SBM
State Bar of Michigan

PRACTICE MANAGEMENT RESOURCE CENTER

Planning Ahead:

Protecting Your Clients' Interests in the Event of Your Disability or Death

Handbook and Forms

As of Sept. 26, 2014

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PLANNING AHEAD:
A GUIDE TO PROTECTING
YOUR CLIENTS' INTERESTS IN THE EVENT
OF YOUR DISABILITY OR DEATH

Handbook and Forms

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The State Bar of Michigan gratefully acknowledges the pioneering work done by the Oregon State Bar Professional Liability Fund in this area.

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This handbook was compiled and produced by the Practice Management Resource Center of the State Bar of Michigan.

OBJECTIVE

This handbook was created for attorneys and their staffs and is intended to help you fulfill your ethical obligations to protect your clients' interests in the event of your death, disability, impairment, or incapacity. Although it is hard to think about events that could render you unable to continue practicing law, freak accidents, unexpected illness, and untimely death do occur. Following the guidelines in this handbook will help to protect your clients' interests and will help to make your practice a valuable asset that can be sold to benefit you or your estate. In addition, it will simplify the closure of your office—a step your family and colleagues will very much appreciate.

DISCLAIMER

This handbook is designed to help you protect your clients' interests in the event of your permanent or temporary disability or your death. The material presented here does not establish, report, or create the standard of care for attorneys and is not a complete analysis of the topic. Rather, it is intended to provide guidelines and materials to help you create the plan for your firm. You should not rely on the material without first conducting your own appropriate legal research.

CONDITIONS OF USE

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SERVING YOUR CLIENTS BY PLANNING AHEAD

Just as we continually urge our clients to do their own estate planning, we as lawyers also have to think about what might happen to our practices, and our clients, upon our sudden disability, retirement, or even worse, our sudden death. This is of particular importance to solo practitioners who may not have a "back up" attorney, but is important for all attorneys by reason of our special relationship with our clients and the duties we owe to them.

You probably know of several cases where a lawyer has had to stop practicing law either without any warning or on relatively short notice. Here are a few from our archives:

- An attorney friend, age 59, hit an ice patch on I-96, flipped his car, and did not recover from his brain injuries.
- A young attorney, age 35, disappeared in a boating incident on Lake St. Clair.
- An estate planning lawyer died after a relatively short battle with prostate cancer.
- An attorney was shot in the middle of the street by the disgruntled husband of a client with whom he had an affair.
- A lawyer suffered a severe stroke and, although he recovered, his speech and communications ability were severely impaired.

To ensure that your clients' interests are protected, there are various steps to take now to plan for your inability to practice law. There are no specific requirements, but the State Bar of Michigan and the American Bar Association have issued informative opinions regarding issues that may arise when tragedy strikes, or, on a happier note, when you decide to retire. While we can always hope for the best, we recommend you plan for the worst case scenario.

The purpose of this handbook is to help you—particularly those in small firms or solo practices—develop a plan for your clients in the event that your health is such that you cannot be there for them. Unfortunately, disaster can occur and it is best to have a plan in place to protect our clients.

While an increasing number of states require lawyers to identify a lawyer who will act as an "inventory attorney" in winding down the practice of a disappeared, disabled, or deceased attorney, the only provision currently in effect in Michigan that deals with the death or disability of an attorney is Michigan Court Rule 9.119(G).[1] It states that if an attorney dies or becomes otherwise incapacitated, the grievance administrator may ask the chief judge in the judicial circuit where the attorney maintains an office to appoint a receiver to step in.

Additionally, many commercial malpractice carriers now require the lawyers they insure to make arrangements for office closure in the event of death or disability, including naming the attorney who is authorized to step in on the insurance application or renewal application.

[1] Dawn Evans, *Planning for an Orderly Transition*, Michigan Bar Journal, Vol. 88, Issue 9 (September 2009), pp. 52-53

The forms and ideas in this handbook are presented to assist you in developing your own plan to protect your clients in case of your disability or death. We hope you find these materials helpful.

TERMINOLOGY

The term *Assisting Attorney* used throughout this handbook refers to the lawyer you have made arrangements with to close your practice or to handle it while you are incapacitated.

The term *Authorized Signer* refers to the person you have authorized as a signer on your lawyer trust account(s).

The term *Planning Attorney* refers to you, your estate, or your personal representative.

FORMS

The sample *Agreement – Full Form*, provided in Chapter 4, authorizes the Assisting Attorney to transfer client files, sign checks on your general account, and close your practice. This form also provides for payment to the Assisting Attorney for services rendered, designates the procedure for termination of the Assisting Attorney's services, and provides the Assisting 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(s). The *Agreement – Full Form* is a sample only. You may modify it as needed.

The sample *Agreement – Short Form*, also provided in Chapter 4, includes authorization of an Authorized Signer 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(s). 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. You may modify this form as needed.

IMPLEMENTING THE PLAN

The first step in the planning process is for you to find someone – an attorney – to close or temporarily manage your practice in the event of your death, disability, impairment, or incapacity. The arrangements you make for closure of your office should include a signed consent form authorizing the Assisting Attorney 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 closure of your law practice. (See sample Agreement – Full Form and sample Agreement – Short Form provided in Chapter 4 of this handbook.)

The agreement could also include provisions that give the Assisting Attorney authority to wind down your financial affairs, provide your clients with a final accounting and statement, collect fees on your behalf, and liquidate or sell your practice. Arrangements for payment by you or your estate to the Assisting Attorney for services rendered can also be included in the agreement. (See sample Agreement – Full Form provided in Chapter 4 of this handbook.)

At the beginning of your relationship, it is crucial for you and the Assisting Attorney to establish the scope of the Assisting Attorney's duty to you and your clients. If the Assisting Attorney

represents you as your attorney, he or she may be prohibited from representing your clients on some, or possibly all, matters. Under this arrangement, the Assisting Attorney would owe his or her fiduciary obligations to you. For example, the Assisting Attorney could inform your clients of your legal malpractice or ethical violations only if you consented. However, if the Assisting Attorney is not your attorney, he or she may have an ethical obligation to inform your clients of your errors. (See What If? Answers to Frequently Asked Questions, Chapter 2 of this handbook.)

Whether or not the Assisting Attorney is representing you, that person must be aware of conflict-of-interest issues and must check for conflicts if he or she (1) is providing legal services to your clients or (2) must review confidential file information to assist with transferring clients' files.

In addition to arranging for an Assisting Attorney, you may also want to arrange for an Authorized Signer on your trust account(s). It is best to choose someone other than your Assisting Attorney to act as the Authorized Signer on your trust account(s). 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(s) account does/do not balance.

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

If you want the Assisting Attorney 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 4 of this handbook should be legally sufficient to grant authority to sign on your account. However, you and the Assisting Attorney and/or the Authorized Signer may also want to sign a limited power of attorney. (See Power of Attorney – Limited provided in Chapter 4 of this handbook.) 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 Assisting

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 Assisting Attorney 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, yet 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 or partner, 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 Letter of Understanding provided in Chapter 4 of this handbook.) When the event occurs, the trusted friend or family member provides the Assisting Attorney 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 Assisting Attorney 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 Assisting Attorney and/or the Authorized Signer, based on reasonable belief, says so? Is it for a specific period of time, for example, a period during which you are on vacation? You and the Assisting Attorney 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.

Another approach is to allow the Assisting Attorney and/or Authorized Signer access at all times. With respect to your bank accounts, this approach requires going to the bank and having the Assisting Attorney and/or Authorized Signer sign the appropriate cards and paperwork. When the Assisting Attorney and/or Authorized Signer is authorized to sign on your account, he or she has complete access to the account. This is an easy approach that allows the Assisting Attorney and/or Authorized Signer to carry out office business even if you are just unexpectedly delayed returning from vacation. Adding someone as a 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 signer's access. These risks make it an extremely important decision. If you choose to give another person full access to your accounts, your choice of signer is crucial to the protection of your clients' interests, as well as your own.

ACCESS TO THE TRUST ACCOUNT

As mentioned above, when arranging to have someone take over or wind down your financial affairs, you should also consider whether you want someone to have access to your trust account. If you do not make arrangements to allow someone access to the trust account, your clients'

money will remain in the trust account until a court orders access. For example, if you become physically, mentally, or emotionally 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, pursuant to MCR 9.119(G).[2] In many instances, the client needs the money he or she has on deposit in the lawyer's trust account to hire a new lawyer, and a delay puts the client in a difficult position. This is likely to prompt ethics complaints, Client Protection Fund claims, malpractice complaints, or other civil suits.

On the other hand, as emphasized above, allowing access to your trust account is a serious matter. You must give careful consideration to whom you give access 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.

There are no easy solutions to this problem, and there is no way to know absolutely whether you are making the right choice. There are many important decisions to make. Each person must look at the options available to him or her, weigh the relative risks, and make the best choices he or she can.

Adding an Assisting Attorney or Authorized Signer to your general or lawyer trust account is permitted regardless of the form of entity you use for practicing law.

CLIENT NOTIFICATION

Once you have made arrangements with an Assisting Attorney 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 provides written authorization for the Assisting Attorney to proceed on the client's behalf, if necessary, if you decide the Assisting Attorney will

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[2] (G) Receivership.

(1) Attorney with a firm. If an attorney who is a member of a firm is disbarred, suspended, is transferred to inactive status pursuant to MCR 9.121, or resigns his or her license to practice law, the firm may continue to represent each client with the client's express written consent. Copies of the signed consents shall be maintained with the client file.

(2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, 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 act as a receiver with necessary powers, including:

(a) to obtain and inventory the attorney's files;
(b) to take any action necessary to protect the interests of the attorney and the attorney's clients;
(c) to change the address at which the attorney's mail is delivered and to open the mail; or
(d) to secure (garner) the lawyer's bank accounts.

The person appointed is analogous to a receiver operating under the direction of the circuit court.

(3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.

(4) Publication of Notice. Upon receipt of notification from the receiver, the State Bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.[2]

not represent you or your estate. (See *Retainer Agreement*, *Contingent Fee Agreement*, and *Engagement Letters* provided in Chapter 4 of this handbook.)

OTHER STEPS THAT PAY OFF

You can take a number of steps while you are still practicing to make the process of closing your office smooth and inexpensive.

These steps include:

1. Making sure that your office procedures manual explains how to produce a list of client names and addresses for open files
2. Keeping all deadlines and follow-up dates on your calendaring system
3. Thoroughly documenting client files
4. Keeping your time and billing records up-to-date
5. Familiarizing your Assisting Attorney and/or Authorized Signer with your office systems
6. Renewing your written agreement with the Assisting Attorney and/or Authorized Signer each year
7. Making sure you do not keep clients' original documents, such as wills or other estate plans. (See Checklist for Lawyers Planning to Protect Clients' Interests in the Event of the Lawyer's Death, Disability, Impairment, or Incapacity provided in Chapter 3 of this handbook.)

If your office is in good order, the Assisting Attorney will not have to charge more than a minimum of fees for closing the practice. Your law office will then be an asset that can be sold and the proceeds remitted to you or your estate. 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.

DEATH OF A SOLE PRACTITIONER: SPECIAL CONSIDERATIONS

If you authorize another lawyer to administer your practice in the event of death, disability, impairment, or incapacity, that authority terminates when you die. The personal representative of your estate has the legal authority to administer your practice. He or she must be told about your arrangement with the Assisting Attorney and/or Authorized Signer and about your desire to have the Assisting Attorney and/or Authorized Signer carry out the duties of your agreement. The personal representative can then authorize the Assisting Attorney 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 shall serve without bond. Absent such a provision, a relatively expensive fiduciary bond will have to be obtained before the personal representative is authorized to act.

For many sole practitioners, the law practice will be the only asset subject to probate. Other property will likely pass outside probate to a surviving joint tenant, usually the spouse. This means that unless you keep enough cash in your law practice bank account, there may not be adequate funds to retain the Assisting Attorney and/or Authorized Signer or to continue to pay your clerical 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 cash during the time it takes to close your practice. Your Assisting Attorney 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. Alternately, your surviving spouse or other family members can be named as beneficiary, with instructions to lend the funds to the estate, if needed.

Michigan 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. 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 of your law practice. The appropriate language will depend on the nature of the practice and the arrangements you make ahead of time. (See *Will Provisions* provided in Chapter 4 of this handbook.) For an instructive and detailed will for a sole practitioner, see Thomas G. Bousquet, Retirement of a Sole Practitioner's Law Practice, 29 LAW ECONOMICS & MANAGEMENT 428 (1989); updated 33 The Houston Lawyer 37 (January/February 1996).

