

SUDDEN DEATH OR DISABILITY: IS YOUR PRACTICE – AND YOUR FAMILY – READY FOR THE WORST

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I. Facing Death or Disability

A. Introduction

No one likes to think about dying, or becoming disabled. For that reason, planning for death and disability is one of the most overlooked issues facing not only attorneys, but everyone. In 2004, almost half of all active attorneys were over age 50. While planning for death or disability is important for attorneys of all ages, it becomes more important the older we get. The issue is particularly important for attorneys due to the special relationship between attorneys and clients and the duties owed by attorneys to their clients.

In a law firm there are other attorneys within the firm to step in to ensure that client matters are handled in the event of the death or disability of an attorney. Sole practitioners, on the other hand, face a number of issues not encountered by attorneys who work in firms. One of the foremost issues facing sole practitioners is that there is no one to provide back up in the event of death or disability. Therefore, while it is important for all attorneys to plan for their death or disability, it is vitally important for all sole practitioners to have a plan in place to deal with the possibility of death or disability.

B. Duties owed to Client

Within the scope of the attorney-client relationship, the attorney owes several duties to the client, which may be affected when an attorney dies or becomes disabled, incapacitated or impaired.

1. MRPC 1.1 Competence

A lawyer shall provide competent representation to a client. A lawyer shall not:

- (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;
- (b) handle a legal matter without preparation adequate in the circumstances; or
- (c) neglect a legal matter entrusted to that lawyer.

2. MRPC 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

3. MRPC 1.4 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.
 - (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
4. MRPC 1.6 Confidentiality of Information
- (a) “Confidence” refers to information protected by the client-lawyer privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
 - (b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
 - (1) reveal a confidence or secret of a client;
 - (2) use a confidence or secret of a client to the disadvantage of the client; or
 - (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.
 - (c) A lawyer may reveal:
 - (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
 - (2) confidences or secrets when permitted or required by these rules, or when required by court order;
 - (3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client’s illegal or fraudulent act in the furtherance of which the lawyer’s services have been used;
 - (4) the intention of a client to commit a crime and the information necessary to prevent the crime; and
 - (5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer’s employees or associates against an accusation of wrongful conduct.
 - (d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.
5. MRPC 1.16 Declining or Terminating Representation (in part)
- (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:
 - (1) the representation will result in violation of the Rules of Professional Conduct or other law;
 - (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

- (3) the lawyer is discharged.
- (d) Upon termination of representation, a lawyer should take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

MRPC 1.1, 1.3, 1.4, 1.6 and 1.16 are the primary Rules of Professional Conduct, which come into play with regard to the death, disability, incapacity or impairment of an attorney. MRPC 1.1 requires attorneys to provide competent representation to his or her clients. Inherent in that duty is anticipating your clients needs in the event that you are unavailable, for any reason, to continue representation.

MRPC 1.4 requires that the attorney keep the client informed of the status of the matter. This includes keeping the client informed of the attorney's health status so that the client can make informed decisions about his or her matter, including retaining new counsel if necessary. MRPC 1.16 requires a lawyer to withdraw from representation if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" and to "take reasonable steps to protect a client's interests" upon termination of representation. For example, an attorney whose health has become an which may impact his or her ability to work must advise potential and current clients and if the attorney knows, or reasonably believes, he or she will be unable to perform, the attorney has a duty to withdraw from representation and take reasonable measures to protect the clients' interests.

MRPC 1.3 requires that attorneys act with diligence and promptness in their representation of clients. The Michigan Supreme Court is currently considering amendments to the Rules of Professional Conduct. Among the changes proposed is a new section in the comment to MRPC 1.3. The proposed comment states:

- (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 (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).

The Court has also proposed modification of MRPC 1.6. The proposed rule states, in part:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client:

- (1) when permitted or required by these rules, or when required by law or by court order;
- (2) to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
- (3) regarding the intention of a client to commit a crime to the extent necessary to prevent the crime;
- (4) necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct; and
- (5) to secure legal advice about the lawyers compliance with these rules.

The current rule, MRPC 1.6(c)(1), states that a lawyer may reveal confidences or secrets “with the consent of the client or clients affected; but only after full disclosure to them.” The proposed rule, MRPC 1.6(a) states: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, *the disclosure is impliedly authorized in order to carry out the representation*, or the disclosure is permitted by paragraph (b).”

Under the current rule, in the event of the death or disability of the attorney, it does not appear that an attorney (or his or her office) can disclose any confidences or secrets without the consent of the client. Under the proposed rule, such a disclosure may be impliedly authorized in order to carry out the representation. The safest route for a sole practitioner to take to ensure not only the continued representation of clients in the event that the attorney is unable to continue representation but also to ensure that confidentiality is to have a succession plan in place and to notify clients of the plan.

