Planning Ahead

Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death

Prepared by The New York State Bar Association's Committee on Law Practice Continuity

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DEDICATED TO

Anne B. Keenan

We dedicate this work to our cherished and highly esteemed colleague, Anne B. Keenan, who died suddenly and tragically in an automobile accident in June of 2004. A member of the New York State Bar Association's Special Committee on Law Practice Continuity from the outset, Anne's work as our resident expert on legal malpractice and professional liability insurance issues was an essential part of our project and was invaluable to its successful completion. Always exceptionally cordial and personable, Anne never hesitated to volunteer her expertise, talent and energy wherever she could be helpful. She will be sorely missed.

Anne was a senior executive at Bertholon-Rowland, with 15 years of service. She started with Bertholon-Rowland in 1989 as an Account Manager in the Marketing Department. She was soon promoted to Assistant Vice President and in 1999 became Senior Vice President of Products and Account Management. In this role, she was responsible for the development and maintenance of client relations with associations and customers as well as management of the marketing, sales and product functions. She was most recently named Senior Vice President of Client & Program Management, with oversight responsibility for Professional Liability and Life/Health Underwriting as well as continued responsibility for Client Relations, Product Development and Marketing. Anne's attention to the insurance needs of the Association and its members, and her constant striving to provide excellence in service, were a mark of her professionalism and dedication. In her role, Anne contributed much to the strength and vitality of the Association-sponsored insurance program administered by Bertholon-Rowland.

Anne loved arts and literature (she founded a book club), the challenges of business, her family, and people. She was highly respected by the people of Bertholon-Rowland not only as a manager and leader, but also as a friend and colleague. She was known to many people throughout the country for her high energy and dedication to the Association-sponsored insurance business, and for her commitment as an active member of insurance industry organizations, such as AIPAGIA and PIMA.

It is with a sense of profound gratitude to Anne and deep sympathy to her family that we dedicate this work to her memory.

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It is not easy to think about circumstances that could render you unable to continue practicing law. Unfortunately, accidents, illness, disability, planned or unplanned retirement, and untimely death are events which do occur. Under any of these circumstances, your clients' interests, as well as your own, must be protected.

Although there is no specific requirement in the Disciplinary Rules of the Code of Professional Responsibility outlining the steps a lawyer must take to protect his or her clients in the event of a sudden inability to continue in practice, several rules and ethical considerations, along with general principles of attorney professionalism, provide guidance on this issue. It is clear that there is a duty on the part of the attorney to protect his/her client from the adverse consequences of such an event. For example, a lawyer who "neglects a matter" may violate DR 6-101(A)(3). By arranging in advance for the temporary management or closing of your practice, your ongoing matters will be handled in a timely manner and there will be less likelihood that a court date will be missed or a closing delayed (for example, because of an inability to access your escrow account), or clients' interests otherwise prejudiced. Funds and property belonging to your clients will be returned to them promptly, as required by DR 9-102(C)(4). You also will be assured that your clients' files will be protected and that the bookkeeping records will be maintained as required by DR 9-102(D).

Attorney professionalism is often equated with dedication to clients, service, competence and the display of good judgment. By formulating a plan today, you will be fulfilling both your ethical responsibilities and your obligations of attorney professionalism. The information in this Guide is designed to assist you in protecting your clients and your practice.

Following this narrative is a compilation of materials that will assist you in this process. It has been designed to encourage you to take steps to properly protect your clients and to carry out your wishes if you personally are unable to act. To assist you in designing your Advance Exit Plan, this narrative refers by name to sample documents for you to consider which are set forth in the attached Appendices. Appendices A–E in this Guide, for example, provide you with some frequently asked questions (FAQs) and checklists which raise issues which should be taken into consideration in making plans to protect clients' interests in the case of the sudden unavailability of a sole practitioner to handle his/her practice, or in closing one's own office or that of another attorney, or in temporarily assuming responsibility for another attorney's practice.

Note: This document refers to three categories of lawyers: (1) the lawyer whose disability, incapacity, retirement or death is the occasion for actions, referred to as the "Planning Attorney," the "Terminating Attorney," the "Affected Attorney," the "Absent Attorney," or "Principal"; (2) the lawyer called upon to respond to the disability, incapacity, retirement or death of another lawyer, referred to variously as the

"Caretaker Attorney," the "Assisting Attorney," the "Responsible Attorney," the "Closing Attorney," or "Agent" (as appropriate), or (3) the "Acquiring Attorney," who buys a law practice.

Establish an Advance Exit Plan

STEP 1: Designate an Assisting Attorney to manage or close your practice in the event of your disability, incapacity, retirement or death. This may be accomplished by a limited power of attorney, a comprehensive agreement with detailed powers, or a short form authorization and consent form to close or manage a law practice. Samples of such forms are set forth in Appendices F, G, and H. If you are a professional corporation, resolutions may be necessary authorizing you, as sole shareholder and director, to appoint another attorney to manage or close your practice (See Appendix I).