It is important to allocate sufficient funds to pay an Assisting Attorney and/or Authorized Signer and necessary secretarial 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.

START NOW

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. Don't put it off – start the process today.

CHAPTER 2
WHAT IF?

ANSWERS TO FREQUENTLY ASKED QUESTIONS

If you are planning to close your office or if you are considering helping a friend or colleague close his or her practice, you should think through a number of issues. How you structure your agreement will determine what the Assisting Attorney must do if the Assisting Attorney finds (1) errors in the files, such as missed time limitations, or (2) misappropriation of client funds.

Discussing these issues at the beginning of the relationship will help to avoid misunderstandings later when the Assisting Attorney interacts with the Planning Attorney's former clients. If these issues are not discussed, the Planning Attorney and the Assisting Attorney may be surprised to find that the Assisting Attorney (1) has an obligation to inform the Planning Attorney's clients about a potential malpractice claim or (2) may be required to report the Planning Attorney to the Michigan Attorney Grievance Commission.

The best way to avoid these problems is to have a written agreement with the Planning Attorney and, when applicable, with the Planning Attorney's former clients. If there is no written agreement clarifying the obligations and relationships, an Assisting Attorney may find that the Planning Attorney believes the Assisting Attorney is representing the Planning Attorney's interests. At the same time, the former clients of the Planning Attorney may also believe that the Assisting Attorney is representing their interests. It is important to keep in mind that an attorney-client relationship can be established by the reasonable belief of a would-be client.

This section reviews some of these issues and the various arrangements that the Planning Attorney and the Assisting Attorney can make. All of these frequently asked questions, except question 8, are presented as if the Assisting Attorney is posing the questions.

1. If the Planning Attorney is unable to practice and I am assisting with the office closure, must I notify the former clients of the Planning Attorney if I discover a potential malpractice claim against the Planning Attorney?

The answer is largely determined by the agreement you have with the Planning Attorney and the Planning Attorney's former clients. If you do not have an attorney-client relationship with the Planning Attorney, and you are the new lawyer for the Planning Attorney's former clients, you must inform your client (the Planning Attorney's former client) of the error, and advise him or her to submit a claim to the Planning Attorney's professional liability insurance carrier and/or the Michigan Attorney Grievance Commission, unless the scope of your representation of the client excludes actions against the Planning Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

If you are the Planning Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Planning Attorney and inform the Planning Attorney of his or her obligation to inform the client of the error. As the attorney for the Planning Attorney, you are obligated to follow the instructions of the Planning Attorney. You must also be careful that you do not make any misrepresentations. This situation could arise if the Planning Attorney refused to fulfill his or her obligation to inform the client – and also instructed you not to tell the

client. If that occurred, you must be sure you do not say or do anything that would mislead the client.

In most cases, the Planning Attorney will want to fulfill his or her obligation to inform the client. As the Planning Attorney's lawyer, you and the Planning Attorney can include a clause in your agreement that gives you (the Assisting Attorney) permission to inform the Planning Attorney's former clients of any malpractice errors. This would not be permission to represent the former clients on malpractice actions against the Planning Attorney. Rather, it would authorize you to inform the Planning Attorney's former clients that a potential error exists and that they should seek independent counsel.

2. I know sensitive information about the Planning Attorney. The Planning Attorney's former client is asking questions. What information can I give the Planning Attorney's former client?

Again, the answer is based on your relationship with the Planning Attorney and the Planning Attorney's clients. If you are the Planning Attorney's lawyer, you would be limited to disclosing only information that the Planning Attorney wished you to disclose. You would, however, want to make clear to the Planning Attorney's clients that you do not represent them and that they should seek independent counsel. If the Planning 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.

3. Since the Planning Attorney is now out of practice, does the Planning Attorney have malpractice coverage?

When attorneys leave private practice, their liability coverage plan limits for the year that they leave are extended to cover claims that occur after they leave private practice. This extension of coverage is called Extended Reporting Coverage (ERC) or Tail Coverage. Contact the planning attorney's professional liability insurance carrier for the details regarding extended coverage.

4. In addition to transferring files and helping to close the Planning Attorney's practice, I want to represent the Planning Attorney's former clients. Am I permitted to do so?

Whether you are permitted to represent the former clients of the Planning Attorney depends on (1) whether the clients want you to represent them and (2) who else you represent.

If you are representing the Planning Attorney, you cannot represent the Planning Attorney's former clients on any matter against the Planning Attorney. This would include representing the Planning Attorney's former clients on a malpractice claim, ethics complaint, or fee claim against the Planning Attorney. If you do not represent the Planning Attorney, you are limited by conflicts arising from your other cases and clients. You must check your client list for possible client conflicts before undertaking representation or reviewing confidential information of a former client of the Planning Attorney.

Even if a conflict check reveals that you are permitted to represent the client, you may prefer to refer the case to another lawyer. 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 Planning Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her

may make you vulnerable to the allegation that you did not zealously advocate on behalf of your new client. To avoid this potential exposure, you should provide the client with names of other attorneys or refer the client to local lawyer referral services or the State Bar of Michigan Lawyer Referral Service (800-968-0738).

5. What procedures should I follow for distributing the funds in the trust account?

If your review or the Authorized Signer's review of the lawyer trust account indicates that there may be conflicting claims to the funds in the trust account, you should initiate a procedure for distributing the existing funds, such as a court-directed interpleader.

6. If there is an ethical violation, must I tell the Planning Attorney's former clients?

The answer depends on the relationships and upon the application of MRPC 8.3. Generally, the answer is (1) no, if you are the Planning Attorney's lawyer; (2) maybe, if you are not representing the Planning Attorney or the Planning Attorney's former clients; and (3) yes, if you are the attorney for the Planning Attorney's former clients.

If the Planning Attorney violated a rule of professional conduct and you are his or her lawyer, you are not obligated to inform the Planning Attorney's former clients of any ethical violations or report any of the Planning Attorney's ethical violations to the Michigan Attorney Grievance Commission if your knowledge of the misconduct is the result of confidential information obtained from your client, the Planning Attorney. Although you may have no duty to report, you may have other responsibilities. For example, if you discover that some of the client funds are not in the lawyer trust account as they should be, you, as the attorney for the Planning Attorney, should discuss this matter with the Planning Attorney and encourage the Planning Attorney to correct the shortfall. If the Planning Attorney does not correct the shortfall and you believe the Planning Attorney's conduct violates the rules of professional conduct, you should resign. If you are the attorney for the Planning Attorney and the Planning Attorney is deceased, you should contact the personal representative of the estate. If the Planning Attorney is alive but unable to function, you (or the Authorized Signer) may have to disburse the amounts that are available and inform the Planning Attorney's former clients that they have the right to seek legal advice.

If you are the Planning Attorney's lawyer, you should make certain that former clients of the Planning Attorney do not perceive you as their attorney. This should include informing them in writing that you do not represent them.

If you are a signer on the trust account and (1) you are not the attorney for the Planning Attorney and (2) you are not representing any of the former clients of the Planning Attorney, you may still have a fiduciary obligation to notify the clients of the shortfall, and you may have an obligation to report the Planning Attorney to the Michigan Attorney Grievance Commission. See MRPC 8.3.

If you are the attorney for a former client of the Planning Attorney, you have an obligation to inform the client about the shortfall and advise the client of available remedies. These remedies may include (1) pursuing the Planning Attorney for the shortfall, (2) filing a claim with the Client Protection Fund, or (3) filing an ethics complaint with the Michigan Attorney Grievance Commission. If you are the attorney for a former client of the Planning Attorney and you are also a friend of the Planning Attorney, this is a particularly important issue. You should determine

ahead of time whether you are prepared to assume (1) the obligation to inform the Planning Attorney's former clients of the Planning Attorney's ethical errors and (2) the duty to report the Planning Attorney to the Michigan Attorney Grievance Commission if a violation occurs. If you do not want to inform your clients (the former clients of the Planning Attorney) about possible ethics violations, you must explain to your clients that you are not providing them with any advice on ethics violations of the Planning Attorney. You should advise the clients, in writing, to seek independent representation on these issues. Limiting the scope of your representation, however, does not eliminate your duty to report.

7. If the Planning Attorney stole client funds, do I have exposure to an ethics complaint against me?

You do not have exposure to an ethics complaint for stealing the money, unless you in some way aided or abetted the Planning Attorney in the unethical conduct.

Whether you have an obligation to inform the Planning Attorney's former clients of the misappropriation depends on your relationship with the Planning Attorney and the Planning Attorney's former clients. (See question 6 above.)

If you are the new attorney for a former client of the Planning Attorney and you fail to advise the client of the Planning Attorney's ethical violations, you may be exposed to the allegation that you have violated your ethical responsibilities to your new client.

8. What are the pros and cons of allowing someone to have access to my trust account? How do I make arrangements to give my Authorized Signer access?

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you (the Planning Attorney) suddenly become unable to continue in practice, an Authorized Signer is able to transfer money from the trust account to pay appropriate fees, provide your clients with settlement checks, and refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account until a court allows access. This delay may leave the clients at a disadvantage, since settlement funds, or unearned fees held in trust, are often needed to hire a new lawyer.

On the other hand, the most important "con" of authorizing trust account access is your inability to control the person who has been granted access. An Authorized Signer with unconditional access has the ability to write trust account checks, withdraw funds, or close the account at any time, even if you are not dead, disabled, impaired, or otherwise unable to conduct your business affairs**. It is very important to carefully choose the person you authorize as a signer and, when possible, to continue monitoring your accounts.**

If you decide to have an Authorized Signer, decide whether you want to give (1) access only during a specific time period or when a specific event occurs or (2) access all the time. (See *The Duty to Plan Ahead* in Chapter 1 of this handbook.)

9. The Planning Attorney wants to authorize me as a trust account signer. Am I permitted to also be the attorney for the Planning Attorney?

Although this generally works out fine, the arrangement may result in a conflict of fiduciary interests. As an Authorized Signer on the Planning Attorney's trust account, you would have a

duty to properly account for the funds belonging to the former clients of the Planning Attorney. This duty could be in conflict with your duty to the Planning Attorney if (1) you were hired to represent him or her on issues related to the closure of his or her law practice and (2) there were misappropriations in the trust account and the Planning Attorney did not want you to disclose them to the clients. To avoid this potential conflict of fiduciary interests, the most conservative approach is to choose one role or the other: be an Authorized Signer **OR** be an Assisting Attorney representing the Planning Attorney on issues related to the closure of his or her practice. (See question 4 above.)

CHAPTER 3
CHECKLISTS

CHECKLIST FOR LAWYERS PLANNING TO PROTECT CLIENTS' INTERESTS IN THE EVENT OF THE LAWYER'S DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

Click Here to Open this Checklist as Word Doc

1. Use retainer agreements that state you have arranged for an Assisting Attorney to close your practice in the event of death, disability, impairment, or incapacity and have arranged for an Authorized Signer to issue refunds from your lawyer trust account. (See sample *Retainer Agreement* provided in Chapter 4 of this handbook.)
2. Have a thorough and up-to-date office procedure manual that includes information on:
    a. How to check for a conflict of interest;
    b. How to use the calendaring system;
    c. How to generate a list of active client files, including client names, addresses, and phone numbers;
    d. Where client ledgers for your lawyer trust account are kept; or in the alternative, how to pull client trust account balances from your trust accounting software.
    e. How the open/active files are organized and assigned numbers;
    f. How the closed files are organized and assigned numbers;
    g. Where the open files are kept and how to access them;
    h. Where the closed files are kept and how to access them;
    i. The office policy on keeping original client documents;
    j. Where original client documents are kept;
    k. Where the safe deposit box is located and how to access it;
    l. The bank name, address, account signers, and account numbers for all law office bank accounts;
    m. The location of all law office bank account records (trust and general);
    n. Where to find, or who knows about, the computer passwords, software licenses, computer and server backup systems, websites, social media sites;
    o. How to access your voice mail (or answering machine) and the access code numbers; and
    p. Where the post office or other mail service box is located and how to access it.
3. Make sure all your file deadlines (including follow-up deadlines) are calendared.
4. Document your files.
5. Keep your time and billing records up-to-date.
6. Avoid keeping original client documents, such as wills and other estate planning documents.