In addition to the Michigan Rules of Professional Conduct, the American Bar Association has opined specifically on the importance of advance planning. ABA Ethics Opinion 92-369 states, in part: “To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death.” The opinion goes on to state:

Although there is no specifically applicable requirement of the rules of ethics, it is fairly to be inferred from the pertinent rules that lawyers should make arrangements for their client files to be maintained in the event of their own death. Such a plan should at a minimum include the designation of another lawyer who would have the authority to look over the sole practitioner's files and make determinations as to which files needed immediate attention, and provide for notification to the sole practitioner's clients of their lawyer's death.

C. Current Provisions

The only provision currently in effect in Michigan which deals with the death or disability of an attorney is Michigan Court Rule 9.119(G), which states in part:

If an attorney whose licenses is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 was a member of a firm, the firm

may continue to represent each client with the client's express written consent. If an attorney is transferred to inactive status or is disbarred or suspended and fails to give notice under the rule, or disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to inventory the attorney's files and to take any action necessary to protect the interests of the attorney and the attorney's clients. The person appointed may not disclose any information contained in any inventoried file without the client's written consent. The person appointed is analogous to a receiver operating under the direction of the circuit court.

Pursuant to MCR 9.119(G), if an attorney dies or becomes otherwise incapacitated, the Grievance Administrator must request that the Chief Judge in the judicial circuit where the attorney maintains an office appoint a receiver to step in. Some local bar associations have programs to deal with the death or disability of an attorney, but there is no formal statewide program.

D. Advance Planning

In order to ensure that clients are taken care of in a proper and timely manner, in the event of death or disability, all attorneys, and especially sole practitioners, should have a plan in place to protect clients. Having a succession plan will ensure that both the clients and the attorney are protected and will ensure that the attorney has complied with his or her duties under the Michigan Rules of Professional Conduct.

One of the most crucial elements of any succession plan is ensuring that you have an up to date policy and procedure manual in your office. This manual should contain all of the following information:

- How to perform conflict checks;
- How to use the calendaring system;
- How to locate a list of active client files and how open/active files are organized;
- Where client ledgers are kept;
- Policies regarding billing;
- Where the closed files are kept, how they are organized and how to access them;
- The office policy on keeping original documents of clients;
- Where original client documents (Wills, etc.) are kept;
- The record retention policy and records regarding time lines for destruction of files and notices to clients;
- Where the safe deposit box (if any) is located and how to access it;
- Information regarding all bank accounts (including trust accounts) including the bank name, address, signatories, and account numbers;
- The location of all bank account records (including trust accounts);
- How to access computers, e-mail, voice mail, answering machines, etc. (passwords, access code numbers).

Additionally, you should ensure that your client files are kept current and organized. Make sure all court dates, filing deadlines and statute of limitations deadlines are properly calendared. Keep good records in all your files. Keep current on time keeping and billing. This is good advice not only for succession planning, but also for basic law office

management and will make it easier for someone to step in in the event of your unavailability.

Another very important part of advance planning is nominating an attorney to assist in the closing of your law practice in the event of your death, disability, impairment or incapacity. In determining who will step in to close your practice in the event of your death or disability you should consider that this individual must be an attorney and should be someone you trust as he or she will need to have access to all of your client files, your business records, etc. You need to ensure that the attorney who will close your practice has all of the necessary authority to close your practice. This would include authorizations to access bank accounts, to review files, to collect fees, to sell or otherwise liquidate your practice.

It is a good idea to have a written agreement with this attorney setting forth the terms of the relationship. The agreement should describe what the assisting attorney's role will be and under what circumstances he or she will step in. A sample agreement can be found in Section II. You should also advise your family members and employees about the agreement to ensure a smooth transition should the assisting attorney's services be required.

In order to avoid issues down the road, clients should be informed at the time they retain your services about the existence of an advance planning agreement. This will resolve any potential issues regarding confidentiality and may also bring to light any conflicts of interest between the client and the assisting attorney. Sample paragraphs for Retainer Agreements and Engagement Letters calling the client's attention to the fact that you have entered into an agreement with another attorney to assist in closing your practice in the event of death, disability or other incapacity and giving consent for that attorney to review the client's file are contained in Section II.

Clients should also be promptly notified of the death or disability of their attorney in order to allow them to make appropriate decisions to protect themselves. The appointment of an Assisting Attorney will help ensure that clients receive the information necessary in a timely manner. It will allow the attorney to continue assisting the client, even after he or she is personally unable to help and will ensure that the attorney complies with the Michigan Rules of Professional Conduct regarding the duties owed to clients. Giving notice to clients should be one of the first things the assisting attorney does.