STEP 2: Prepare written instructions to your family, your designated Assisting Attorney, your nominated executor, and your key office staff containing:

- General information and guidance to minimize uncertainty, confusion and possible oversights;
- Authorizations to release medical information (required by HIPAA) that may be needed to determine your incapacity;
- Specific and detailed information and authorizations needed to close your law practice;
- Steps to be taken to assure that your written instructions are updated and reviewed periodically for completeness and accuracy.

See "Checklist for Lawyers Planning to Protect Clients' Interests in the Event of the Lawyer's Death, Disability, Impairment or Incapacity" and "Checklist for Closing Your Own Office," set forth as Appendices B and C. See also, Appendix Q, a form which lists your Law Office Contacts, which should be kept up-to-date and given to your family, staff, and/or Assisting Attorney.

STEP 3: Discuss your Advance Exit Plan with the appropriate persons (e.g., your family, your designated Assisting Attorney, your nominated executor, and your key office staff) to avoid confusion or delay in the event of your disability, incapacity, retirement or death. For example, your executor should be aware of your wishes with respect to your practice in the event of death, including any instructions you may have given to an Assisting Attorney. Not only will this protect your practice, but it will also save considerable time and expense that may be incurred in the administration of your estate. Appendices R and S provide you with a checklist for your executor, and a sample provision that can be used in your will giving instructions to your executor regarding your law practice.

STEP 4: Your Advance Exit Plan should describe arrangements you enter into with your designated Assisting Attorney (see Appendices F, G, and H, which are sample forms which could be used to accomplish this objective), and should cover the following:

- Authorization to obtain medical information to assist the Assisting Attorney (or other designated person, e.g., family member) in determining your incapacity to continue in practice;
- Authorization to provide all relevant people with notice of closure of your law practice;
- Authorization to your Assisting Attorney to contact your clients for instructions on transferring their files;

- Authorization to obtain extensions of time in litigation matters, where needed.

Your Advance Exit Plan might also include sample letters notifying clients of your inability to continue in practice, and arranging for transfer or return of files. See "Letter Advising That Lawyer is Unable to Continue in Practice" (Appendix J) and "Request for File/ Acknowledgement of Receipt for File/Authorization for Transfer of Client File"(Appendices K, L, and M). At Appendix N, you will find a helpful list of questions and answers on the subject of document destruction and preservations, providing you with guidance on file disposition. If you are retiring, you should prepare a letter to your clients advising them of your retirement, the need to obtain new counsel, and a procedure for transfer of their files. See "Letter from Planning Attorney Advising that Lawyer is Closing His/Her Office" (Appendix O). If there are other attorneys in your firm who would be available to represent the clients in the event of your own inability to practice, your Advance Exit Plan should include a letter from your colleague(s) to your clients advising them of your disability and their availability to continue handling their matter (see Appendix P).

Your Advance Exit Plan also should include instructions as to:

- Disposition of closed files (See Appendix N);
- Disposition of your office furnishings and equipment;
- Authorization to draw checks on your office and trust accounts;
- Payment of current liabilities of the office;
- Billing fees on open files;
- Collecting accounts receivable;
- Access to important information (e.g., passwords to your computer); and
- Insurance matters.

Your Advance Exit Plan also might include provisions that give your Assisting Attorney or executor, as the case may be, authority to:

- Wind down your business financial affairs;
- Provide your clients with a final accounting and statement of work done by you/your office;
- Collect fees on your behalf;
- Liquidate or sell your practice;
  (See Appendices F, G, and H for sample language authorizing the foregoing)
- Act on behalf of your PC or your PLLC in the event of your death or disability,
  (See Appendices I and J for sample "Waiver of Notice of Special Joint Meeting of the Sole Shareholder and Sole Director of Corp." and "Minutes of the Special Joint Meeting of the Sole Shareholder And Sole Director of Corp.")

Compensation to Your Assisting Attorney and Staff

Your Advance Exit Plan should include an arrangement for payment by you or your estate to your Assisting Attorney and staff for services rendered on your behalf in closing, temporarily managing until

your return, or managing your practice pending its sale. For example, the agreement with your Assisting Attorney may provide for compensation based on an hourly rate, for reimbursement of reasonably necessary expenses, and for billing on a monthly basis.

You also will need to address the issue of how to fund this compensation to your Assisting Attorney and support staff. You can direct that payment be made from your office receipts. If you are concerned that your law practice income will be insufficient to defray this expense, you may want to consider disability insurance in an amount sufficient to cover this potential liability. Business Overhead Expense Insurance is a variation on Disability Income Insurance that specifically covers the ongoing expenses of running your office (including non-lawyer staff salaries, rent, equipment leasing, etc.), in the event of your disability.

In the case of death, since your estate will be responsible for payment to the Assisting Attorney, your executor or other personal representative should be notified in advance of any arrangements you may have made with regard to this issue. You may want to consider reiterating those instructions in your will, especially if you neglected to make such arrangements in a separate written agreement. As in the case of disability or incapacity, since your practice may be your only probate asset and insufficient to cover the cost of compensation to the Assisting Attorney and disbursements incurred in closing your practice, you may want to consider purchasing an insurance policy naming the estate as beneficiary and specify in your will that the proceeds from the policy be used for this purpose.