7. Have a written agreement with an attorney who will close your practice (the "Assisting Attorney") that outlines the responsibilities involved in closing your practice. Determine whether the Assisting Attorney will also be your personal attorney. Choose an Assisting Attorney who is sensitive to conflict-of-interest issues.
8. If your written agreement authorizes the Assisting Attorney to sign 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. In some instances, you and the Assisting Attorney will have to sign bank forms authorizing the Assisting Attorney to have access to your general account. (See *The Duty to Plan Ahead, Implementing the Plan,* in Chapter 1 of this handbook.)
9. 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. In most instances, you and the Authorized Signer will have to sign bank forms providing for access to your trust account. (See *The Duty to Plan Ahead, Access to the Trust Account,* in Chapter 1 of this handbook.) Choose your Authorized Signer wisely; he or she will have access to your clients' funds.
10. Familiarize your Assisting Attorney with your office systems and keep him or her apprised of office changes.
11. Introduce your Assisting 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 Assisting Attorney and/or Authorized Signer if an emergency occurs before or after office hours. If you practice without regular staff, make sure your Assisting Attorney and/or Authorized Signer knows whom to contact (the landlord, for example) to gain access to your office.
12. Inform your spouse, partner, or closest living relative and the personal representative of your estate of the existence of this agreement and how to contact the Assisting Attorney and/or Authorized Signer.
13. Renew your written agreement with your Assisting Attorney and/or Authorized Signer annually.
14. Review your retainer agreement each year to make sure that the name of your Assisting Attorney is current.
15. Fill out the Law Office List of Contacts practice aid provided in Chapter 4 of this handbook. Make sure your Assisting Attorney has a copy.

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ASSISTING ATTORNEY'S CHECKLIST FOR CLOSING ANOTHER ATTORNEY'S OFFICE

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

1. Check the calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, and so on. Tip: In addition to checking the closing attorney's personal calendar, consider searching online court calendars where available.
2. Contact clients for matters that are urgent or immediately scheduled for hearing, court appearances, or discovery. Obtain permission for requesting the resetting of hearing dates. (If making these arrangements poses a conflict of interest for you and your clients, retain another attorney to take responsibility for obtaining extensions of time and other immediate needs.)
3. Contact courts and opposing counsel immediately for files that require discovery or court appearances. Obtain resetting of hearing dates or extensions when necessary. Confirm extensions and resets in writing.
4. Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate files.
5. Look for an office procedure manual. Determine whether anyone has access to a list of clients with active files.
6. Determine whether the Closing Attorney stored files online. Locate the user name and password, retrieve the digital data, and arrange for the cloud storage provider to close the account.
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 pick up a copy of 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. (See sample *Letter Advising That Lawyer Is Unable to Continue in Practice* provided in Chapter 4 of this handbook.)
8. For cases before administrative bodies and courts, obtain permission from the clients to submit a motion and order to withdraw the Closing Attorney as attorney of record.
9. If the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed. (http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc306.pdf)
10. Select an appropriate date to check whether all cases have either a motion and order allowing withdrawal of the Closing Attorney or a Substitution of Attorney filed with the court.

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

12. Advise all clients where their closed files will be stored and whom they should contact in order to retrieve a closed file.

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

14. Contact the Closing Attorney's malpractice/excess carrier, if applicable, about extended reporting coverage.

15. If the Closing Attorney is a notary and wishes to resign his or her commission, he or she must follow the instructions found on the Michigan Secretary of State's website FAQ. "How Do I Cancel My Michigan Notary Public Commission?" Answer: To cancel your current notary public commission please place your request in writing, include your signature and the date of your request, and mail it to: Office of the Great Seal, 7064 Crowner Drive, Lansing, MI 48918. You must also include in your request your name, address, county of commission, appointment date, and expiration date. If you choose to cancel your notary public commission, you may reapply for a new commission at any time through the original application process.

    The MICHIGAN NOTARY PUBLIC ACT (EXCERPT), Act 238 of 2003, 55.313 Maintenance of Records, Sec. 53 provides the standard for notary record retention. It reads as follows: "A person, or the personal representative of a person who is deceased, who both performed a notarial act and created a record of the act performed while commissioned as a notary public under this act shall maintain all the records of that notarial act for at least 5 years after the date of the notarial act."

16. If the Closing Attorney died, you may wish to speak to family members about submitting memorial notices or obituaries to appropriate publications. *In Memoriam* notices may be submitted to the State Bar of Michigan by calling 888-726-3678. You can also mail documentation of the Closing Attorney's death, an obituary or death certificate, to Member Services, State Bar of Michigan, 306 Townsend Street, Lansing, MI 48933.

17. If you have authorization to handle the Closing Attorney's financial matters, look around the office for checks or funds that have not been deposited. Determine whether funds should be deposited or returned to clients. (Some of the funds may be for services already rendered.) Get instructions from clients concerning any funds in their trust accounts. These funds should be either returned to the clients or forwarded to their new attorneys. Prepare a final billing statement showing any outstanding fees

due and/or any money in trust. (To withdraw money from the Closing Attorney's accounts, you will probably need: (1) to be an Authorized Signer on the accounts; (2) to have a written agreement such as the sample provided in Chapter 4 of this handbook; or (3) to have a limited power of attorney. If none of these have been done and the Closing Attorney is dead, disabled, impaired, or incapacitated, you may have to petition the court to take jurisdiction over the practice and the accounts. You can contact the Michigan Attorney Grievance Commission for assistance with the process of becoming appointed the receiver of the Closing Attorney's practice. If the Closing Attorney is deceased, another alternative is to petition the court to appoint a personal representative under the probate statutes.) Money from clients for services rendered by the Closing Attorney should go to the Closing Attorney or his/her estate.

18. If you are authorized to do so, handle financial matters, pay business expenses, and liquidate or sell the practice.
19. If your responsibilities include sale of the practice, you may want to advertise in the local bar newsletter, the State Bar of Michigan's Bar Journal, (517-346-6315 or http://www.michbar.org/publications/advertising.cfm) and other appropriate places.
20. If your arrangement with the Closing Attorney or estate is that you are to be paid for closing the practice, submit your bill.
21. If your arrangement is to represent the Closing Attorney's clients on their pending cases, obtain each client's consent to represent the client and check for conflicts of interest.

CHECKLIST FOR CLOSING YOUR OWN OFFICE

Click Here to Open this Checklist as Word Doc

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. (See sample *Letter Advising That Lawyer Is Closing His/Her Office* provided in Chapter 4 of this handbook.)
3. For cases with pending court dates, depositions, or hearings, discuss with the clients how to proceed. When appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and 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.
5. If the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed. (http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc306.pdf)
6. Pick an appropriate date to check whether 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 with open matters. Retain your original files. All clients should either pick up the copy of 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. (See sample *Acknowledgment of Receipt of File and Authorization for Transfer of Client File* provided in Chapter 4 of this handbook.) If a client is picking up the file, return original documents to the client and keep copies in your file.
8. Remind clients of your file retention and destruction policy. Tell them where you will be storing your client file records and who they can contact should they need an additional copy of their file. If your fee agreement or engagement letter did not notify your client about your file retention and destruction policy, you should obtain all clients' permission to destroy the files after approximately five years. (See File Retention and Destruction in Chapter 5 of this handbook.) If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number.
9. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your disconnected 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. In the

alternative, arrange for your telephone number to have a recorded announcement about your closed office for 30 to 60 days after you close your office.

CHECKLIST FOR CLOSING YOUR IOLTA ACCOUNT

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1. Fully reconcile the IOLTA account. Any funds remaining in the account should correspond to specific clients or nominal funds used to open the account or should cover reasonably anticipated bank charges.
2. Contact the bank to determine whether there will be any charges associated with closing the account. If a closing fee will be assessed, deposit sufficient funds to cover the closing fee into the IOLTA account. You are responsible for this bank charge – do not use client funds to cover this fee.
3. Prepare and send final client bills, if necessary.
4. Disburse funds belonging to clients. Send to clients with a duplicate copy of their final bill or prepare cover letters transmitting your checks.
5. For unclaimed trust account funds follow the procedures set forth in the UNIFORM UNCLAIMED PROPERTY ACT, Act 29 of 1995. The *Manual for Reporting Unclaimed Property*, Revised April 2014 may also provide assistance. (http://www.michigan.gov/documents/2013i_2598_7.pdf)
6. Disburse funds belonging to you (earned fees, reimbursement for costs advanced) and deposit into your business account.
7. There are no requirements for you to notify the Michigan State Bar Foundation that your IOLTA account has been closed. Your bank will notify the Michigan State Bar Foundation when your IOLTA account is closed.
8. Do not close the account until all outstanding checks have cleared the account.
9. Shred unused checks and deposit slips once the IOLTA account is closed. This will prevent fraud and protect you from mistakenly using checks and deposit slips from your closed account.
10. Keep the IOLTA check register, client ledgers, bank statements, and other records for at least five years. (Michigan Ethics Opinion RI-038)

CHAPTER 4
SAMPLE FORMS

AGREEMENT – FULL FORM DESCRIPTION

(Sample – Modify as appropriate)

The sample *Agreement – Full Form* beginning on the next page gives the Assisting Attorney the power to determine whether you are disabled, impaired, or incapacitated and provides the Assisting Attorney with authority under the designated circumstances to sign on your business bank accounts (except your trust account) and to close your law practice. The agreement gives an Authorized Signer authority to sign on your trust accounts. (See *Caveat* below.) The agreement also enumerates powers such as termination, payment for services, and resolution of disputes.

Caveat: The Assisting Attorney must determine ahead of time whether he or she is going to represent the Planning Attorney, clients of the Planning Attorney, or no one (acting exclusively as a neutral file-transferring agent). If the Assisting Attorney (1) represents the Planning Attorney on issues related to office closure, (2) is an Authorized Signer on the lawyer trust account, (3) finds misappropriations in the lawyer trust account, and (4) is instructed by the Planning Attorney not to inform the clients about the misappropriations, the Assisting Attorney will have conflicting fiduciary duties. To avoid this potential for conflicting fiduciary duties, it is best if the Planning Attorney selects one person to represent him or her as Assisting Attorney and another person to serve as the Authorized Signer on the trust account. (See Chapter 1, *The Duty to Plan Ahead*, and Chapter 2, *What If? Answers to Frequently Asked Questions*, in this handbook for more detailed information on these topics.)

An agreement authorizing someone to sign on bank accounts may not meet the banking institution's record-keeping requirements. The Planning Attorney should consult his or her banking institution to complete the paperwork the institution requires for its records.

If you do not want the Assisting Attorney to be the person who determines whether you are disabled, incapacitated, or impaired, you will need to modify this agreement. For a discussion of alternatives, see *The Duty to Plan Ahead*, *Access to the Trust Account*, in Chapter 1 of this handbook.

AGREEMENT TO CLOSE LAW PRACTICE

Click Here to Open this Form as Word Doc

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 signator, 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:

- 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 client files and records of Planning Attorney's law practice and obtaining information about any pending matters that may require attention;
- 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;
- Copying Planning Attorney's files;
- Obtaining client consent to transfer files and client property to new attorneys;
- 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 when their interests 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 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;
- Advertising Planning Attorney's law practice or any of its assets to find a buyer for the practice; and
- 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 Michigan Rules of Professional Conduct. Assisting Attorney has permission to inform the Planning Attorney's professional liability insurance carrier 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 possible 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 Planning Attorney's professional liability

insurance carrier and/or the Michigan Attorney Grievance Commission of errors or potential errors of Planning Attorney. Assisting Attorney has permission to inform Planning Attorney's clients of any errors or possible 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 or to contact the Michigan Attorney Grievance Commission.

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 his or her legal services. Assisting Attorney agrees to check for conflicts of interest and, when necessary, refer the clients to another attorney.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 Michigan Rules of Professional Conduct and other applicable law.

15. 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.

16. Fee Disputes to be Arbitrated.

Planning Attorney, Assisting Attorney, and Authorized Signer agree that all fee disputes among them will be decided by an independent arbitrator.

17. 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 MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

_____ _____

[Assisting Attorney] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

_____ _____

[Assisting Attorney's Alternate] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

_____ _____

[Authorized Signer] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

_____ _____

[Alternate Authorized Signer] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

AGREEMENT – SHORT FORM DESCRIPTION

(Sample – Modify as appropriate)

The sample *Agreement – Short Form* beginning on the next page includes authorization for the Assisting Attorney to sign on your business bank accounts (except the lawyer trust accounts) and to close your law practice. It authorizes the Authorized Signer to sign on your trust account. It does not include a provision for payment to the Assisting Attorney, a description of termination powers, consent to represent the Planning Attorney's clients, or other provisions included in the sample *Agreement – Full Form.*

Caveat: The Assisting Attorney must determine ahead of time whether he or she is going to represent the Planning Attorney, clients of the Planning Attorney, or no one (acting exclusively as a neutral file-transferring agent.) If the Assisting Attorney (1) represents the Planning Attorney on issues related to office closure, (2) is a signer on the lawyer trust account, (3) finds misappropriations in the lawyer trust account, and (4) is instructed by the Planning Attorney not to inform the clients about the misappropriations, the Assisting Attorney will have conflicting fiduciary duties. To avoid this potential for conflicting fiduciary duties, it is best if the Planning Attorney selects one person to represent him or her as Assisting Attorney and another person to serve as the Authorized Signer on the trust account. (See Chapter 1, *The Duty to Plan Ahead*, and Chapter 2, *What If? Answers to Frequently Asked Questions,* in this handbook for more detailed information on these topics.)