Trust Account Issues

All attorneys in Michigan who receive client funds are required to maintain IOLTA accounts. State Bar of Michigan Informal Ethics Opinion RI-107 opines that "signatories on a law firm's IOLTA trust account must be lawyer members or employees of the law firm." Sole practitioners don't have other attorneys in their firms to act as signatories on IOLTA accounts and therefore the death or disability of a sole practitioner could create enormous problems with regard to trust account access if the sole practitioner is the only signatory on the account. The only remedy for this situation is for the attorney you choose to assist you, the personal representative of your estate or the court appointed receiver, to obtain a court order giving him or her access to your trust account. This may cause unavoidable delay in accessing the account upon your death or disability and may conflict with the requirements of MRPC 1.15(d)(1)(C) which states that trust account funds "shall be subject to withdrawal upon request and without delay..." Unfortunately, there is no other alternative for sole practitioners at this time, although the State Bar of Michigan

Ethics Committee is currently evaluating RI-107 to determine whether it requires modification. Attorneys in a firm should ensure that at least two attorneys are named as signatories on the firm trust account to ensure seamless access to the account at all times.

Conflict of Interest Issues

When entering into an agreement with another attorney to assist you, you must clearly set forth what the relationship is between you and that attorney and between that attorney and your clients. Be aware of any potential conflicts of interest.

Conflicts issues arise in two contexts. The first deals with the assisting attorney's role. You must determine, and should spell out in both your advance planning agreement and in your retainer agreements, whether the assisting attorney is your attorney or your clients' attorney. If the attorney is your attorney, he or she will have a fiduciary relationship to you, or your estate, and may be prohibited from representing your clients on certain matters, for example legal malpractice issues. On the other hand, if the assisting attorney is your clients' attorney, he or she may be required to disclose ethical violations or errors or negligence that resulted in malpractice to your clients. He or she may also have a duty to report violations to the Attorney Grievance Commission pursuant to MRPC 8.3. Regardless of the relationship of the assisting attorney, you should always be mindful of potential conflict issues and perform a conflicts check.

The second context in which conflicts issues may arise occurs when the assisting attorney has a conflict with your clients, unrelated to his or her position as your assisting attorney. In order to minimize this type of potential conflict, it is helpful to include information about your Assisting Attorney in your retainer agreements. You should also advise your Assisting Attorney to be mindful of potential conflicts when he or she is reviewing your files upon stepping in to close your practice. Upon discovery of a conflict the assisting attorney should immediately stop reviewing the file and forward it to an Alternate Assisting Attorney as contemplated by the proposed Agreement to Close A Law Practice found in Section II below.

Corporate Issues

When an attorney's practice is in the form of a Professional Service Corporation (PC) or Professional Limited Liability Company (PLLC), the attorney must ensure that proper corporate resolutions are in place to ensure that the Assisting Attorney will have appropriate authority to act. This can be accomplished by having a resolution in place which sets forth the manner and the circumstances in which the Assisting Attorney can act.

E. Sale of Practice

The Michigan Rules of Professional Conduct, Rule 1.17, allow for the sale of a law practice. MRPC 1.17(c) requires "actual written notice of a pending sale shall be given at least 91 days prior to the date of the sale to each of the seller's clients." The notice required by section (c) must include:

- (1) notice of the fact of the proposed sale;
- (2) the identity of the purchaser;
- (3) the terms of any proposed change in the fee agreement permitted under paragraph (b);

- (4) notice of the client's right to retain other counsel or to take possession of the file; and
- (5) notice that the client's consent to the transfer of the client's file to the purchaser will be presumed if the client does not retain other counsel or otherwise object within 90 days of receipt of the notice.

The new proposed Rule 1.17 modifies section (c) above to state that actual notice must be given at least 91 days prior to the date of sale "unless circumstances require shorter notice."

F. Conclusion

Planning for death or disability is part of an attorney's responsibility to his or her client pursuant to the Michigan Rules of Professional Conduct. Additionally, advance planning can alleviate stress not only on the attorney and the client but also the attorney's office staff and family. Advance planning will ensure that the clients will be protected even after the death or disability of the attorney. Having a plan in place in advance will assist with much of the transition necessary when a lawyer dies or becomes disabled. It is something every lawyer, particularly sole practitioners, should complete.

II. Sample Forms

The forms provided in this Section are samples only and may require modification prior to use. All sample forms were originally published by the Indianapolis Bar Association, and have been used with permission of the Indianapolis Bar Association and modified for Michigan law.

A. Agreement to Close Law Practice

This Agreement is entered into this ____ day of _____, 200____, by and between: _____, hereinafter referred to as “Planning Attorney,” an individual licensed to practice law in the State of Michigan and whose office is located at _____, and _____, hereinafter referred to as “Assisting Attorney,” an individual licensed to practice law in the State of Michigan and whose office is located at _____.

1. Purpose

This Agreement recognizes the Planning Attorney’s obligations to provide competent and diligent representation (MRPC 1.1 and MRPC 1.3) and as a sole practitioner to protect the clients’ interests in the event the Planning Attorney is unable to continue his or her law practice due to death, disability, impairment or incapacity.

2. Parties

The term “Assisting Attorney” refers to the attorney designated in the caption above. The term “Planning Attorney” refers to the attorney designated in the caption and the Planning Attorney’s representatives, heirs or assigns.

