.

Michigan State Bar Opinion RI-100 (1991) states that the retiring lawyer would need to contact clients and advise them as to how their matters would be handled and by whom. The Michigan Committee states further that the lawyer could have active matters reassigned to another lawyer in the firm provided he or she was competent to handle the matter. With client consent, the lawyer could also refer the matter to a lawyer outside the firm or simply notify the client that representation will no longer be available and that the client should seek new counsel. The Committee emphasizes that it is ultimately the clients' decision as to whom they want to represent them. In all matters involving the transfer of client files, the lawyer should take steps to protect the confidentiality of client information under Rule 1.6, *Confidentiality of Information*, of the ABA Model Rules of Professional Conduct.

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Both the Louisiana and Michigan opinions also refer to Rule 1.16(d), *Declining or Terminating Representation*, stating that in all matters pending before a court, a lawyer must get the court's consent before withdrawing from the matter.

Several of these opinions stress the importance of the lawyer's acting competently and diligently under Rules 1.1, *Competence*, and 1.3, *Diligence*, to help the client secure new counsel who is competent to handle the representation.

The Louisiana Bar offers some practical tips for retiring lawyers as well, suggesting that such lawyers retain their law licenses in the event that they might consider returning to the practice at a later date, and that they keep up with their CLE requirements so as to keep their licenses in good standing. This would be particularly important for the lawyer in Scenario 1 above, who wishes to remain active in pro bono bar activities.

Client Files and Property

When a lawyer decides to wind down a practice, the disposition of closed or dormant client files becomes an important issue. A lawyer who has been in private practice for an extended period of time may well accumulate thousands of client files, most of which will most likely have become inactive when the lawyer decides to retire. Files that are active require careful attention and active maintenance. Responsibilities with regard to closed and/or dormant client files are less clear. Many state bar opinions addressing client file retention issues refer back to ABA Informal Opinion 1384, *Disposition of a Lawyer's Closed or Dormant Files Relating to Representation of or Services to Clients (1977)*, for guidance in this area. This opinion provides a number of guidelines to keep in mind when considering when to keep or discard closed or dormant client files. These include the obligation to:

- retain items that clearly belong to the client (such as original documents);
- keep information that the lawyer knows the client may need in the future (including items the client may need to defend himself or herself in a matter for which the applicable statute of limitations has not yet expired);
- maintain indefinitely complete records of client trust account transactions; and
- keep a list of the files that the lawyer has disposed of or destroyed.

The Louisiana Committee notes that it cannot provide a specific date for the amount of time that a lawyer should retain client files; nevertheless, it cautions that, because there is no statute of limitations on lawyer disciplinary cases, a lawyer may be prudent to examine old files on a case-by-case basis and decide which ones to retain, as it would be difficult for the lawyer to defend against such claims without a copy of the file.

ABA Model Rule 1.15, *Safekeeping Property*, mandates the

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preservation of client trust account funds and other client property for a period of five years. This time period can vary state by state. Check your local rules.

Of particular interest to the lawyer in Scenario 1 is the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association Informal Opinion 98-2 (1998), which provides the following guidance to a lawyer who wished to retire and who inquired as to what he should do with original client wills that he assumed responsibility for upon the death of two senior partners:

It is the Committee's opinion that your ethical obligations with respect to these wills is to ascertain whether the makers are still living and, if so, to return the wills to them; and, if the maker is deceased, then your obligation is to locate and deliver the will to the maker's personal representative. Your ethical obligation is to make a diligent effort to locate either the client or, if the client is deceased, his or her personal representative. If, after undertaking this effort, there remain clients whose whereabouts you cannot determine, then, the Committee is of the opinion that you must preserve and retain the wills. You should leave instructions that upon your death, if there is no responsible party willing to assume appropriate responsibility, then the wills should be delivered to the chair of the local certified grievance committee or Disciplinary Counsel.

Other thorny issues are present when a lawyer who is a partner in a law firm decides to retire and leaves his old client files with his former law firm. This type of issue could arise under Scenario 2 above and has been addressed by various state bar associations in different permutations. In general, these opinions suggest that both the departing lawyer and the law firm have joint obligations with regard to the client files. See New York State Bar Opinion 623 (1991) and New Jersey Advisory Opinion 692 (revised; 2002).