Authorizing someone to sign on bank accounts in an agreement may not meet the banking institution's record-keeping requirements. A Planning Attorney should consult his or her banking institution to complete the paperwork required for its records.

CONSENT TO CLOSE OFFICE

Click Here to Open this Form as Word Doc

This Consent to Close Office (hereinafter "this Consent") is entered into between

_____, hereinafter referred to as "Planning Attorney," and _____
_____, hereinafter referred to as "Assisting Attorney," and _____
_____, hereinafter referred to as "Authorized Signer."

I, (*insert name of Planning Attorney*), authorize (*insert name of Assisting Attorney*), Assisting Attorney, and any attorney or agent acting on my behalf, to take all actions necessary to close my law practice upon my death, disability, impairment, or incapacity. These actions include, but are not limited to:

- Entering my office and using my equipment and supplies, as needed, to close my practice;
- Opening and processing my mail;
- Taking possession and control of all property comprising my law office, including client files and records;
- Examining client files and records of my law practice and obtaining information about any pending matters that may require attention;
- 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;
- Copying my files;
- Obtaining client consent to transfer files and client property to new attorneys;
- 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 my clients;
- Filing notices, motions, and pleadings on behalf of my clients when their interests 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 I have given this authorization;
- Winding down the business affairs of my practice, including paying business expenses and collecting fees;
- Contacting my professional liability carrier concerning claims and potential claims.

I authorize (*insert name of Authorized Signer*), Authorized Signer, to sign checks on my trust accounts and provide an accounting to my clients of funds in trust.

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

For the purpose of this Consent, my death, disability, impairment, or incapacity shall be determined by evidence the Assisting Attorney deems reasonably reliable, including, but not limited to, communications with my family members or representative or a written opinion of one or more medical doctors duly licensed to practice medicine. Upon such evidence, the Assisting Attorney is relieved from any responsibility or liability for acting in good faith in carrying out the provisions of this Consent.

Assisting Attorney and Authorized Signer agree to preserve client confidences and secrets and the attorney client privilege of my clients and to make disclosure only to the extent reasonably necessary to carry out the purpose of this Consent. Assisting Attorney and Authorized Signer are appointed as my agents 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.

(Delete one of the following paragraphs as appropriate:)

Assisting Attorney represents me and acts as my attorney in closing my law practice. Assisting Attorney has permission to inform the Attorney Grievance Commission of Michigan of my errors or potential errors. Assisting Attorney has permission to inform my clients of any errors or potential errors and to instruct them to obtain independent legal advice. Assisting Attorney also has permission to inform my clients of any ethics violations committed by me.

OR:

Assisting Attorney does not represent me and is not acting as my attorney in closing my law practice. While fulfilling the obligations of this Consent, Assisting Attorney has permission to inform the Attorney Grievance Commission of Michigan of my errors or potential errors. Assisting Attorney may inform my clients of any errors or potential errors and instruct them to obtain independent legal advice. Assisting Attorney also has permission to inform my clients of any ethics violations committed by me.

Authorized Signer is not my attorney. Authorized Signer may inform my clients of any misappropriations in my trust account and instruct them to obtain independent legal advice or contact the State Bar of Michigan Client Protection Fund.

I, Planning Attorney, appoint Authorized Signer as signator, in substitution of my signature, on my lawyer trust account(s) upon my death, disability, impairment, or incapacity.

I understand that neither Authorized Signer nor Assisting Attorney will process, pay, or in any other way be responsible for payment of my personal bills.

I agree 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 Consent, provided the actions or omissions of Assisting Attorney and Authorized Signer were in good faith and in a manner reasonably believed to be in my best interest. Assisting Attorney and Authorized Signer shall be responsible for all acts and omissions of gross negligence and willful misconduct.

Assisting Attorney and/or Authorized Signer may revoke this acceptance at any time, and each has the power to appoint a new assisting attorney or authorized signer in Assisting Attorney's and/or Authorized Signer's place. My authorization and consent to allow Assisting Attorney and Authorized Signer to perform these and other services necessary for the closure of my law office do not require Assisting Attorney and/or Authorized Signer to perform these services. If Assisting Attorney and/or Authorized Signer revokes this acceptance, Assisting Attorney and/or Authorized Signer must promptly notify me.

_____ _____

[Planning Attorney] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

_____ _____

[Assisting Attorney] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

_____ _____

[Authorized Signer] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

POWER OF ATTORNEY – LIMITED

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I, _____, do hereby appoint _____ as my agent and attorney-in-fact for the limited purpose of conducting all transactions and taking any actions that I might do with respect to my law office bank account(s) and safe deposit box(es). I further authorize my banking institutions to handle my account(s) as directed by my attorney-in-fact and to give to 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); make electronic fund transfers; receive statements and notices on the account(s); and do anything with respect to the account(s) that I would be able to do. I am also authorizing my 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 until the banking institution receives 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 subsequent disability or incapacity.

_____ _____

[Account Holder] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

This instrument was acknowledged before me on _____ (date) by

_____ (name(s) of person(s)).

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

SPECIMEN SIGNATURE OF ATTORNEY-IN-FACT

Click Here to Open this Form as Word Doc

The attorney-in-fact acknowledges that the signature below is his/her signature.

_____ _____

[Attorney-in-Fact] *[Date]*

STATE OF MICHIGAN)

) ss.

County of _____)

[Insert name of Attorney-in-Fact] personally appeared before me who, being duly sworn, did say and acknowledge that the foregoing signature is his/her signature.

SUBSCRIBED AND SWORN to before me this _____ day of _____.

_____

(SEAL) NOTARY PUBLIC FOR MICHIGAN

My commission expires: _____

LETTER OF UNDERSTANDING

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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. You should show these signed directions to my Attorney-in-Fact along with records of expenses you incurred to claim reimbursement under this agreement.
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 I am unable to conduct my business affairs, you will be notified by a family member, friend, or colleague of mine.

_____ _____

[Trusted Family Member or Friend/Attorney-in-Fact] *[Date]*

_____ _____

[Planning Attorney] *[Date]*

NOTICE OF DESIGNATED ASSISTING ATTORNEY

Click Here to Open this Form as Word Doc

I, _____, have authorized the following attorneys to assist with the closure of my practice:

Name of Authorized Assisting Attorney: _____

Address: _____

Phone Number: _____

Name of Assisting Attorney's Alternate: _____

Address: _____

Phone Number: _____

I,_____, have made arrangements with my financial institution to have an authorized signer on my Lawyer Trust Account:

Name of Authorized Signer on Lawyer Trust Account: _____

Address: _____

Phone Number: _____

_____ _____

[Planning Attorney] *[Date]*

_____ _____

[Assisting Attorney] *[Date]*

_____ _____

[Alternate Assisting Attorney] *[Date]*

_____ _____

[Authorized Signer on Lawyer Trust Account] *[Date]*

NOTICE OF DESIGNATED AUTHORIZED SIGNER

Click Here to Open this Form as Word Doc

I, _____ , have authorized the following [attorneys] to sign on my lawyer trust account(s) upon the closure of my practice:

Name of Authorized Signer for Trust Account (s):_____

Address: _____

Phone Number: _____

Name of Authorized Signer's Alternate: _____

Address: _____

Phone Number: _____

_____ _____

[Planning Attorney] *[Date]*

_____ _____

[Authorized Signer] *[Date]*

_____ _____

[Alternate Authorized Signer] *[Date]*

[NOTE: This form may be used in lieu of, or in addition to, the Notice of Designated Assisting Attorney. If you have selected an Assisting Attorney to help in the closure of your practice and added someone as an Authorized Signer on your lawyer trust account, you should communicate your choices to your family, the Assisting Attorney, the Authorized Signer, and any designated alternates to avoid confusion.]

WILL PROVISIONS

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(Sample – Modify as appropriate)

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 Assisting Attorney on _____, [and/or with Authorized Signer on _____]; 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 his or her sole discretion, may determine to be necessary or desirable to protect the interests of my clients and to close my practice.

OR

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 close that practice, including, but not limited to, selling of the practice, collecting accounts receivable, paying expenses relating to the practice, reconciling my trust account(s), refunding any 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.

RETAINER AGREEMENT

Click Here to Open this Form as Word Doc

(Sample – Modify as appropriate)

THIS RETAINER AGREEMENT ("Agreement") is made this _____ day of _____, _____, between [*Name of Client*], hereinafter referred to as "Client," and [*Name of Attorney(s)*], Attorney at Law, hereinafter referred to as "Attorney":

1. Client agrees to employ Attorney for representation in a legal matter in connection with [describe].

2. Attorney has consented to accept such employment and agrees to render the services required of [him/her] as Attorney by this Agreement on the terms and conditions herein stated. Client agrees to cooperate fully with Attorney and others working on Client's case by keeping appointments, appearing for depositions, producing documents, attending scheduled court appearances, and making all payments. Client also agrees to keep Attorney informed of any change of address or telephone number within five (5) days of the change.

3. The fee for legal services on behalf of Client shall be Client's sole responsibility and shall be billed at the rate of [dollar amount] per hour, plus any expenses and costs incurred on Client's behalf.

4. Client will deposit with Attorney the sum of [dollar amount] to be held by Attorney in [his/her] trust account. Attorney will not commence representation of Client until such funds are received. Attorney will provide Client with a monthly statement of fees, costs, and expenses. Upon mailing the monthly statement to Client, Attorney will apply the retainer to fees earned, costs, and expenses incurred on Client's behalf. Client is responsible for paying all fees, costs, and expenses in excess of the retainer held in trust.

5. Attorney reserves the right to withdraw from further representation of Client at any time on reasonable written notice to Client at Client's last known mailing address. If Attorney withdraws, Attorney shall refund to Client any part of the retainer that Attorney has not earned.

6. **Attorney may appoint another attorney to assist with the closure of Attorney's law office in the event of Attorney's death, disability, impairment, or incapacity. In such event, Client agrees that the assisting attorney can review Client's file to protect Client's rights and can assist with the closure of Attorney's law office.**

7. Attorney will send Client information and correspondence throughout the case. These copies will be Client's file copies. Attorney will also keep the information in Attorney's file. When Attorney has completed all the legal work necessary for Client's case, Attorney will close Attorney's file and return original documents to Client. Attorney will then store the file for approximately ____ years. Attorney will destroy the file after that period of time.

8. Client acknowledges reading a copy of this Agreement and consents to its terms.

[Attorney]	*[Date]*
[Client]	*[Date]*

[NOTE: This is a sample form only. Use of this agreement will help to establish clear expectations and avoid misunderstandings between you and your client. It will not, however, provide absolute protection against a malpractice action.]

ENGAGEMENT LETTER

Click Here to Open this Form as Word Doc

(Sample – Modify as appropriate)

Re: *[Subject]*

Dear *[Name]*:

The purpose of this letter is to confirm, based on our conversation of *[date]*, that *[firm name]* will represent you in *[describe matter]*. We will provide the following services: *[list services to be provided]*.

Attached for your use is information on our billing and reporting procedures. Our fee is *[dollar amount]* per hour for services performed by lawyers of this firm and *[dollar amount]* per hour for services performed by our nonlawyer staff. You will also be billed for expenses and costs incurred on your behalf.

Our expectations of you are: *[list any expectations concerning payment of bills, responses to requests for information, etc.]*.

This firm has not been engaged to provide the following services: *[list services that are outside the scope of the representation]*.

I estimate that fees and expenses in this case will be *[provide a realistic, worst-case estimate of fees and expenses]*. Please keep in mind that this is only an estimate and that, depending on the time required and the complexity of the action, actual fees and expenses may exceed this estimate. You will be billed for actual fees and expenses.

It is very difficult to accurately predict how long it will take to conclude your case. Generally, these cases take *[provide a realistic, worst-case estimate of time to be spent on the case]*. This is only an estimate, and the actual time required to conclude this matter may be greater than expected.