3. Reliance

The Assisting Attorney may rely on my use of Engagement Letters with clients designating the Assisting Attorney to assure the attorney client relationship and confidentiality. These Engagement Letters will be so labeled in a central file within my office. The Planning Attorney shall add the Assisting Attorney to his or her malpractice coverage for purpose of this Agreement. Assisting Attorney shall have the right to confirm coverage. The Planning Attorney’s current malpractice carrier is (name of insurance company) and if any change is made in the carrier written notice thereof shall be given to the Assisting Attorney.

4. Establishing Death, Disability, Impairment or Incapacity

In determining whether Planning Attorney is disabled, impaired or incapacitated, the Assisting Attorney may act upon such evidence as Assisting Attorney shall deem reasonably reliable, including, but not limited to, communication with Planning Attorney’s family members, representative or a written opinion of one or more medical doctors duly licensed to practice medicine. As part of the process of determining whether Planning Attorney is disabled, impaired or incapacitated, all health information and medical records may be released to Assisting Attorney. This release and authorization applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) 42 USC 1320d and 45 CFR 160-164. Assisting Attorney shall sign an affidavit stating the facts upon which his or her determination is based, which shall, for the purposes of this agreement, be conclusive proof that the Planning Attorney is disabled, impaired or incapacitated. 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.

5. Consent to Close Practice

Planning Attorney hereby gives consent to the Assisting Attorney to take all actions necessary to close Planning Attorney's legal practice in the event that Planning Attorney is unable to continue in the private practice of law and is unable to close his or her 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 of 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 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 disability, impairment or incapacity, Planning Attorney consents to the issuance of a court order naming Assisting Attorney as signatory or in substitution of Planning Attorney's signature, on all of Planning Attorney's law office accounts with any bank or financial institution, including, but not limited to, checking accounts, savings accounts and trust accounts. Planning Attorney's consent includes but is not limited to:

- Entering Planning Attorney's office and using Planning Attorney's equipment and supplies as needed to close Planning Attorney's practice;
- Opening Planning Attorney's mail and processing it;
- Taking possession and control of all property comprising Planning Attorney's law office, including client files and records;
- Examining files and records of Planning Attorney's law practice, wherever located, and obtaining information as to any pending matters that may require attention. If Assisting Attorney identifies a conflict of interest with regard to a specific client or file, he or she shall assign that client or file to the Successor Assisting Attorney pursuant to paragraph 10 below;
- Notifying clients, potential clients, and others who appear to be clients, of Planning Attorney's death, disability, incapacity or impairment; that Planning Attorney has given this authorization and that it is in their best interest to obtain other legal counsel of their choice;
- Copying Planning Attorney's files;
- Obtaining clients' consent to transfer files and client property to new attorneys chosen by clients;
- Transferring client files and property to clients or their new attorneys;

- Obtaining client consent to obtain extensions of time and contacting opposing counsel and courts/administrative agencies to obtain extensions of time;
- Applying for extensions of time pending employment of other counsel by the clients;
- Filing notices, motions and pleadings on behalf of clients where the client's interest must be immediately protected and other legal counsel has not yet been retained;
- Contacting all appropriate persons and entities who may be affected and informing them that Planning Attorney has given this authorization;
- Arranging for transfer and storage of closed files;
- Winding down the financial affairs of Planning Attorney's practice, including providing Planning Attorney's clients with final accounting and statement for services rendered by Assisting Attorneys. 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;
- Continuing to employ Planning Attorney's employees to the extent necessary to help the Assisting Attorney in performing the duties required by this Agreement. Compensating and terminating Planning Attorney's employees and other agents;
- Terminating or canceling Planning Attorney's business obligations, including leases of office space, equipment, furniture, etc.;
- Purchasing, renewing, maintaining or terminating insurance policies, including making claims or collecting benefits. Notifying professional liability insurance carriers of Planning Attorney's death, disability, incapacity or impairment. Cooperating with insurance carriers regarding matters related to Planning Attorney's coverage;
- Preparing, executing and/or filing tax forms and/or returns on behalf of Planning Attorney's law practice;
- Settling or compromising any claims or disputes between Planning Attorney's law practice and any other party, including submission to alternative dispute resolution. Commencing or defending any action affecting Planning Attorney's law practice;
- Executing any deed, contract or other instrument on Planning Attorney's behalf;
- Resigning any fiduciary position held by Planning Attorney and notifying any interested parties. Notifying the court for appointment of successor fiduciaries when necessary;
- Advertising Planning Attorney's law practice or any of its assets to find a buyer for the practice. Selling or otherwise disposing of Planning Attorney's personal property located in Planning Attorney's law office;

- Arranging for an appraisal of Planning Attorney's law practice for the purpose of selling Planning Attorney's practice and if Assisting Attorney elects to purchase this practice he or she shall immediately cease acting as Assisting Attorney hereunder.