Conflicts of Interest and Confidentiality

Although the designation of an Assisting Attorney to assume responsibility for client files raises issues of client confidentiality, it is reasonable to read the Disciplinary Rules as authorizing such access and disclosure under these circumstances. [DR 2-111, DR 4-101]. Remember that if an Assisting Attorney discovers evidence of legal malpractice or ethical violations, he or she may have an ethical obligation to inform the clients of such errors. (See "What If? Answers to Frequently Asked Questions" set forth in Appendix A).

Your Assisting Attorney also must be aware of conflict of interest issues and do a conflicts check if he or she is either providing legal services to your clients or reviewing confidential file information to assist with referral of your clients' files. Your Assisting Attorney should be prepared to delegate to another attorney those files with which he/she has a conflict of interest, while being careful to protect materials and information that may be subject to attorney-client privilege (See "FAQ," Appendix A).

Trust Accounts

If you do not make arrangements to allow another attorney access to your office trust account(s), your clients' money must remain in trust until a court authorizes access. This is likely to cause delay and put your client and you in a difficult position if you are unable to conduct your practice. On the other hand, allowing access to your trust account(s) is a serious matter. If you give access to your trust account(s) and that person misappropriates money, then your clients will suffer, and you may be held responsible. There is no simple answer to this dilemma and other important decisions which you must make regarding your trust accounts (See "FAQ," Appendix A).

First, you must decide whether to appoint a co-signatory prior to your disability, or to grant access to the account at a specified future time or event. If you decide to allow access to your trust account(s) by your Assisting Attorney all of the time, then you can authorize the attorney as a signer on your accounts

and contact the bank to sign all appropriate cards and paperwork. This allows easy access on the part of your Assisting Attorney if, for example, you are unexpectedly delayed on a trip. However, it opens the door to a host of other risks, as you are unable to control the signer's access. If you prefer not to have a co-signatory on your trust account while you are able to conduct your practice, you may nevertheless plan in advance and give such authority in the future. One option is to give your Assisting Attorney a power of attorney that takes effect upon your disability and includes as a power the authority to withdraw funds from your trust account (See Appendix H). You may want to leave the executed power of attorney with a third party whom you trust to insure that it will not be released until the specified event, e.g., disability, occurs.

Another option is to give your Assisting Attorney access to your trust account in an agreement or consent and authorization form (See Appendices F and G). Again, the power may be conditioned upon the occurrence of a specified event. However, unlike a power of attorney, which ceases upon death, the agreement can authorize your Assisting Attorney to operate your trust account upon and after your death. In such case, this power may be used by your Assisting Attorney in winding up your practice.

Whichever method you choose, remember to check with the bank that holds your trust account to insure that your power of attorney or agreement is acceptable to it and to sign additional documents that may be required. New York Disciplinary Rules have detailed procedures which should be reviewed carefully by you and your Assisting Attorney to ensure that the appropriate steps are taken to safeguard these funds and to have the funds delivered to the appropriate parties on a timely basis. (See DR 2-110(A) & 9-102 and NYSBA publication *Attorney Escrow Accounts*).

Include Family and Staff

Your Advance Exit Plan also should include written letters of instruction to your family and office staff. In the event of death, these letters should ease the administration of your estate by describing what you have, where it is located, how to access it, and what to do with it. Your family, your executor (in the event of death), your designated Assisting Attorney and your office staff need to share information and coordinate their activities in the event of your disability, incapacity or death. Care should be taken to safeguard against improper access to client files and information by unauthorized persons, e.g., non-attorney family members. Generally, these instructions should cover the following:

- All pertinent personal and family information and financial information;
- Identification and location of all estate planning documents, including original wills/trusts;
- Location of personal and business insurance records, among other things.

Guidance to your staff should include directions as to:

- Notifying your professional liability carrier;
- Notifying all courts, boards and administrative agencies where your matters are pending;
- Closing your office;
- Reviewing all depositories, including trust accounts and safe contents;
- Coordinating with your accountant.

In reality, you must create a system for the orderly winding up of your law practice and the settlement of your own estate. See "Checklist for the Executor of a Solo Practitioner" (Appendix R); "Law Office List of Contacts" (Appendix Q); and "Special Provisions for Attorney's Will" (Appendix S).

Other Steps

There are a number of other steps that you can take while you are in practice to make the closing of your office smooth, timely and cost efficient in the event of disability, incapacity, retirement or death. These steps include:

- Making sure that your office procedures manual explains how to produce a list of client names and addresses for open files;
- Keeping a calendaring system with all deadlines and follow-up dates;
- Thoroughly documenting client files;
- Keeping your time and billing records up-to-date;
- Familiarizing your Assisting Attorney with your office systems;
- Reviewing and updating on a regular basis your written agreement with your Assisting Attorney;
- Periodically purging old and closed files (See Appendix N);
- Periodically communicating with clients for whom wills or other original documents are held by your firm to confirm that addresses are up-to-date and documents are still relevant.

If your office is organized and in good order, your designated Assisting Attorney will be able to manage, close or wind down your law practice in a timely and cost efficient manner. It also will make your law office a more valuable asset which may be sold and the proceeds remitted to you or your estate.