I have enclosed a copy of the initial interview form. If any of the information on this form is incorrect, please notify *[primary contact]* immediately. If you have any questions about this information, please call *[primary contact]*.

My goal is to provide you with conscientious, competent, and diligent legal services. However, I cannot achieve this goal without your cooperation. This includes keeping appointments, appearing for depositions, producing documents, attending scheduled court appearances, and making payments as required. It is also important that you promptly notify me of any change of address or telephone number so I will always be able to reach you. In addition, I may suggest that we consult with another attorney about issues in your case. Before I do this, I will discuss the issue with you and ask you to decide whether you want to retain the attorney as a consulting attorney on the case.

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 event, my office staff or the assisting attorney will contact you and provide you with information about how to proceed.

I will send you pleadings, documents, correspondence, and other information throughout the case. These copies will be your file copies. I will also keep the information in a file in my office. The file in my office will be my file. Please bring your file to all our meetings so that we both have all the necessary information available to us. When I have completed all the legal work necessary for your case, I will close my file and return original documents to you. I will then store the file for approximately ____ years. I will destroy the file after that period of time unless you instruct me in writing now to keep it longer.

If any of the information in this letter is not consistent with your understanding of our agreement, please contact me before signing this letter. Otherwise, please sign the letter and return it to me. I have included a copy of this letter for your file. On behalf of the firm, we appreciate the opportunity to represent you in this matter. If you have any questions, please feel free to call.

Very truly yours,

[Attorney]

[Firm]

I have read this letter and consent to it.

_____ _____

[Client] *[Date]*

Enclosures

[NOTE: This is a sample form only. Use of this letter will help to establish clear expectations and avoid misunderstandings between you and your client. It will not, however, provide absolute protection against a malpractice action.]

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ENGAGEMENT LETTER AND FEE AGREEMENT
FOLLOW-UP LETTER TO INITIAL INTERVIEW

(Sample – Modify as appropriate)

Click Here to Open this Form as Word Doc

Re: *[Subject]*

Dear *[Name]*:

We met to discuss your case on *[date]*, and I have agreed to represent you in connection with *[type of matter]*, and we agreed to *[insert appropriate details]*.

Thank you for selecting our law firm to represent you in this matter. At this time, I also wish to set forth our agreement regarding payment of our fees. Our fees for legal services are [dollar amount] per hour, plus any expenses incurred, such as filing fees, deposition charges, copying costs, postage, and related expenses. We will bill you approximately monthly, depending on the amount of work that was done on your file during that period of time. At this point, it is difficult to estimate the amount of time and expense that will be necessary to adequately represent you in this case. However, as we discussed, we estimate the fee will be approximately *[dollar amount]*. We will also advise you before we do any work that will substantially increase the amount of fees.

You have deposited *[dollar amount]* with us for fees and costs. We will hold your funds in our lawyer's trust account. We will provide you with a monthly statement of fees, costs, and expenses. After we mail you the monthly statement, we will apply the funds to fees earned, costs, and expenses incurred. You are also responsible for paying fees, costs, and expenses in excess of the funds that we hold.

My goal is to provide you with conscientious, competent, and diligent legal services. However, I cannot achieve this goal without your cooperation. This includes keeping appointments, appearing for depositions, producing documents, attending scheduled court appearances, and making all payments required under this agreement. It is also important that you promptly notify me of any changes of address or telephone number so I will always be able to reach you. In addition, I may suggest that we consult with another attorney about issues in your case. Before I do this, I will discuss the issue with you and ask you to decide whether you want to retain the attorney as a consulting attorney on the case.

I also want to protect your interests in the event of my unexpected death, disability, impairment, or incapacity. In order 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 event, my office staff or the assisting attorney will contact you and provide you with information about how to proceed.

I will send you pleadings, documents, correspondence, and other information throughout the case. These copies will be your file copies. I will also keep the information in a file in my office. The file in my office will be my file. Please bring your file to all our meetings so that we both have all the necessary information available to us. When I have completed all the legal work necessary for your case, I will close my file and return the original documents to you. I will then

store the file for approximately _____ years. I will destroy the file after that period of time unless you instruct me in writing now to keep it longer.

I have included a copy of this letter for you to review, sign, and return to me. If any of the information in this letter is not consistent with your understanding of our agreement, please contact me before signing the letter. Otherwise, please sign the enclosed copy and return it to me.

On behalf of the firm, we appreciate the opportunity to represent you in this matter. If you have any questions, please feel free to call.

Very truly yours,

[Attorney]

[Firm]

I have read this letter and consent to it.

_____ _____

[Client] *[Date]*

Enclosure

[NOTE: This is a sample form only. Use of this letter will help to establish clear expectations and avoid misunderstandings between you and your client. It will not, however, provide absolute protection against a malpractice action.]

LETTER ADVISING THAT LAWYER IS UNABLE TO CONTINUE IN PRACTICE

Click Here to Open this Form as Word Doc

(Sample – Modify as appropriate)

Re: *[Name of Case]*

Dear *[Name]*:

Due to ill health, *[Affected Attorney]* is no longer able to continue practice. You will need to retain the services of another attorney to represent you in your legal matters. I will be assisting *[Affected Attorney]* in closing *[his/her]* practice. We recommend that you retain the services of another attorney immediately so that all your legal rights can be preserved.

You will need a copy of your legal file for use by you and your new attorney. I am enclosing a written authorization for your file to be released directly to your new attorney. You or your new attorney can forward this authorization to us, and we will release the file as instructed. If you prefer, you can come to *[address of office or location for file pick-up]* and pick up a copy of your file so that you can deliver it to your new attorney yourself.

Please make arrangements to pick up your file or have your file transferred to your new attorney by *[date]*. It is imperative that you act promptly so that all your legal rights will be preserved.

Your closed files will be stored in *[location]*. If you need a closed file, you can contact me at the following address and phone number until *[date]*:

[Name]	*[Address]*	*[Phone]*

After that time, you can contact *[Affected Attorney]* for your closed files at the following address and phone number:

[Name]	*[Address]*	*[Phone]*

You will receive a final accounting from *[Affected Attorney]* in a few weeks. This will include any outstanding balances that you owe to *[Affected Attorney]* and an accounting of any funds held in trust on your behalf by *[Affected Attorney]*.

On behalf of *[Affected Attorney]*, I would like to thank you for giving *[him/her]* the opportunity to provide you with legal services. If you have any additional concerns or questions, please feel free to contact me.

Sincerely,

[Assisting Attorney]

[Firm]

Enclosure

LETTER ADVISING THAT LAWYER IS CLOSING HIS/HER OFFICE

Click Here to Open this Form as Word Doc

(Sample – Modify as appropriate)

Re: *[Name of Case]*

Dear *[Name]*:

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. In addition, the State Bar of Michigan provides a Lawyer Referral Service that can be reached at (800)-968-0738. You may also want to check with one of the several local bar associations providing lawyer referral services.

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 our 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 time lines that client should be aware of.]* Please let me know the name of your new attorney or pick up a copy of your file by *[date]*.

I *[or insert name of the attorney who will store files]* will continue to store my copy of your closed file for _____ years. After that time, I *[or insert name of other attorney, if relevant]* 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 (insert name of attorney who will be storing files) storing my copy of your closed file, let me know immediately and I will make alternative 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 any funds held in my trust account on your behalf and payment due for any legal services rendered.

You will be able to reach me at the address and phone 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:

_____	_____	_____
[Name]	*[Address]*	*[Phone]*

Remember, it is imperative to 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 to have provided you with legal services. Please do not hesitate to give me a call if you have any questions or concerns.

Sincerely,

[Attorney]

[Firm]

LETTER FROM FIRM OFFERING TO CONTINUE REPRESENTATION

Click Here to Open this Form as Word Doc

(Sample – Modify as appropriate)

Re: *[Name of Case]*

Dear *[Name]*:

Due to ill health, *[Affected Attorney]* is no longer able to continue representing you on your case(s). A member of this firm, *[Name]*, is available to continue handling your case if you wish *[him/her]* to do so. You have the right to select the attorney of your choice to represent you in this matter.

If you wish our firm to continue handling your case, please sign the authorization at the end of this letter and return it to this office.

If you wish to retain another attorney, please give us written authority to release your file directly to your new attorney. If you prefer, you may come to our office and pick up a copy of your file and deliver it to your new attorney yourself. We have enclosed these authorizations for your convenience.

Since time deadlines may be involved in your case, it is imperative that you act immediately. Please provide authorization for us to represent you or written authority to transfer your file by *[date]*.

I want to make this transition as simple and easy as possible. Please feel free to contact me with your questions.

Sincerely,

[Assisting Attorney]

Enclosures

I want a member of the firm of *[insert law firm's name]* to handle my case in place of *[insert Affected Attorney's name]*.

_____ _____

[Client] *[Date]*

ACKNOWLEDGMENT OF RECEIPT OF FILE

I hereby acknowledge that I have received a copy of my file from the law office of *[Firm/Attorney Name]*.

Click Here to Open this Form as Word Doc

_____

[Client Name] PRINTED

_____ _____

[Client Signature] *[Date]*

AUTHORIZATION FOR TRANSFER OF CLIENT FILE

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I hereby authorize the law office of *[Firm/Attorney Name]* to deliver a copy of my file to my new attorney at the following address:

_____

_____

_____

_____

_____

[Client Name] PRINTED

_____ _____

[Client Signature] *[Date]*

Return this authorization to:

[Name]

[Address]

[Address]

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REQUEST FOR FILE

I hereby request that *[Firm/Attorney Name]* provide me with a copy of my file. Please send the file to the following address:

_____

_____

_____

_____

_____

[Client Name] PRINTED

_____ _____

[Client Signature] *[Date]*

Return this request to:

[Name]

[Address]

[Address]

OFFICE CLOSURE FILE TRACKING CHART

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FILE NAME	FILE NO.	REVIEWED	DISCUSSED W/CLIENT	INSTRUCTIONS RECEIVED	FILE COPIED	FILE TO NEW LAWYER	OTHER ACTION REQUIRED	RECEIPT REC'D & FILED

LAW OFFICE LIST OF CONTACTS

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(Sample – Modify as appropriate)

ATTORNEY NAME:		Social Security #:	
State Bar P #		Federal Employer ID #	
State Tax ID #:		Date of Birth:	

Office Address:	
Office Phone:	
Home Address:	
Home Phone:	
Cell Phone	
SPOUSE/PARTNER:	
Name:	
Cell Phone:	
Employer:	
Employer Address:	
Work Phone:	
OFFICE MANAGER:	
Name:	
Home Address:	

Home Phone:	
Cell Phone:	
PASSWORDS (FOR COMPUTER SYSTEM. SOFTWARE PROGRAMS, WEB SITES, ONLINE DATA STORAGE, VOICEMAIL, OTHER):	
(Name of person who knows passwords or location where passwords are stored, such as a safe deposit box or password storage program or device.)	
Name:	
Home Address:	
Home Phone:	
Cell Phone:	
POST OFFICE OR OTHER MAIL SERVICE BOX(S):	
Location:	
Box No.:	
Obtain Key From:	
Address:	
Phone:	
Other Signatory:	
Address:	
Phone:	
LEGAL ASSISTANT/SECRETARY:	

Name:	
Home Address:	
Home Phone:	
Cell Phone:	
BOOKKEEPER:	
Name:	
Home Address:	
Home Phone:	
Cell Phone:	
LANDLORD:	
Name:	
Address:	
Phone:	
Cell Phone:	
PERSONAL REPRESENTATIVE:	
Name:	
Address:	
Phone:	
Cell Phone:	

Work Phone:	
ATTORNEY:	
Name:	
Address:	
Phone:	
ACCOUNTANT:	
Name:	
Address:	
Phone:	
ATTORNEY TO HELP WITH PRACTICE CLOSURE:	
First Choice Name:	
Address:	
Phone:	
Second Choice Name:	
Address:	
Phone:	
Third Choice Name:	

Address:	
Phone:	
LOCATION OF WILL AND/OR TRUST:	
Access Will and/or Trust by Contacting:	
Address:	
Phone:	
PROFESSIONAL CORPORATIONS:	
Corporate Name:	
Date Incorporated:	
Location of Corporate Minute Book:	
Location of Corporate Seal:	
Location of Corporate Stock Certificate:	
Location of Corporate Tax Returns:	
Fiscal Year-End Date:	
Corporate Attorney:	
Address:	
Phone:	