6. Payment for Services

Planning Attorney agrees to pay Assisting Attorney a reasonable sum for services rendered by Assisting Attorney while closing the law practice of Planning Attorney. Assisting Attorney shall be paid from Planning Attorney's law practice (*or name other source*). Assisting Attorney agrees to keep accurate time records for the purpose of determining amounts due for services rendered. Assisting Attorney agrees to provide the services specified herein as an independent contractor.

7. Preserving Attorney-Client Privilege

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

8. Providing Legal Services

Planning Attorney authorizes Assisting Attorney to provide legal services to Planning Attorney's former clients providing Assisting Attorney first advises clients of their right to select a successor attorney, including the Assisting Attorney, if they have no conflict of interest and obtain the consent of the Planning Attorney's former clients to do so. Assisting Attorney has the right to enter into an attorney-client relationship with Planning Attorney's former clients and to have clients pay Assisting Attorney for his or her legal services.

9. Informing Bar Association

Assisting Attorney agrees to inform the _____ Bar Association where Planning Attorney's closed files will be stored and the name, address and phone number of the contact person for retrieving those files.

10. Successor Assisting Attorney

If Assisting Attorney is unable or unwilling to act on behalf of Planning Attorney, Planning Attorney appoints _____ as Successor Assisting Attorney. Successor Assisting Attorney is authorized to act on behalf of Planning Attorney pursuant to this agreement. Successor Assisting Attorney shall also review and take any necessary action with respect to clients and/or files with which Assisting Attorney has a conflict of interest. Successor Assisting Attorney consents to this appointment, as shown by the signature of the Successor Assisting Attorney on this agreement.

11. Indemnification

Planning Attorney agrees to indemnify Assisting Attorney against any claim, loss or damage arising out of any act or omission by Assisting Attorney under this agreement, provided the actions or omissions of Assisting Attorney 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 was assisting Planning Attorney with the closure of Planning Attorney's office. This indemnification agreement does not extend to any act, errors or omissions of Assisting Attorney while rendering or failing to render professional services in Assisting Attorney's capacity as attorney for the former clients of Planning Attorney. Assisting Attorney shall be responsible for all acts and omissions of gross negligence and willful misconduct. Notwithstanding this indemnification Assisting Attorney is advised to have his or her malpractice coverage cover their activities under this agreement.

12. Fee Disputes to be Arbitrated

Planning Attorney and Assisting Attorney agree that all fee disputes between them will be submitted to and bound by the decision of the _____ Arbitration Procedure.

13. Termination

This Agreement shall terminate upon: (1) delivery or written notice of termination by Planning Attorney to Assisting Attorney during anytime that Planning Attorney is not under disability, impairment or incapacity as established under Section 4 of this Agreement; (2) delivery of written notice of termination by Planning Attorney's court appointed representative upon a showing of good cause; or (3) delivery of a written notice of termination given by Assisting Attorney to Planning Attorney, subject to any ethical obligation to continue or complete any matter undertaken by Assisting Attorney pursuant to this agreement.

14. Governing Law

This Agreement shall be governed and interpreted by the laws of the State of Michigan.

(Planning Attorney)

Date

State of Michigan)
)SS
County of _____)

This instrument was acknowledged before me in _____ County, Michigan on _____ by (name of person).

(Name of Notary)
Notary public, State of Michigan, County of _____.
My commission expires _____.
Acting in the County of _____.

(Assisting Attorney)

Date

State of Michigan)
)SS
County of _____)

This instrument was acknowledged before me in _____ County, Michigan on
_____ by (name of person).

(Name of Notary)
Notary public, State of Michigan, County of _____.
My commission expires _____.
Acting in the County of _____.

(Successor Assisting Attorney)

Date

State of Michigan)
)SS
County of _____)

This instrument was acknowledged before me in _____ County, Michigan on
_____ by (name of person).

(Name of Notary)
Notary public, State of Michigan, County of _____.
My commission expires _____.
Acting in the County of _____.

B. Limited Power of Attorney

I, _____, do hereby appoint _____ as my agent and attorney-in-fact in an Agreement to Close Law Practice between me and this agent and attorney-in-fact dated _____ which is incorporated herein by reference for the limited purpose of conducting all transactions and taking any actions that I might do with respect to my general bank account(s) and safe deposit box(es), but NOT my IOLTA account. I do further authorize my banking institutions to transact my account(s) as directed by my attorney-in-fact and to afford the attorney-in-fact all rights and privileges that I would otherwise have with respect to my account(s) and safe deposit box(es). Specifically, I am authorizing my attorney-in-fact to sign my name on checks, notes, drafts, orders, or instruments for deposit, withdraw, or transfer money to or from my account(s), and do anything with respect to the account that I would be able to do. I am also authorizing my named attorney-in-fact to enter and open my safe deposit box(es), place property in the box(es), remove property from the box(es), and otherwise do anything with the box(es) that I would be able to do even if my attorney-in-fact has no legal interest in the property in the box.