Special Considerations in the Event of Death

In the event of your death, your practice will be an asset of your estate. Your personal representative, be it executor or administrator, is the person ultimately responsible for the administration of this asset, including insuring that all obligations to clients are met.

If you have designated an Assisting Attorney prior to your death, you should notify your personal representative of the appointment and review your Advance Exit Plan with him or her. This will avoid confusion and enable your personal representative to promptly, upon the award of letters testamentary or administration, authorize your Assisting Attorney to embark upon his or her duties. You may wish to include in your will a direction to your executor that authorizes and requests delegation of responsibilities relating to the administration and closing of your practice to your Assisting Attorney and refers, specifically, to the Advance Exit Plan, if appropriate.

If you have not designated an Assisting Attorney in advance of your death, your executor may appoint an attorney to manage and close (or assist in selling) your practice. You may want to include language in your will that provides guidelines to your executor and any attorneys that your executor may retain regarding the management/closing of your practice. For example, you may want to name specific attorneys to take over certain of your files and enumerate powers to close your practice similar to those set forth in an Advance Exit Plan. If your nominated executor is not an attorney, it is important that he or she avoid inappropriate access to client files and information and rely instead, on an attorney or office staff to

attend to these matters. (See "Special Provisions for Attorney's Will" (Appendix S) and "Checklist for the Executor of a Solo Practitioner" (Appendix R)).

Whether or not you have an Advance Exit Plan, it is critical that you have a current will so that management and closure of your law practice can be addressed without delay and attendant harm to clients.

You also should consider a source of funding to compensate your designated Assisting Attorney, office staff, or attorney and staff retained by your executor who will be working during this transition period. Since your practice may be your only probate asset and your operating account may not have sufficient funds for this purpose, you may want to consider an insurance policy as a source of funding to defray this expense. The beneficiary of the policy could be the estate with specific instructions in your will that proceeds be used for this purpose.

Sale of a Law Practice

Your practice also may be an asset that can be sold to benefit you and/or your family or estate if you are no longer able to practice. Taking the appropriate steps as outlined above will not only protect your clients, but also may be necessary to preserve the value of your practice so that it may be transferred to another attorney or firm. Included in these materials are guidelines for the transfer of a practice (including an overview of DR 2-111), detailed suggestions for structuring such a sale, and a sample agreement and forms that would be relevant if your practice is sold (See "Transfer of a Law Practice", Appendix T; and "Asset Purchase Agreement between Executor and Purchaser", Appendix V).

Information for the Attorney Who Has Been Designated as a Successor, Caretaker or Closer of a Law Practice

The Assisting Attorney designated to manage or close another attorney's office will face a myriad of responsibilities, some of which will require immediate action. Where a detailed plan is in place (as described in these guidelines), the job of the Assisting Attorney will be easier. If no such plan is in place, the "Checklist for Closing Another Attorney's Office" (Appendix D) and "Checklist for Concerns When Assuming Responsibilities of Another Attorney's Practice…" (Appendix E), and the sample letters and forms regarding notification to clients and transfer of files (Appendices K, L, M, and N) will be helpful to you. The checklists at Appendices D and E also may be useful for the Planning Attorney to review prior to designing his or her own Advance Exit Plan to insure that the issues raised in those checklists are dealt with in the plan he or she develops.

Other Considerations

You will find in the Guide suggestions relating to file destruction or retention (Appendix N). The Guide also provides information on how to provide for practice continuity issues when the law practice of a partner or associate becomes interrupted because of issues related to his or her alcoholism, drug addiction or other impairment. A firm must be aware of the principal employment and disability laws involved, as well as the resources available to members of the firm in their efforts to assist their colleague (Appendix W).

Should a law office suffer a complete failure due to unforeseen disaster, a suggested checklist and plan is included to help in planning for orderly transition and resumption of practice (Appendix X).

The Guide sets forth the relevant statutes, disciplinary rules, ethics, opinions and ethical considerations relevant to all advanced planning issues (Appendix Z).

Finally, the Guide reproduces an article by David Kee, a Maine attorney, which relates to the "dos" and "don'ts" of retirement based upon his own experience (Appendix AA).

Start Now

We encourage you to develop and implement an Advance Exit Plan utilizing the basic guidelines discussed above. You can accomplish this now, at little or no expense, to protect your clients' and your own interests. Don't put it off—start the process today and keep it current and complete.

NOTE: This Guide and the appendices have been prepared by the New York State Bar Association's Special Committee on Law Practice Continuity, which gratefully acknowledges the use of "Planning Ahead: Protecting Your Client's Interest in the Event of Your Disability or Death", published by the Ethics Department of the Virginia State Bar, as well as "Planning Ahead: A Guide to Protecting Your Clients' Interest in the Event of your Disability or Death" by Barbara S. Fishleder, published by the Oregon State Bar Professional Liability Fund. With their permission, we borrowed language from sample will provisions prepared by James E. Brill, Esq., a solo practitioner from Houston, Texas, and Edward S. Schlesinger, Esq., of Hofheimer, Gartlir & Gross, in New York City. We thank them for that contribution. We also thank Patrick J. Higgins, Esq., of Powers & Santola, LLP, in Albany, NY for his contribution and guidance in the area of caretaking for an absent attorney whose practice deals with civil litigation.