Nassau County Bar Association 93-23 (1993) discusses the joint ethical obligations of the lawyers who were formerly partners in a now-dissolved law firm. The lawyers who withdrew made arrangements to store their inactive files with the lawyers who remained to form a successor law firm. The successor firm then contacted the former partners and gave them a list of the files the firm had in storage. The former partners instructed the firm to send them approximately 30 percent of the files and to destroy the rest. The successor firm inquired as to its obligations with regard to the remaining files in its possession. The Committee states that the successor lawyers had joint responsibility with the withdrawing partners to maintain the client files, even if the lawyers in the

successor law firm had no knowledge of the withdrawing partners' client files:

Neither the fact that inquiring counsel and his present partners have no knowledge of the files which remain in their custody, changes their obligations with respect to the files. . . . Thus, while the private contractual agreement may have the effect of allocating among the former partners the economic burden of dealing with particular files . . . it cannot shift the ethical burden which is joint and several as to (a) all the former partners, both "withdrawing partners" and those remaining at the successor firm and (b) any new partners of the successor firm.

See also State Bar of Wisconsin Committee on Professional Ethics Opinion E-98-01 (1998):

The fact that the firm has dissolved or that the lawyers maintaining the files may not have been involved in the representation does not alter the duties of either the lawyer or firm that performed the engagement or the lawyer or firm that now maintains the files. Each retains responsibilities to the client. Lawyers in firms that are dissolving should agree among themselves on the handling of client files, and shall transfer files to a departing or new lawyer upon client request. However, those arrangements do not obviate the ethical and fiduciary duty to maintain and properly handle client files. See Nassau County B. Ass'n Op. 93-23 (1993). Both the lawyers who handled the engagement and the lawyers who may have voluntarily assumed custody of the file owe the same obligation to handle the return or destruction in a reasonable fashion as described above.

Have a Plan

Ethics issues in this area are also informed by a line of authority that addresses the steps sole practitioners should take in order to prevent the neglect of their client matters in the event of their death or disability.

See, for example, ABA Formal Opinion 92-369, *Disposition of Deceased Sole Practitioners' Client Files and Property* (1992). In this opinion, the ABA Standing Committee on Ethics and Professional Responsibility states that under ABA Model Rules of Professional Conduct Rule 1.1, *Competence*, and Rule 1.3, *Diligence*, sole practitioners should have a plan in place that

provides for the orderly transfer of client matters to successor counsel in the event of the lawyers' death or disability.

This opinion inspired the ABA Ethics 2000 Commission (E2K), which conducted an extensive review of the ABA Model Rules of Professional Conduct from 1998 to 2002 to add a new paragraph [5] to the Comment to Rule 1.3:

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 (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Conclusion

When closing down a law practice, a lawyer has an obligation to provide active clients with adequate notice of the closure and should inform them as to how the closure will affect their matters. A lawyer should also consider offering them assistance in locating new counsel. When making decisions as to the disposition of closed or dormant client files, a lawyer should review the contents of the files and should keep items that clearly belong to the clients, such as original documents and any other items that the client may need in the future, as suggested in ABA Informal Opinion 1384. Finally, a sole practitioner should have a plan in place to protect clients' interests in the event of the lawyer's death or disability.

When questions arise, consult with your state or local bar. Chances are they have fielded many questions in this area and may even have prepared written guidelines as you transition to the next phase of your life.

Resources

Links to and Digests of Local and State Bar Opinions

[ABA Center for Professional Responsibility Links of Interest](#)

[ABA/BNA Lawyers' Manual on Professional Conduct](#)

State Bar Monographs and Articles

Association of the Bar of the City of New York, [Lawyer Continuity](#) (2012)

New Hampshire State Bar Association, [Closing a Solo Practice in New Hampshire](#) (2007)

State Bar of Michigan, [Planning for an Orderly Transition](#) (2009)

Washington State Bar Association, [Succession Planning](#) (2012)

State Bar Ethics Opinions

[Louisiana State Bar Opinion 2005-01](#) (2005)

[Michigan State Bar Opinion RI-100](#) (1991)

[New Jersey Advisory Opinion 692](#) (2002)

[Oregon Opinion 2005-23](#) (2005)