PROCESS SERVI CE COMPANY:	
Name:	
Address:	
Phone:	
Contact:	
OFFICE-SHARER OR OF COUNSEL:	
Name:	
Address:	
Phone:	
Name:	
Address:	
Phone:	
OFFICE PROPERTY/LIABILITY COVERAGE:	
Insurer:	
Address:	
Phone:	
Policy No.:	
Contact Person:	
OTHER IMPORTANT CONTACTS:	

Reason for Contact:	
Name:	
Address:	
Phone:	
Reason for Contact:	
Name:	
Address:	
Phone:	
Reason for Contact:	
Name:	
Address:	
Phone:	
Reason for Contact:	
Name:	
Address:	
Phone:	
GENERAL LIABILITY COVERAGE:	
Insurer:	

Address:	
Phone:	
Policy No.:	
Contact Person:	
LEGAL MALPRACTICE PRIMARY COVERAGE:	
Insurer:	
Address:	
Phone:	
Policy No.:	
Contact Person:	
LEGAL MALPRACTICE ADDITIONAL COVERAGE:	
Insurer:	
Address:	
Phone:	
Policy No.:	
Contact Person:	
VALUABLE PAPERS COVERAGE:	
Insurer:	
Address:	

Phone:	
Policy No.:	
Contact Person:	
OFFICE OVERHEAD/DISABILITY INSURANCE:	
Insurer:	
Address:	
Phone:	
Policy No.:	
Contact Person:	
HEALTH INSURANCE:	
Insurer:	
Address:	
Phone:	
Policy No.:	
Persons Covered:	
Contact Person:	
DISABILITY INSURANCE:	
Insurer:	
Address:	

Phone:	
Policy No.:	
Contact Person:	
LIFE INSURANCE:	
Insurer:	
Address:	
Phone:	
Policy No.:	
Contact Person:	
LIFE INSURANCE:	
Insurer:	
Address:	
Phone:	
Policy No.:	
Contact Person:	
WORKERS' COMPENSATION INSURANCE:	
Insurer:	
Address:	
Phone:	

Policy No.:			
Contact Person:			
CLOUD OR INTERNET-BASED STORAGE LOCATION(S):			
Cloud Provider:		Account No.:	
Address:			
Phone:			
Location of Password: (if not included on page one)			
Address:			
Phone:			
Items Stored:			
STORAGE LOCKER LOCATION(S):			
Storage Company:		Locker No.:	
Address:			
Phone:			
Obtain Key from:			
Address:			
Phone:			
Items Stored:			

Where Inventory of Files Can Be Found:	
SAFE DEPOSIT BOXES:	
Institution:	
Box No.:	
Address:	
Phone:	
Obtain Key From:	
Address:	
Phone:	
Other Signatory:	
Address:	
Phone:	
Items Stored:	
LEASES:	
Item Leased:	

Lessor:	
Address:	
Phone:	
Expiration Date:	
LAWYER TRUST ACCOUNT:	
IOLTA:	
Institution:	
Address:	
Phone:	
Account No.:	
Other Signatory:	
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INDIVIDUAL TRUST ACCOUNT(S):	
Name of Client:	
Institution:	
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Account No.:	
Other Signatory:	

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GENERAL OPERATING ACCOUNT:	
Institution:	
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Account No.:	
Other Signatory:	
Address:	
Phone:	
BUSINESS CREDIT CARD(S):	
Institution:	
Address:	
Phone:	
Account No.:	
Other Signatory:	
Address:	
Phone:	
MAINTENANCE CONTRACTS:	

Item Covered:	
Vendor:	
Address:	
Phone:	
Expiration:	
ALSO ADMITTED TO PRACTICE IN THE FOLLOWING STATES:	
State of:	
Bar Address:	
Phone:	
Bar ID No:	

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CHAPTER 5 – ARTICLES, RULES, FORMAL OPINIONS, RESOURCES

A SOUND RECORD RETENTION POLICY

A Matter of Self-Preservation

Originally published in the February 2014 Michigan Bar Journal

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By Michael J. Sullivan and JoAnn L. Hathaway

You've just wrapped up a complicated matter on behalf of a client. It could have been a major transaction or a significant piece of litigation. Either way, your file is extensive, consisting of three to five red ropes and maybe a banker's box or two of documents.

Unless you also have a duplicate digital copy, you are wrestling with the usual document storage issues: what to store, what to return to the client, and what to discard. Suddenly, the client calls you and asks for the file. Your client doesn't give a reason, and nothing about the recently concluded legal work gives you cause to suspect your client might sue you. Maybe the transaction closed cleanly or the litigation settled on what seemed like favorable terms. Maybe you tried the case for the client and lost it on the merits. Nothing you did caused or contributed to the result, and there is no reason to think the client is more upset than any unsuccessful litigant.

You are tempted to give the file to the client without retaining a copy for yourself because doing so would cost you hundreds of dollars in external copying costs or hours of internal time to duplicate the file in its entirety. Besides, if you copy the documents, where are you going to keep them? Your file room needs more space, not more clutter. The storage facility in the basement of your building is brimming with files that serve as a constant reminder that you, like most of the lawyers you know, have been a pack rat for too long. The caution that led you to keep those files packed away for years without looking at any of them has left you overconfident about the future.

Stop! You are about to make what could be a serious mistake.

In this instance, the call you received from your client is leading to a lawsuit. Either the transaction that closed cleanly has gone sour or the litigation that ended neatly did not meet the client's expectations. Thus, this previously valued attorney-client relationship is about to turn negative, and the documents in your file may well turn out to be your only defense.

When a lawsuit is filed against you and you meet with the attorney hired to defend you, the last thing your attorney wants to hear is that you did not maintain a copy of your file. You won't want to admit that you returned the file to the client without making a copy or turned it over to

successor counsel on a matter in which your client replaced you midstream. If you are left without a copy of the file, your lawyer will have to recreate it to properly defend you. You'll hope it can be recreated in its original form.

Is this too dark a picture? No; recreating a file from scratch is more difficult than it seems. Successor counsel may have melded your file into theirs. It could be hard to determine which documentation was originally yours. Your client might allege that facts discovered during the successor attorney's tenure should have been acted on while you had the file, and it may be very difficult to prove that those facts were undiscoverable by you.

If you turn over the file to your client, you trust that he or she will keep the file intact before turning it over to new counsel. It may seem cynical, but it is possible your client could discard documents or correspondence that may be helpful—maybe even essential—in your defense.

Avoid this predicament. While you may not want to pay to duplicate the file and retain a copy for yourself, it is money well spent.

Record Retention Fundamentals

We're all faced with questions when a matter is closed: what to keep, what not to keep, and how long to keep it. We want to ensure we have the necessary paperwork if a former client files a malpractice action against us and we must comply with rules regarding retention of client records.

Ethics Opinion R-5

When the State Bar of Michigan Professional Ethics Committee issued Ethics Opinion R-5, it did so to provide lawyers with ethical advice and general guidelines for records retention.

Ethics Opinion R-5 does not set forth precise rules regarding how long lawyers are obligated to keep files. It does, however, require law firms to have a record retention policy. The opinion provides, in pertinent part:

> A law firm, including a solo practice, is obligated to have a record retention policy or plan in order to meet ethical obligations. Components of a retention policy should include at a minimum: (1) instructions to lawyer and nonlawyer personnel concerning their obligations under the policy; (2) information concerning the location of storage facilities; (3) methods for the eventual disposition of records and files; (4) information concerning retention periods and the establishment of retention periods, and (5) a system for monitoring lawyer and non-lawyer employee compliance with the plan. [1]

The rule suggests that lawyers should encourage clients to participate in the decision-making process regarding the ultimate disposition of their files. Further, the opinion provides that, "A lawyer who fails to obtain client input prior to destruction of a representation file is not absolved of legal liability for negligent or improper destruction of property." [2]

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[1] SBM Professional Ethics Committee, Ethics Opinion R-5, Syllabus (December 15, 1989), available at <http://www.michbar.org/opinions/ethics/numbered_opinions/r-005.cfm>(accessed January 19, 2014).
[2] *Id.*

Client File Material

Are there any hard-and-fast rules? The answer is yes, but not as many as one might think.

There are statutory rules for the retention of records by courts and state agencies.[3] In addition, lawyers whose practices involve dealing with federal governmental agencies should be familiar with those agencies' guidelines.

There are also rules with respect to retaining certain types of records that should be kept in mind when establishing firm policy. MRPC 1.15 requires lawyers to keep records of client funds (i.e., trust account records and client "property") for five years after termination of the representation. A safe harbor for lawyers is to avoid becoming the custodian of original client records. Typically, there is little reason to have original client records during the pendency of a case, and there is no reason to have them once a matter has been closed. Moreover, there are numerous reasons why you might not want to have your client's original records in your possession at any time. No office filing system is foolproof, and there always exists the possibility that a client record could be lost or otherwise inadvertently destroyed. If it is the original, it may not be replaceable. If it is merely a copy and your client still has the original record, replacing it is simple. For record-retention purposes, possessing original client records when a file is closed creates obligations that would not otherwise exist.

Attorney's File

In general, how long to keep a file after closure depends on the nature of the matter. A law firm could certainly draft a record-retention policy that theoretically disposes of certain types of files soon after representation is concluded. However, there are significant reasons why files should not be disposed of, not the least of which is self-preservation.

The statute of limitations applicable in a legal malpractice action expires two years from the date of last services rendered concerning the matter from which the claim arises, or six months from the client's discovery of the claim. Apart from the implications of the discovery rule, a lawyer could theoretically be timely served with suit papers as much as three years after concluding representation of the client. MCR 2.102 (D) provides that a summons expires 91 days after the complaint is filed. However, the court may issue a second summons for a definite period not exceeding one year from the date the complaint is filed. Your file may well turn out to be your best, and perhaps only, defense to that lawsuit.

Thus, it seems minimally prudent to keep a file for at least three years following its closure. Even a three-year destruction policy does not take into consideration the fact that a lawsuit could occur at a later time if the client had not yet discovered the claim.

A uniform period for record retention will not work for all files. Using the three-year minimum as a baseline, lawyers must exercise good judgment concerning how long to keep a particular matter in storage.

Under MCL 600.5838b, no legal malpractice claim can be filed more than six years after the act or omission giving rise to the claim. This statute of repose, enacted in 2013, imposes an outside

[3] See MCL600.2137 and MCL 18.1285 et seq.

cap on the statute of limitations. For example, a claim "discovered" more than six years after the act or omission giving rise to it would be barred by the statute of repose, even if it were timely under the statute of limitations. With this new legislation, a policy of retaining files for seven years (six years plus an extra year to account for service, as described above) would minimize the risk of facing a legal malpractice claim after disposing of the relevant file.

Here are some general guidelines worth mentioning:

- Records of client property and client funds must be kept for five years pursuant to MRPC 1.15 (a).
- Tax information regarding a client should be kept for six years pursuant to IRS guidelines.
- Probate and estate planning records should be maintained at least until the client dies and the estate is settled, and then for three years afterward for access in the event of a malpractice action.
- Litigation files might typically fall within the general three-year rule, i.e., three years after all appeal periods have expired. Be careful of non-final orders. An order becomes appealable as of right only when the matter is fully disposed of at the trial-court level concerning all defendants. Thus, if your client is extracted early from the litigation through a motion, the order may not be appealable for several years if the case remains pending against codefendants. Special situations involving claims of minors or claims settled by way of a structured settlement may call for a much longer storage period.
- Divorce files should typically be kept for at least three years after all orders are fulfilled, i.e., three years after alimony ends, child support ends, or the property settlement is completed.

Conclusion

There is no guarantee that even your best efforts will prevent a client from bringing a malpractice claim against you. However, you can take steps to protect yourself by protecting your client's records and complying with the rules that apply to record retention. By doing so, you will have the file that may well form the building block for your defense against any claim that might arise.

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PLANNING FOR AN ORDERLY TRANSITION

By Dawn M. Evans

Originally published in the September 2009 Michigan Bar Journal

Most lawyers identify the importance of having a will and developing a personal financial contingency plan when planning for retirement. Unfortunately, many are less diligent in developing and maintaining a contingency plan for winding down a law practice in the event of disability or death. In a multi-member law firm, other attorneys may immediately step in to ensure that client matters are handled in the event of the death or disability of an attorney. Because solo practitioners do not have that built-in backup system, it is vitally important for all solo practitioners to have a plan in place to deal with the possibility of death or disability.