APPENDIX A

WHAT IF?
ANSWERS TO FREQUENTLY ASKED QUESTIONS
ABOUT CLOSING A LAW PRACTICE ON A TEMPORARY OR PERMANENT BASIS

If you are planning to close your office or if you are considering helping a friend or colleague close his or her practice, there are numerous issues to resolve. 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, (2) errors in the Planning Attorney's trust account, or (3) defalcations of client funds.

Discussing these issues at the beginning of the relationship with your friend or colleague 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) that the Assisting Attorney may be required to report the Planning Attorney to the Disciplinary Committee [DR 1-103, See also NYSBA Ethics Opinion #'s 275, 295, 480, 531, 635, & 734].

The best way to avoid these problems is for the Planning Attorney and the Assisting Attorney to have a written agreement, and, when applicable, for the Assisting Attorney to have a written agreement 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 that 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. [DR's 5-101, 5-105, 5-107].

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 #9, are presented as if the Assisting Attorney is posing the questions.

1. 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 that 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 professional malpractice insurance carrier of the Planning Attorney, 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 review the obligation to inform the client and the Planning Attorney's malpractice insurance carrier of the error. If you are the attorney for the Planning Attorney, you would not be obligated to inform the Planning Attorney's client of the error. You would, however, want to be careful not to make any misrepresentations. [DR 1-102]. For example, if the Planning

Attorney had previously told the client a complaint had been filed, and the complaint had not been filed, you should not say or do anything that would lead the client to believe the complaint had been filed. In any case, you should notify the Planning Attorney's malpractice insurance carrier as soon as you become aware of any error or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to the "late notice" provision.

If you are the Planning Attorney's lawyer, an alternative arrangement that you can make with the Planning Attorney is to agree that you may 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. 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 any 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 no longer practicing law, does the Planning Attorney have malpractice coverage?

This depends on the type of coverage the Planning Attorney had. Most malpractice policies include a short automatic extended reporting period of 60 or 90 days, which provides the opportunity to report known or potential malpractice claims when a policy ends and will not be renewed. In addition, most malpractice policies provide options to purchase an extended reporting period endorsement for longer periods of time. These extended reporting period endorsements do not provide ongoing coverage for new errors, but they do provide the opportunity to lock in coverage under the expiring policy for errors that surface after the end of the policy, but within the extended reporting endorsement timeframe.

4. What protection will I have under the Planning Attorney's malpractice insurance coverage, if I participate in the closing or sale of the office?

You must check the definition of "Insured" in the malpractice policy form. Most policies define "Insured" as both the firm and the individual lawyers employed by or affiliated with the firm. This typically is broadened to include past employees and "of counsel" attorneys. In addition, most lawyers' professional liability policies specifically provide coverage for the "estate, heirs, executors, trustees in bankruptcy and legal representatives" of the Insured, as additional insureds under the policy.

5. 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) if the clients want you to represent them and (2) whom else you represent.

If you are representing the Planning Attorney, you are unable to represent the Planning Attorney's former clients on any matter against the Planning Attorney. This would include representing the Planning Attorney's former client 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 undergoing 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. 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 didn't 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 the New York State Bar Association's Lawyer Referral Service (telephone number 1-800-342-3661) or other appropriate lawyer referral service.

6. What procedures should I follow for distributing the funds that are in the Planning Attorney's escrow account?

If your review of the Planning Attorney's escrow account indicates that there may be conflicting claims to the funds in the account, you should initiate a procedure for distributing the existing funds, such as a court directed interpleader, pursuant to CPLR Section 1006.

7. If there was a serious ethical violation, must I tell the Planning Attorney's former clients?

The answer depends on the relationships. The answer is (A) no, if you are the Planning Attorney's lawyer, (B) maybe, if you are not representing the Planning Attorney or the Planning Attorney's former clients, and (C) maybe, if you are the attorney for the Planning Attorney's former clients.

(A) If you are the Planning Attorney's lawyer, you are not obligated to inform the Planning Attorney's former clients of any code violations or report any of the Planning Attorney's ethical violations to the disciplinary committee if your knowledge of the misconduct is a confidence or secret of your client, the Planning Attorney. [DR 1-103, DR 4-101]. 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 Planning Attorney's escrow 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 disciplinary rules, you should resign (see the following ethics opinions: N.Y. State 674 (1995); N.Y. State 545 (1982)).

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 may have to disburse what you can, 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 may include informing them in writing that you do not represent them.

(B) If you are not the attorney for the Planning Attorney, and you are not representing any of the former clients of the Planning Attorney, you may still have a fiduciary obligation (as an authorized signer on the escrow account) to notify the clients of the shortfall, and you may have an obligation under DR 1-103 to report the Planning Attorney to the Disciplinary Committee. You should also report any notice of a potential claim to the Planning Attorney's malpractice insurance carrier in order to preserve coverage under the Planning Attorney's malpractice insurance policy.