This Power of Attorney will continue as respects the banking institution until the banking institution received my written revocation of this Power of Attorney or written instructions from my attorney-in-fact to stop honoring the signature of my attorney-in-fact.

This Power of Attorney shall not be affected by my disability or incapacity.

(Account Holder)

Date

State of Michigan)
)SS
County of _____)

This instrument was acknowledged before me in _____ County, Michigan on _____ by (name of person).

(Name of Notary)
Notary public, State of Michigan, County of _____.
My commission expires _____.
Acting in the County of _____.

C. General Medical Records Release and Authorization for Use or Disclosure of Protected Health Information

Patient Name: _____

Address: _____

Social Security Number: _____

I authorize the custodian of the records _____ to disclose/release the following information [all medical records, including mental health, substance abuse and HIV/AIDS records or certain particular records]. These records are for services rendered in [time period].

Please send the records listed above to:

Name: _____

Address: _____

Phone Number: _____

The information may be used/disclosed to assist in the determination of my mental or physical capacity to practice law.

The Authorization expires one year from the date it is presented to the custodian of records.

In understand that after the custodian of records discloses my health information, it may no longer be protected by Federal privacy laws. By signing below I represent and warrant that I have authority to sign this document and authorize the use or disclosure of protected health information and that there are no claims or orders pending or in effect that would prohibit, limit or otherwise restrict my ability to authorize the use or disclosure of this protected health information.

Signature of Patient

Date

D. Letter of Understanding

To: _____

I am enclosing a Limited Power of Attorney in which I have named _____ as my first choice and _____ as my alternate choice attorney-in-fact under an Agreement to Close Law Practice between them and me dated _____ which is incorporated herein by reference. 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 that I designate.
2. You will deliver the Power of Attorney to the person named as my first choice attorney-in-fact and if delivery is refused to my Alternate attorney-in-fact 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 if I am able to conduct my business affairs. I expect that if this occurs, you will be notified by a family member, friend, colleague or mine or by the designated attorneys.

(Trusted Family Member or Friend)

Date

(Planning Attorney)

Date

E. Sample Will Provisions

With respect to my law practice, my Personal Representative, if an attorney licensed to practice law in Michigan, is expressly authorized and directed to carry out the terms of the Agreement to Close Law Practice I have made with the Personal Representative. If my Personal Representative is not an attorney licensed to practice law in Michigan; my Personal Representative is authorized and directed to honor an Agreement to Close Law Practice dated _____ in which I have designated Assisting Attorneys to protect the interests of my clients and dispose of my practice.

OR

If I have not entered into an Agreement to Close Law Practice in my lifetime my Personal Representative is expressly authorized and directed to take such steps as he or she deems 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 the sale of the practice, collection of accounts receivable, payment of expenses relating to the practice, and employing an attorney or attorneys to review my files, complete unfinished work, notify my clients of my death and assist them in finding other attorneys and provide long term storage of an access to my files.

F. Sample Paragraph for Retainer Agreements

Client understands that Attorney may enter into an agreement with another attorney to assist with the closure of Attorney's law practice in the event of Attorney's death, disability, impairment or incapacity. In the event of Attorney's death, disability, impairment or incapacity, Client agrees that the assisting attorney shall be permitted to review Client's file and take whatever steps are necessary to protect Client's rights and assist with the closure of Attorney's law practice.

(If Attorney already has an Agreement in place, the Assisting Attorney(s) may be named in this paragraph)

G. Sample Paragraph for Engagement Letter

I have entered into an agreement with another attorney to assist in closing my law practice in the event of my death, disability, impairment or incapacity. I have done this in an effort to protect the interests of all my clients and to ensure your rights are protected should I die or become disabled. My office will notify you and provide you with all relevant information in the event this situation ever arises.

(If Attorney already has an Agreement in place, the Assisting Attorney(s) may be named in this paragraph)

H. Letter Advising Client that Lawyer is Closing His/Her Office

Dear _____:

As of [date], I will be closing my law practice due to [provide reason, if possible]. I will be unable to continue representing you on your legal matters.

I recommend that you immediately hire another attorney to handle your case for you. You can select any attorney you wish, or I would be happy to provide you with a list of local attorneys who practice in the area of law relevant to your legal needs.

When you select your new attorney, please provide me with written authority to transfer your file to the new attorney. If you prefer, you may come to my office and pick up a copy of your file and deliver it to that attorney yourself.

It is imperative that you obtain a new attorney immediately. [Insert appropriate language regarding time limitations or other critical dates that client should be aware of] Please let me know the name of your new attorney, or arrange to pick up a copy of your file by [date].

I [or other individual who will store files] will continue to store my copy of your closed file for five years. After that time, I [or other attorney] will destroy my copy of the file unless you notify me in writing immediately that you do not want me to follow this procedure. [If relevant, add: If you object to (name of other attorney) storing my copy of your closed file, let me know immediately and I will make alternate arrangements.]

If you, or your new attorney, need a copy of the closed file please feel free to contact me. I will be happy to provide you with a copy.