In the absence of a plan, a lawyer who is suddenly disabled or dies without having previously identified someone to step in and wind down the practice may leave clients unaware of the need to retain new counsel or retrieve records, courts unaware that the lawyer is unable to appear in court, clients and third parties unable to access escrowed funds,[1] and surviving family members vulnerable to lawsuits from unhappy now-former clients.

While an increasing number of states require lawyers to identify a lawyer who will act as an "inventory attorney" in winding down the practice of a disappeared, disabled, or deceased attorney, the only provision currently in effect in Michigan that deals with the death or disability of an attorney is Michigan Court Rule 9.119(G), which states in pertinent part:

[1]All attorneys in Michigan receiving funds in connection with a representation in which a client or third person claims an interest are required to deposit such funds into an IOLTA or non-IOLTA account separate from the lawyer's own property. See Rule 1.15 of the Michigan Rules of Professional Conduct. 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." Because solo practitioners do not have other attorneys in their firms to act as signatories on IOLTA accounts, the death or disability of a solo practitioner can create enormous problems with regard to trust account access if the solo practitioner is the only signatory on the account. The only remedy for this situation is for the chosen successor attorney, the personal representative of the estate, or the court-appointed receiver to obtain a court order giving him or her access to the trust account. This may cause unavoidable delay in accessing the account upon the lawyer's death or disability and may conflict with the requirements of MRPC 1.15(b)(3), which requires the lawyer to "promptly pay or deliver any funds . . . that the client or third person is entitled to receive . . . ." Unfortunately, there is no alternative for solo practitioners at this time. Attorneys practicing in multi-member firms should ensure that at least two attorneys are named as signatories on the firm trust account to facilitate seamless access to the account at all times.

> If an attorney . . . disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the [grievance] 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 ask the chief judge in the judicial circuit where the attorney maintains an office to appoint a receiver to step in. Some local bar associations have programs to manage the death or disability of an attorney, but there is no formal statewide program. While this procedure exists, relying solely on its operation guarantees delay for clients and courts. This delay could be avoided if the lawyer selects a successor in advance and provides sufficient documentation and information in the form of a succession plan to empower that successor to step in immediately if the operative circumstances occur.

One critical element of a succession plan is an up-to-date policy and procedure manual for the law firm containing 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 closed files are kept, how they are organized, and how to access them;
- Policy on keeping clients' original documents and where they are kept;
- Record retention policy, records identifying destruction dates for specific files, and notifications to clients regarding destruction policy;
- Location of the safe deposit box (if any) and how to access it;
- Information regarding all bank accounts and trust accounts, including bank name, address, signatories, and account numbers;
- Location of all bank account and trust account records; and
- How to access computers, e-mail, voice mail, answering machines, etc., including necessary passwords and access codes.

This information should be presented in a manner that is understandable to someone completely unfamiliar with the firm's protocols, which may be the case for the person identified as a successor.

In determining whom to select as a successor (also called an assisting attorney) to wind down a practice, a lawyer should be mindful of the important role this person will play in allaying clients' fears that the handling of their matters will be jeopardized by the original lawyer's departure. The assisting lawyer should be competent, trustworthy, ethical, and capable of being as committed to the clients as the original attorney. It is a choice that should be discussed with

the prospective assisting attorney ahead of time so that he or she is aware of the responsibilities being asked of him or her. Once an agreement has been reached, a written agreement should be drafted setting forth the terms of the relationship, describing the assisting attorney's role, and stating under what circumstances the assisting attorney will step in. It must be determined and spelled out in both the advance planning agreement and in retainer agreements whether the assisting attorney represents the attorney or the attorney's clients. If the successor attorney represents the disabled or deceased lawyer, he or she will have a fiduciary relationship with the lawyer or the lawyer's estate and, therefore, may be prohibited from representing the clients on certain matters, such as legal malpractice issues related to the former attorney. On the other hand, if the assisting attorney represents the clients, he or she may be required to disclose ethical violations under certain circumstances or report errors or negligence that resulted in malpractice to the clients. Upon execution of an agreement, family members and employees should be informed to ensure a smooth transition should the assisting attorney's services be required.

Additionally, once an agreement is in place, clients should be informed at the time they retain the lawyer's services about the existence of the advance planning agreement to resolve any potential issues regarding confidentiality and to shed light on any potential conflicts of interest between the client and the assisting attorney. With that notification in place, clients can be assured that they will be promptly notified of the death or disability of their attorney and allow them to make appropriate decisions to protect their interests in the event the advance planning agreement becomes operational.

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 give the assisting attorney appropriate authority to act. This can be accomplished by having a resolution in place that sets forth the manner and the circumstances in which the assisting attorney can act.

Also, the lawyer's will should clarify the personal representative's role in winding down the practice, if any, to prevent a potential conflict between the role of the personal representative of the lawyer's estate and the assisting attorney. Specifically, any funds in the lawyer's trust account when he or she ceases to practice due to unforeseen circumstances should be handled consistent with the provisions of the agreement to close the practice.

Finally, Rule 1.17 of the Michigan Rules of Professional Conduct allows for the sale of a law practice. This option should be explored when planning for winding down a practice and may provide an alternative to a process that essentially involves an orderly return of the files to the clients.[2]

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[2] In accordance with MRPC 1.17(c), "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) [of MRPC 1.17];

(4) notice of the client's right to retain other counsel or to take possession of the file; and

Planning for an orderly transition upon disability or death—which is particularly important for solo practitioners—is a way of assuring family, staff, and clients that their respective concerns and interests have been addressed at a time when decisions about who will handle their matters during the transition can be made dispassionately. Having such a plan in place also eliminates a significant source of stress for the lawyer.[3]

Dawn M. Evans is the director of regulatory services and disciplinary counsel at the State Bar of Oregon. She is the former director of professional standards with the State Bar of Michigan. She spent eighteen years in attorney discipline with the State Bar of Texas—the last five of those as chief disciplinary counsel. Before her public service, she was in private practice for six years in Huntsville, Texas. She is currently president of the National Organization of Bar Counsel and was formerly a member of the Texas Young Lawyers Association Board of Directors.

(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.

[3] For more extensive information on this topic, see O'Connell, *Sudden Death or Disability: Is Your Practice—And Your Family—Ready for the Worst,* available at <http://www.michbar.org/seniorlaw/pdfs/death-disability.pdf> (accessed August 6, 2009).

PROTECTING THE CLIENT WHEN A LAWYER DIES OR BECOMES DISABLED

By Thomas K. Byerly

Originally published in the October 1999 Michigan Bar Journal

Protecting the public is one of the primary goals of the legal profession. When a lawyer dies or becomes disabled, the legal profession has a continuing obligation to ensure that the client's interests are protected, even if the lawyer can no longer represent that client.

In larger firms, remaining lawyers in the firm can assume representation of the deceased or disabled lawyer's clients. However, if the deceased or disabled lawyer was a solo practitioner, it is often difficult to quickly address the needs of the client. Surviving spouses or other family members who are dealing with the death or major disability of a lawyer are thrust into the unfortunate situation of also trying to deal with the closure of a law office and making sure the clients have continued representation.

The only formal guidance available on this issue is found in MCR 9.119(G). The relevant portion of that rule states:

> ". . . 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 [grievance] 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."

Under this rule, the grievance administrator acquires "jurisdiction" to seek permission from the circuit court to appoint a receiver to wind up the practice of the deceased or disabled lawyer if there is no other responsible person capable of performing this duty. However, if another person can be found, no circuit court action is required.

In most cases, local bar associations will step forward and devote considerable time and resources to winding up the practice when a solo practitioner dies or otherwise becomes disabled. Without publicity or fanfare, local bar associations and volunteer lawyers have donated countless hours and other resources in assisting clients to make the transition to new counsel. In those instances where no one is available to assist the closing of the practice, the grievance administrator and his staff have done an excellent job in fulfilling the duties of MCR 9.119 (G).

Usually, the first task is to provide notice to the existing clients of the death or disability of the lawyer. See MRPC 1.16(d). Courts are also given notice and a formal substitution of counsel document is presented to the court when substitute counsel is found. MCR 2.117(B).

Ethics opinion RI-100 provides some sound guidance to individuals who are left with the task of closing a law practice. That opinion outlines some of the basic issues facing the person charged with the responsibility of winding up a law practice. Suggestions include:

- Assisting the client in obtaining new competent legal representation
- Protecting confidences and secrets of clients;
- Fulfilling the lawyer's fiduciary duties regarding safekeeping client property; and
- Satisfying the lawyer's record-keeping obligations.

Individuals who are appointed as receivers must be careful to prioritize the open files of the deceased or disabled lawyer. Open litigation files may have court dates set and other open files may have time-sensitive issues, such as the statute of limitations. These matters should be immediately referred to new counsel for action.

Receivers must also preserve the confidences and secrets of the clients of the deceased or disabled lawyer. This applies equally to the "closed" files in the possession of the lawyer. It is common for a receiver to "inherit" a large number of closed files and not know what to do with those files. If the deceased or disabled lawyer did not have a file retention plan (even though such a plan is required under ethics opinion R-005), the receiver may be faced with the prospect of establishing a file retention policy, reviewing all closed files and confidentially destroying old files after notice to the former client. Many times this process takes longer than all other duties of the receivership.

Although no lawyer likes to actively plan for the day when he or she is unable to practice law, some advance planning by solo practitioners can prevent many of the "horrors" involved in picking up the pieces of an abandoned practice. Solo practitioners can help to minimize the work of a future receiver by:

1. Adopting and enforcing a sound record retention policy;
2. Developing a cordial relationship with another lawyer who could quickly come to the lawyer's aid, if needed; and
3. Training the lawyer's staff on the proper procedures to wind up the law practice, if that becomes necessary.

Without adequate planning by the solo practitioner, clients sometimes receive the stress of suddenly being without legal representation on top of the stress that took the client to the lawyer in the first place. With adequate planning, however, clients can continue to be protected even after the death or disability of the lawyer and court-appointed receivers for the practice may not be necessary.

Notice to Lawyers:

State Bar of Michigan ethics opinions are advisory and non-binding in nature. This index is a complete historical catalog. Some of the listed ethics opinions, though not expressly superseded in subsequent ethics opinions, may be nonetheless outmoded or no longer sound due to subsequent changes in case law, statutes, or court rules. Practitioners are urged to thoroughly research all sources to determine the current validity of any given ethics opinion.

RESPONDING TO REQUESTS FOR COPIES FROM FORMER CLIENTS

By Dawn M. Evans

March 2012

Frequently, lawyers contact the State Bar's ethics helpline to ask how to respond to a former client's request for copies from the lawyer's file maintained during the representation. The request for a "complete copy" of the file might be made when the attorney-client relationship ends or much later, leaving the lawyer to ponder how long the file must be maintained, whether duplicates must be provided if copies were provided during the representation, and whether the provision of copies can be predicated on prepayment for them. A related secondary question is whether providing a "complete copy" includes copying the lawyer's handwritten notes or providing a copy of a deposition transcript that may or may not have been paid for by the client at the time that the request is made.

Answering these questions completely requires an understanding of what is being sought as well as an examination of the applicable Michigan Rules of Professional Conduct (MRPC) and previous ethics opinions, tempered by whether the client has a current, ongoing need for what is being sought.

A lawyer's best preparation for answering these questions is the establishment of protocols defining what records will be maintained, the length of time that records will be maintained after conclusion of the representation, and the costs associated with their reproduction in a written engagement agreement entered into with the client at the outset of the representation. In a formal opinion issued on December 15, 1989, the State Bar's Standing Committee on Professional Ethics opined that Michigan lawyers are "obligated to have a record retention policy or plan in order to meet ethical obligations."[1] In addition to providing clarity on these topics, the inclusion of a record retention/destruction schedule in the engagement agreement lays the groundwork for being able to destroy the contents of the file without having to give notice as a predicate to doing so years after the conclusion of the representation.[2] Providing the client a copy of all pertinent

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[1] Formal Opinion R-5 (December 15, 1989) provides:

> Components of a retention policy should include at a minimum: (1) instructions to lawyer and nonlawyer personnel concerning their obligations under the policy; (2) information concerning the location of storage facilities; (3) methods for the eventual disposition of records and files; (4) information concerning retention periods and the establishment of retention periods; and (5) a system for monitoring lawyer and nonlawyer employee compliance with the plan.

Language describing the record destruction/retention policy should be reiterated in billing statements and a final closing letter, to maximize the argument that the client was given appropriate notice of the policy.