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 such as pursuing the Planning Attorney for the shortfall, filing a claim with the Lawyers Fund for Client Protection, 119 Washington Ave., Albany, NY 12210 (telephone number 1-800-442-3863); the malpractice insurance carrier; and filing an ethics complaint with the Disciplinary Committee, if DR 1-103 applies. If you are a friend of the Planning Attorney, this is a particularly important issue. You should determine ahead of time whether you are prepared to assume the obligation to inform the Planning Attorney's former clients of the Planning Attorney's ethical errors. If you do not want to inform your clients about possible ethics violations, you must explain to your clients (the former clients of Planning Attorney) that you are not providing the clients with any advice on ethics violations of the Planning Attorney. You should advise the client in writing, to seek independent representation on these issues. Limiting the scope of your representation, however, does not eliminate your duty to report pursuant to DR 1-103.

As a general rule, whether you have an obligation to disclose a mistake to a client will depend on the nature of the Planning Attorney's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm from the possible error or omission, and the likelihood that the Planning Attorney's conduct would be deemed unreasonable and therefore give rise to a malpractice claim. Ordinarily, since lawyers have an obligation to keep their clients informed and to provide information that their clients need to make decisions relating to the representation, you would have an obligation to disclose to the client the possibility that the Planning Attorney has made a significant error or omission. [See New York State Bar Association Ethics Opinions 275, 295, 396 and 734]

8. 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 in some way you 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 defalcation depends on your relationship with the Planning Attorney and with the Planning Attorney's former clients. (See #7 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.

9. What are the pros and cons of allowing someone to have access to my escrow account? How do I make arrangements to give my Assisting Attorney access?

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you suddenly become unavailable or unable to continue your practice, an Assisting Attorney is able to transfer money from your trust account to pay appropriate fees, disbursements and costs, to provide your clients with settlement checks, and to refund unearned fees. If these

arrangements are not made, the clients' money must remain in the trust account, until a court allows access. This court order may be through a guardianship proceeding, or an order for a court-directed interpleader, pursuant to CPLR 1006. This delay may leave your clients at a disadvantage, since settlement funds, or unearned fees held in trust, may be needed by them to hire a new lawyer.

On the other hand, the most important "con" of authorizing access is your inability to control the person who has been granted access. Since serving as an authorized signer gives the Assisting Attorney the ability to write trust account checks, withdraw funds, or close the account, he or she can do so at any time, even if you are not disabled, incapacitated, or for some other reason unable to conduct your business affairs, or dead. 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 allow your Assisting Attorney to be an authorized signer, you must decide if you want to give the Assisting Attorney (A) access only during a specific time period or when a specific event occurs (e.g., incapacity) or (B) access all the time.

10. The Planning Attorney wants to authorize me as an escrow account signer. Am I permitted also to be the attorney for the Planning Attorney?

Not if there is a conflict of interest. As an authorized signer on the Planning Attorney's escrow account, you would have a duty to properly account for the funds belonging to the former clients of the Planning Attorney. This duty could conflict with your duty to the Planning Attorney if (A) you were hired to represent him or her on issues related to the closure of his or her law practice and (B) there were defalcations in the escrow account. Because of this potential conflict, it is probably best to choose to be an authorized signer OR to represent the Planning Attorney on issues related to the closure of his or her practice, but not both. (See #4 above.)

APPENDIX B

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

1. Consider using retainer agreements with your clients that state that you have arranged for an Assisting Attorney to manage or close your practice in the event of your death, disability, impairment or incapacity, and identifying such attorney.

2. Have a thorough and up-to-date office procedure manual that includes information on:

   a. How to check for conflicts of interest;

   b. How to use the calendaring system;

   c. How to generate a list of active client files, including client names, addresses, and phone, numbers;

   d. Where client ledgers are kept;

   e. How the open/active files are organized;

   f. How the closed files are organized and assigned numbers;

   g. Where the closed files are kept and how to access them;

   h. The office policy on keeping original documents of clients;

   i. Where original client documents are kept;

   j. Where the safe deposit box is located and how to access it;

   k. The bank name, address, account signers, and account numbers for all law office bank accounts;

   l. The location of all law office bank account records (trust and general);

   m. Where to find, or who knows about, the computer passwords;

   n. How to access your voice mail (or answering machine) and the access code numbers; and

   o. Business and personal insurance policies with contact information for brokers and insurance companies.

3. Make sure all of your file deadlines (including follow-up deadlines) are on your calendaring system.

4. Document your files.

5. Keep your time and billing records up-to-date.

6. Have a written agreement and/or power of attorney with an attorney who will manage or close your practice (the "Assisting Attorney") that outlines the responsibilities delegated to the Assisting Attorney who will be managing or closing your practice. Include a procedure to enable your Assisting Attorney to determine whether your incapacity renders you unable to practice law, and

complete, in advance, a medical release and authorization form as required by HIPAA permitting disclosure of medical information to assist in this determination (See form attached to Appendix F). Determine whether the Assisting Attorney also will be your personal attorney. Choose an Assisting Attorney who is sensitive to conflict of interest issues.