Within the next [fill in number] weeks I will be providing you with a full accounting of your funds in my trust account and fees you currently owe me.

You will be able to reach me at the address and telephone number listed on this letter until [date]. After that time, you or your new attorney can reach me at the following phone number and address [insert phone number and address].

Remember, it is imperative that you retain a new attorney immediately. This will be the only way that time limitations applicable to your case will be protected and your other legal rights preserved.

I appreciate the opportunity of providing you with legal services. Please do not hesitate to give me a call if you have any questions or concerns.

Sincerely,

[Attorney]

III. Other Michigan Resources

**All resources available at www.michbar.org

A. Ethics Articles from the Michigan Bar Journal

1. Protecting the Client When a Lawyer Dies or Becomes Disabled
Michigan Bar Journal, October 1999
2. Lawyer Trust Accounts – Frequently Asked Questions
Michigan Bar Journal, November 1999

B. Ethics Packages

1. Closing a Law Practice
2. Record Retention Kit

C. Ethics Opinions

1. Opinions Regarding Closing a Law Practice
 - a. R-5
 - b. R-12
 - c. RI-19
 - d. RI-30
 - e. RI-38
 - f. RI-69
 - g. RI-100
 - h. RI-102
 - i. RI-110
2. Opinions Regarding Trust Accounts
 - a. R-7
 - b. RI-38
 - c. RI-58
 - d. RI-61
 - e. RI-64
 - f. RI-65
 - g. RI-67
 - h. RI-69
 - i. RI-70
 - j. RI-71
 - k. RI-92
 - l. RI-93
 - k. RI-107
 - m. RI-189
 - n. RI-222
 - o. RI-224
 - p. RI-312
 - q. RI-329
3. Opinions Regarding Record Retention
 - a. R-5
 - b. R-7
 - c. R-12
 - d. RI-86
 - e. RI-100
 - f. RI-109
 - g. RI-178
 - h. RI-240
4. Opinions Regarding Client Files
 - a. R-19

IV. Checklists

All sample checklists originally published by the Indianapolis Bar Association, used with permission of the Indianapolis Bar Association and modified for Michigan law.

A. Checklist for Lawyers Planning to Protect Clients' Interests in the Event of the Lawyer's Death, Disability, Incapacity or Impairment

1. Create a retainer agreement which includes a provision stating that you have arranged for another attorney to close your practice in the event of your death or disability.
2. Create, and keep current, a thorough office procedure manual which contains the following information:
 - a. How to check for conflicts of interest;
 - b. How to use the calendaring system;
 - c. How to generate a list of active client files, including client names, addresses and phone numbers;
 - d. Where client ledgers are kept;
 - e. Policies regarding billing clients;
 - f. How the open/active files are organized;
 - g. How the closed files are organized;
 - h. Where the closed files are kept and how to access them;
 - i. The office policy on keeping original documents of clients;
 - j. The office record retention policy;
 - k. Where original client documents are kept;
 - l. Where the safe deposit box is located and how to access it;
 - m. The bank name, address, account signers, and account numbers of all law office bank accounts;
 - n. The location of all law office bank account records (trust and general);
 - o. Where to find or who knows about the computer passwords;
 - p. How to access your voice mail, answering machine, and/or e-mail and the access code numbers
3. Make sure all of your file deadlines (including follow up deadlines) are on your calendaring system;
4. Document your files;
5. Keep your timesheets and billing records up to date;
6. Avoid keeping original documents of clients, such as wills and other estate planning documents;

7. Have a written agreement that outlines the responsibilities involved in closing your practice with an attorney who will close your practice. Determine whether this attorney will also be your personal attorney. Be conscious of conflict of interest issues when choosing this attorney;
8. If your written agreement authorizes your Assisting attorney to sign general business account checks, follow the procedures required by your bank. Decide whether you want to authorize access at all times, at specific times or only upon the happening of a specific event. In some instances, you and your Assisting attorney will have to sign bank forms authorizing the attorney to have access to your general business account. Choose your Assisting attorney carefully. He or she will have access to your funds;
9. Include a procedure in your written agreement regarding the determination of whether your incapacity renders you unable to practice law. Complete, in advance, a medical release and authorization form as required by HIPAA permitting disclosure of medical information to assist in this determination.
10. Familiarize your Assisting attorney with your office systems, and keep him or her apprized of office changes. Also advise of any insurance coverage and any changes in coverage;
11. Introduce your Assisting attorney to your staff. Make certain your staff knows where you keep the written agreement and how to contact the Assisting attorney if an emergency occurs outside office hours. If you don't have office staff make sure the Assisting attorney has contact information that will allow him or her to access your office (e.g. landlord);
12. Inform your spouse or closest family member and the personal representative of your estate of the existence of the agreement between you and the Assisting attorney and provide those individuals with contact information for the Assisting attorney;
13. Renew your written agreement with the Assisting attorney each year. If you include the name of the Assisting attorney in your retainer agreements make sure they are current;
14. Maintain a file consisting of current retainer agreements between clients and attorney.