[2] A subsequent formal opinion, R-12 (September 27, 1991), sets forth a requirement that for files closed prior to October 1, 1988 (the implementation date of the Michigan Rules of Professional Conduct), a lawyer was to make "reasonable efforts" to obtain client input regarding the disposition of the file and its contents before destruction. For files closed after that date, it requires lawyers to give each client notice regarding the disposition of the file either when the lawyer-client relationship is established or at the conclusion of the representation.

documentation as it is generated and received during the representation and documenting the delivery of copies through itemized letters as a record of what is being provided lays a reasonable foundation for specifying in the engagement agreement that copying charges will be levied for subsequent duplications. Additionally, because future technologies will prompt periodic changes in the format and manner in which records are retained, retrieved, and reproduced, language in the fee agreement pertaining to record retention should give the lawyer the flexibility to modify the way in which records are stored and retrieved as those technologies evolve, consistent with MRPC 1.6.[3]

By establishing expectations in the fee agreement, communicating to the client about them, and reaffirming them through such means as replicating the language in billing statements and in a closing letter sent at the conclusion of the representation, the lawyer is prepared for answering a former client's request for copies years after the representation, by referring the former client to the language in the fee agreement.

Additionally, original documents provided by a client – documents to which the client has a pre-existing property right or which have intrinsic value (such as a will, promissory note, stock, or certificate of title) should be returned to the client prior to conclusion of the representation when not required to be delivered elsewhere as a part of the representation. To the extent practicable, the lawyer should retain both a copy of the returned documents and some documentation establishing when and how they were returned to the client.

In the absence of such planning, two ethical rules – MRPC 1.15(b) and MRPC 1.16(d) – discuss the retention of records and the delivery of property and papers to the client.

How Long to Maintain Records

There is not a one-size-fits-all answer to how long to maintain records. Although the MRPC provide some guidance, there are other legal as well as practical considerations that impact construction of a record retention policy, such as applicable statutes of limitation, availability of the documentation through third parties, and the limitations of a lawyer's or law firm's capacity to store records.

MRPC 1.15(b) provides:

A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by

[3] The language of the Rules does not specify a particular format for retention of documents. Lawyers may use paper or electronic means so long as the methodology used is consistent with protecting client confidentiality (MRPC 1.6), and safekeeping (MRPC 1.15) and delivery requirements (MRPC 1.15 and 1.16).

> agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

MRPC 1.15(b) discusses, among other things, the handling of property that the lawyer has received. The commentary to MRPC 1.15 makes clear that the "property" being referred to in paragraph (2) is tangible property – such as deeds or securities – as distinguished from documents generated by the lawyer during the course of the representation.[4] Records pertaining to funds and property (as that term is used in MRPC 1.15) received on behalf of the client must be maintained for five years after termination of the representation.

Recognizing that recordkeeping pertaining to IOLTA and non-IOLTA accounts can be managed independently of other types of documents (such as copies of pleadings, correspondence, etc.), the timeframe for maintenance of records not covered by MRPC 1.15(b)(2) can be of a different duration set forth in the document retention/destruction policy described in the engagement agreement.[5] The length of time prescribed for retention of the other types of documentation should be neither unreasonably short for the client nor burdensomely long for the lawyer, taking into consideration the storage requirements that will flow from the length of time established for retention.[6] From the lawyer's vantage point, records should be retained until all applicable statutes of limitation expire for any claim that may be brought by the former client against the lawyer or that may otherwise arise from the representation.[7] A fine point worth noting is that the length of time a lawyer makes the representation file available to clients through a retention schedule communicated to them may differ from the lawyer's retention of records for his or her own purposes. The purpose of the former is to afford the former client access for a reasonable

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[4]The commentary notes, "A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of a client or a third person should be kept separate from the lawyer's business and personal property and, if funds, should be kept in one or more trust accounts."

[5] The retention/destruction period for records covered by MRPC 1.15(b)(2) should also be addressed in the engagement agreement, reflecting what the Rule requires so that, at the appropriate time, those records can be destroyed as well.

[6] Formal Opinion R-5 notes, "A number of factors must be considered in the establishment of a law firm's record retention policy or plan beyond legal ethics, such as tax recordkeeping requirements, compliance with malpractice insurer standards, and specific requirements necessary for particular fields of law practice. It is, of course, not within the jurisdiction of the [State Bar of Michigan Professional Ethics] Committee to provide guidance in those areas. An awareness of those factors, however, is important when a policy is established. See, for example, MCL 600.2137, retention of certain court records; MCL 18.1285, et seq., retention of state agency records; MCL 399.5, authority of State Historical Commission; and MCL 600.8344, court retention of civil litigation records." Another example of a statutory requirement pertaining to records is MCL 567.252, which requires the retention of records reflecting the name and last known address of an owner of unclaimed property.

[7] Acknowledging that MCR 9.101, et seq., the Rules pertaining to Professional Disciplinary Proceedings, do not contain a statute of limitations for either the opening of a [disciplinary] investigation or the filing of a [formal] complaint, prudent practitioners may want to consider maintaining indefinitely a copy of any significant documentation pertaining to a representation that is not otherwise accessible through courthouse or other public records necessary to defend against a disciplinary charge arising out of a representation. Additionally, to the extent that a lawyer has possession of property or funds to which a former client is entitled and the lawyer is unable, after good faith efforts, to locate a former client and deliver the property or funds, Michigan's Uniform Unclaimed Property Act may impose recordkeeping requirements descriptive of the unclaimed property and identifying the last known name of and contact information for the former client who owned the unclaimed property.

period of time, after which there is no reasonable basis upon which to believe that the lawyer will indefinitely provide copies.

The method of storage and means utilized to destroy records should protect client confidentiality, consistent with the requirements of MRPC 1.6. The Rules do not specify the type of system used for recordkeeping.[8]

What Must Be Provided

MRPC 1.16(d) states:

> Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interest, 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.

While Formal Ethics Opinion R-19 (August 4, 2000) notes that, "the determination of what papers the client is entitled to receive and what information is the property of the client are questions of law beyond the jurisdiction of the Committee,"[9] it also asserts that, "[t]here is no legal support in Michigan for the proposition that the files are the property of the client," concluding that the client's right is "in general, one of access, not custody or possession."[10] Rather than answering with precision what must be provided from a file, this opinion draws a conclusion about ownership of its contents, placing Michigan with a minority of jurisdictions that have concluded that the lawyer owns the file. Assuming that the lawyer has dutifully returned to the client anything appropriately identified as "client property" at the conclusion of the representation, what remains might include copies of documents generated by the lawyer for dissemination to others (such as correspondence, pleadings and other litigation papers, transactional documents, and billing statements); copies of depositions and transcripts prepared by others; original notes prepared by the lawyer pertaining to client interviews, conversations with witnesses or opposing counsel, and intraoffice communications about the case; and records pertaining to monies received and disbursed. Formal Opinion R-12 (September 27, 1991) makes these suggestions about what should be maintained, referencing Formal Ethics Opinion R-5 (December 15, 1989):

> Those items that should be retained include those which the lawyer knows or should know may still be necessary to the assertion or defense of the client's position in a matter for which the applicable statutory limitation period has not expired; information that the client may need, has not previously been given to the client, is not otherwise readily available to the client, and which the client

[8] Formal Ethics Op R-12 discussed the maintenance of microfilm in lieu of paper files, paving the way for acceptance of more recent technologies.
[9] Formal Ethics Op R-19, p 3.
[10] Formal Ethics Op R-19, p 4.

> may reasonably expect will be preserved by the lawyer; accurate and complete records of the lawyer's receipt and disbursement of trust funds.[11]

As to what must be provided from among those categories of records, Formal Ethics Opinion R-5 (December 15, 1989) notes that, "Some documents in files assembled for the representation of clients 'belong' to the law firm or lawyer, e.g., attorney work product. The law firm and lawyer may properly maintain and destroy the documents which 'belong' to the lawyer or law firm without consultation with the client."[12] Presumably, this would include handwritten or otherwise self-generated notes or memoranda prepared by the lawyer, or distributed within or among members and employees of the law firm. Exempting these types of records from what is copied for the client is a departure from the position taken in earlier ethics opinions written under the Code of Professional Responsibility, such as CI-743 (June 30, 1982).[13]

To the extent that some of the records might be equally obtainable from other sources, such as a clerk's office or a court reporting service, the lawyer may wish to redirect the former client to those third parties rather than continuing to maintain copies of those types of records. No existing ethics opinion specifically addresses whether a lawyer who in fact has duplicates on hand of court-filed documents, deposition transcripts, or hearing transcripts must produce copies of them as a part of copying the file.

R-19 concludes that a lawyer may charge a reasonable fee for the service of searching the files to determine and identify those portions of the file that are the client's property and for reproducing copies from the files. However, whether it is prudent for a lawyer to require a former client pay or even prepay for copies before tendering them depends upon whether the client's matter is ongoing or completed. The reason for this is the requirements set forth in MRPC 1.16(d).

If the client's matter is truly completed (whether by the lawyer from whom copies are sought or a subsequent lawyer) at the time the request for copies is made, the lawyer can reasonably seek the costs of research and copying in advance of providing the copies, consistent with MRPC 1.16(d), R-19, and language in the engagement agreement addressing what will be charged for copies.

If the client's matter is ongoing such that the lack of documentation the lawyer possesses will jeopardize the client's ability to pursue or protect his or her legal interests, then the lawyer must

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[11] Formal Ethics Op R-12, p 2.

[12] Formal Ethics Op R-5, p 4.

[13] Formal Ethics Op R-5 notes CI-743 as one of several opinions that "remain worthy of consideration" wherein it states that "an attorney in possession of a file concerning a former client has an ethical duty, upon request from the former client, to deliver the file, including but not limited to, all 'write-ups,' 'work-up or intake sheets,' and 'file interview notes,' to the former client or newly retained counsel, with the possible exception of the lawyer's personal observation notes or memos with respect to the client's character or competency traits and, particularly, if and when negative," before later concluding that a law firm and lawyer may properly maintain and destroy the documents which "belong" to the lawyer or law firm without consultation with the client. (Id., pp 2 and 4). To the extent those positions may seem inconsistent, the distinction that may be drawn in a particular case is whether, at the time of the request for copies, the former client's matter has been completed or is ongoing. Where it is ongoing, the former client may have a more compelling need for information that perhaps has not been captured in any way other than the lawyer's notes.

consider his or her obligations under MRPC 1.16(d) in responding to the request for copies. If holding the copies hostage pending payment or prepayment of copying expenses or payment of a past due billing statement will impair the former client's ability to, for example, adequately prepare for an eminent trial setting or timely pursue an appeal with a newly-hired lawyer, the lawyer's withholding of copies might not be viewed as having taken "reasonable steps to protect the client's interests" by "surrendering papers and property to which the client is entitled." In that circumstance, the pertinent question is not whether those documents "belong" to the client but whether withholding copies of them would prejudice the client's ability to go forward, a consequence presumably disproportionate to the reproduction costs.

Commentary to MRPC 1.16 notes, "even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law."

How Many Times Copies Must Be Provided

Neither the MRPC nor the existing ethics opinions provide a bright line rule about how many times a lawyer must provide duplicates of what has previously been provided, even if the former client is willing to pay for the copies. Arguably, so long as the request for copies comes within the record retention time period communicated in the engagement agreement, it is a reasonable expectation that the lawyer will produce copies consistent with that policy, which may include a requirement of prepayment consistent with R-19 and MRPC 1.16(d).

Summary

Regardless of the length of the retention/destruction policy articulated to clients, the lawyer should maintain a core file that contains, at a minimum, a copy of any significant documents not otherwise accessible through courthouse records or third party vendors until the expiration of any applicable statute of limitations for claims that might be brought by the client or third parties regarding the subject of the representation. Trust account records must be maintained for at least five years.

A well-crafted and well-executed retention/destruction policy affords clients a reasonable period of access after the representation has ended, while not binding the lawyer to lengthy and expensive storage requirements; assures that clients are fully informed about these policies; and follows through with a destruction method that protects the confidentiality of client information. Once in place, it provides a way for the lawyer to be equipped to answer subsequent requests for copies from former clients.

ETHICS OPINIONS

Ethics Opinions Regarding:

Closing a Law Practice

R-5
R-12
RI-19
RI-30
RI-38
RI-69
RI-100
RI-102
RI-110

Record Retention

R-5
R-7
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RI-329

Ethics opinions are available at www.michbar.org.

RULE 8.3

Rule: 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.

(b) A lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office shall inform the Judicial Tenure Commission.

(c) This rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer while serving as an employee or volunteer of the substance abuse counseling program of the State Bar of Michigan, to the extent the information would be protected under Rule 1.6 from disclosure if it were a communication between lawyer and client.

Comment: Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.