7. If your written agreement authorizes the Assisting Attorney to sign trust or 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 upon the happening of a specific event. In some instances, you and the Assisting Attorney will be required to sign bank forms authorizing the Assisting Attorney to have access to your trust or general account. Choose your Assisting Attorney wisely for he or she may have access to your clients' funds.

8. Familiarize your Assisting Attorney with your office systems and keep him or her apprised of office changes.

9. Introduce your Assisting Attorney to your office staff. Make certain your staff knows where you keep the written agreement with your Assisting Attorney and how to contact the Assisting Attorney if an emergency occurs before or after office hours. If you practice without a regular staff, make sure your Assisting Attorney knows whom to contact (the landlord, for example) to gain access to your office.

10. Inform your spouse or closest living relative and your named executor of the existence of this agreement and how to contact the Assisting Attorney.

11. Renew your written agreement with your Assisting Attorney each year. If you include the name of your Assisting Attorney in your retainer agreement, make sure the information concerning that attorney is current.

APPENDIX C

CHECKLIST FOR CLOSING YOUR OWN OFFICE

1. Finalize as many active files as possible.

2. Write to clients with active files, advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their matters. The letter should explain how and where they can pick up copies of their files and should give a deadline for doing so. (See "Letter from Planning Attorney Advising That Lawyer is Closing His/Her Office," provided in Appendix O).

3. For cases that have pending court dates, depositions or hearings, discuss with affected clients how to proceed. Where appropriate, request extensions, continuances and the rescheduling of hearing dates. Send written confirmations of these extensions, continuances and rescheduled dates to opposing counsel and to your client.

4. For cases before administrative bodies and courts, obtain clients' permission to submit motions and orders to withdraw as counsel of record. Review DR 2-110 and DR 2-111.

5. In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.

6. Select an appropriate date and check to see if all matters have a motion and order allowing your withdrawal as counsel of record or a Substitution of Attorney filed with the court.

7. Make copies of files for clients. Retain your original files (except, in the case of original documents such as deeds, retain a copy and provide the client with the original). All clients should either pick up copies of their files (and sign a receipt acknowledging that they have received them) or sign an authorization for you to release copies of their files to their new attorneys. (See "Acknowledgment of Receipt of File and Authorization for Transfer of Client File" provided in Appendices L and M).

8. Write to all clients for whom you have retained original wills, advising them that you are closing your office and request that they pick up their original will. Ask them to sign a receipt and maintain a record of all wills that are retrieved.

9. Tell all clients where their closed files will be stored and whom they shou1d contact in order to retrieve them. Obtain all clients' permission to destroy their files after approximately seven years (See Appendix N). If a closed file is to be stored by another attorney, obtain the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number.

10. If you have sold your practice, tell your clients the name, address, and phone number of the purchasing attorney.

11. If you are a sole practitioner, arrange to have your calls forwarded to you or another person who can assist your clients. 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.

APPENDIX D

CHECKLIST FOR CLOSING ANOTHER ATTORNEY'S OFFICE

If you are handling the closing or sale of another attorney's practice, the following checklist will be of assistance to you and your staff. The reason that the attorney is closing his or her practice will also affect how you make these decisions. For example, if the attorney is disabled or dead, you may need to make decisions without the attorney's assistance. To the extent that the terminating attorney or his or her staff is available, you should make every effort to use that assistance.

Costs involved in taking over the responsibility for another attorney's practice can be substantial. Be prepared and be careful about who is responsible for these expenses.

The term "Affected Attorney" refers to the attorney whose office is being closed or sold. "Closing Attorney" refers to the attorney who is handling the closing or sale of another attorney's practice. "Acquiring Attorney" refers to one who is purchasing another attorney's practice.

1. Check the calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, etc.

   If possible, discuss with the attorney the status of open files – what has been completed, what has not, what has been billed, etc.

   If a sale of the practice is being contemplated or pursued, whether by the Affected Attorney or the estate, review and understand DR 2-111 which has critical notice and time requirements.

2. Contact clients for matters that are urgent or immediately scheduled for hearing, court appearances, or discovery. Obtain permission to postpone or reschedule (see CPLR 321(c)). (If making these arrangements constitutes a conflict of interest with your own clients, retain another attorney to take responsibility for obtaining extensions of time and other immediate needs.)

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

   Consider the overhead costs involved in purchasing a practice or closing a practice.

3. Contact courts and opposing counsel about files that require immediate discovery or court appearances. Reschedule hearings or obtain extensions where necessary. Confirm extensions and reschedulings 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 procedures manual. Determine if there is a way to get a list of clients with active files.

6. In cases where the client is obtaining a new attorney, be certain that a Substitution of Counsel is filed.

7. For cases before administrative bodies and courts, obtain permission from the clients to submit a Motion and Order to withdraw the Affected Attorney as attorney of record. Review DR 2-110 and DR-2-111.

8. Send clients who have active files a letter explaining that the law office is being closed,

   - instructing them to retain a new attorney and/or to pick up the open file. Provide clients
   - with a date by which they should pick up copies of their files. Inform clients that new
   - counsel should be chosen immediately.