B. Checklist for Closing Another Attorney's Office

The term "Affected Attorney" refers to the attorney whose office is being closed. To the extent possible, you should utilize the assistance of the Affected Attorney and/or his or her staff.

1. Check the calendar and active files to determine which items are urgent and/or scheduled for hearing, trials, depositions, court appearances, etc. If possible, discuss with the Affected Attorney the status of all open files.
2. Contact clients for matters that are urgent or immediately scheduled for hearing, court appearances, or discovery. Obtain permission to postpone or reschedule. **(If making these arrangements constitutes a conflict of interest for you and your clients, contact Successor Assisting Attorney to take responsibility for obtaining extensions of time and other immediate needs.)**

Consider consulting with other lawyers if you do not have expertise in one or more of the areas in which the Affected Attorney practiced.

4. Contact courts and opposing counsel for files that require discovery or court appearances immediately. Reschedule hearings or obtain extensions where necessary. Confirm extensions and reschedulings in writing. Keep in mind the attorney client privilege.
5. Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate files.
6. Look for an office procedures manual. Determine if there is a way to get a list of clients with active files.
7. Send clients who have active files a letter explaining that the law office is being closed and instructing them to retain a new attorney and/or to pick up the open file. Provide clients with a date by which they should pick up copies of their files. Inform clients that new counsel should be chosen immediately.
8. For cases before administrative bodies and courts, obtain permission from the clients to submit a Motion and Order to withdraw the Affected Attorney as attorney of record.
9. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
10. Pick an appropriate date and check to see if all cases have either a motion and order allowing withdrawal of the Affected Attorney or a Substitution of Attorney filed with the court.
11. Make copies of files for clients. Retain the Affected Attorney's original file. All clients should either pick up a copy of their files (and sign a receipt acknowledging that they received it) or sign an authorization to release a copy to a new attorney. If the client is picking up a copy for the file and there are original documents in it that the client needs (such as a title to property), return the original documents to the client and keep copies for the Affected Attorney's file, noting same in retained file. Return original wills to clients.

12. All clients should be advised on where their closed files will be stored and who they should contact in order to retrieve a closed file.
13. Send the name, address and phone number of the person who will be retaining the closed files to the central filing place as discussed in meetings to date or filed with private office or other office.
14. If the attorney whose practice is being closed was a sole practitioner (the Affected Attorney), try to arrange for his or her phone number to have a forwarding number. This eliminates the problem created when clients call the Affected Attorney's phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.
15. Contact the Affected Attorney's malpractice carrier, if applicable, about extended reporting coverage. Be sure you have coverage for your actions as Assisting Attorney.
16. (Optional) If you have authorization to handle the Affected Attorney's financial matters, look around the office for checks or funds that have not been deposited. Determine if funds should be deposited or returned to clients. (Some of the funds may be for services already rendered.) Get instructions from clients concerning any funds in their trust accounts. Prepare a final billing statement showing any outstanding fees due, and/or any money in trust. (To withdraw money from the Affected Attorney's general business accounts, you will probably need to be an authorized signer on the accounts, you will need a written agreement, or you will need a limited power of attorney. If this has not been done and is not obtainable from the Affected Attorney because of death, disability, impairment, or incapacity, and for IOLTA account access you will have to request the judge of the Circuit Court to take jurisdiction over the practice and the accounts pursuant to MCR 9.119(G) or petition the Probate Court to appoint a personal representative.) Money from clients for services rendered by the Affected Attorney should go to the Affected Attorney or his/her estate.
17. (Optional) If you are authorized to do so, handle financial matters, pay business expenses, and liquidate or sell the practice
18. (Optional) If your responsibilities include sale of the practice, you may want to advertise in the local bar newsletter, and other appropriate places.
19. (Optional) If your arrangement with the Affected Attorney or estate is that you are to be paid for closing the practice, submit your bill.
20. (Optional) If your arrangement is to represent the Affected Attorney's clients on their pending cases, obtain each client's consent to represent the client and check for conflicts of interest.

C. Checklist for Closing Your Own Office

1. Finalize as many active files as possible.
2. Write to clients with active files advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this.
3. For cases that have pending court dates, depositions or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.
4. For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.
6. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
6. Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as attorney of record or have a Substitution of Attorney filed with the court.
7. Make copies of files for clients. Retain your original files (except original documents, such as deeds, keep a copy of the documents and return the original to the client). All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys.
8. Contact all clients for whom you have retained original Wills. Advise them that you are closing your office and ask that they pick up their original Will. Be sure they sign a receipt and maintain a record of all Wills that are retrieved.
9. All clients should be told where their closed files will be stored and whom they should contact in order to retrieve them. Obtain all clients' permission to destroy the files after approximately five years. If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number.
10. If you have sold your practice, advise your clients of the name, address and telephone number of the purchasing attorney.
11. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.