   If you, as Closing Attorney will represent the Affected Attorney's clients, or if you are buying the practice, consider whether the fee policy will be the same as the Affected Attorney's policy. For example, if hourly rates are used, and if so, are they similar? Are set fees used, and are they similar? Have retainers historically been required, and are the policies and retainer requirements of the purchasing attorney the same? Disclosure of these items is required under the disciplinary rules governing the sale of a law practice [DR 2-111].

   In open estate files, are your practices consistent with the Affected Attorney's practices with respect to what is covered on a quoted fee? For example, is a fee for probate limited to just the probate of the will or does it cover estate tax return preparation, will contests, etc. Carefully review retainer letters and send modifications if necessary. Note that the DRs require a notice as to whether the Acquiring Attorney is going to honor the Affected Attorney's retainer/engagement agreements and arrangements. One attorney may have varied fee arrangements. Make sure you know what you are agreeing to before stating that you are honoring "all" the arrangements with all the clients.

   If the Affected Attorney is available and willing, he or she should introduce you to non-lawyer staff members, and referral sources such as insurance agents, bankers, realtors, and accountants with whom the Affected Attorney worked. If the Affected Attorney is not available or willing to assist in this capacity, you should make these contacts immediately, not only for purposes of preserving client relations, but also to determine the location of clients, history of clients, etc. Many clients work with a team of advisors and, with the client's consent, you should have discussions with each of these other professionals. Clients may be looking to these other advisors for recommendations for new counsel.

9. Make sure that all court cases have either a motion and order allowing withdrawal of the Affected Attorney or a Substitution of Attorney filed with the court.

10. Make copies of files for clients. Retain the Affected Attorney's original file. All clients should either pick up a copy of their file (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 there are original documents in it that the client needs (such as a title abstract to property), return the original documents to the client and keep copies for the Affected Attorney's file. Determine who or what entity is responsible for storing the Affected Attorney's files and records. Return original wills to clients.

    Make contact with firms or practices with which the Affected Attorney was associated to determine what, if any, files remain with those practices. This will save the acquiring attorney a significant amount of time "searching" for files demanded by clients for past representation by the

Affected Attorney. Also, determine who will bear the cost and the responsibility for acquiring or copying those files: Is it the closing attorney, the Affected Attorney or the court or other agency that has taken over the primary responsibility for the Affected Attorney's practice?

Consider file storage: The older the practice, the more time and expense will be involved in file review and management.

Determine whether "closed" files contain valuable documents such as wills, agreements, etc. Practices differ: one attorney's "closed" files may be considered another attorney's "open and continuing" files. For example, an attorney may habitually notify clients following every service that the representation has ceased, and that the file is closed. Others may never take this step and always assume that the client may be coming back for further representation.

When returning files, make sure that you are returning files to the proper "client." If a husband and wife have a will file from years ago, and the wife responds to your client inquiry letter by asking for the file, do you send back both wills? We advise not. What if there has been a divorce, or there is presently a dispute between the husband and wife? The same rule applies with corporations, shareholders, partners, etc. Obtain consent from all that are involved. Look for court or disciplinary committee guidance where appropriate.

Review the content of files before returning them to clients who have requested them; decide whether you need to retain a copy of all or some portion of the file, in relation to any potential liability you might face for having been responsible at some point for the file. Consider retaining documents for the benefit of the Affected Attorney so that her or his estate could defend any claims against them? Proceed with caution.

11. Advise all clients where their closed files will be stored, and who they should contact in order to retrieve a closed file. Again, carefully address the issue of file storage costs with all parties.

12. To locate clients for whom there is no current address, contact the postal service, referral sources of the Affected Attorney, and clients in the same geographic area. Consider publication to advertise that the firm has closed – be careful about any specific comments concerning Affected Attorney's actions that led to closing of the office.

13. If the attorney whose practice is being closed 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 Affected Attorney's phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.

14. Make arrangements through the executor or through the Affected Attorney to obtain reporting endorsement coverage on professional liability insurance for continuing malpractice insurance.

15. Obtain written instructions from clients concerning any funds in their trust accounts. Contact other signatories on the IOLA account. Comply with DR 9-102 with respect to having the IOLA account assigned to new counsel if desired.

    Determine responsibility for the IOLA and other attorney escrow accounts immediately. Your rights and obligations as the Acquiring Attorney must be known — potential liability is significant.

16. Prepare a final billing statement showing any outstanding fees due, and/or any money in trust. Remit money received from clients for services rendered by the Affected Attorney to the Affected Attorney or his/her estate. Remember, in many cases, the client has an entirely different understanding of what the billing arrangement is than the Affected Attorney. Be prepared for the time and expense of discussing and negotiating fee arrangements with clients. Immediately notify, and schedule a meeting with the Affected Attorney's accountant to obtain a full understanding of the financial reporting policy of the Affected Attorney. If the Affected Attorney did his or her own accounting and tax preparation, the Closing Attorney's accountant should be given immediate access to books and records to determine tax and financial liabilities of the Affected Attorney.

17. If authorized, pay business expenses and liquidate or sell the practice. If the Affected Attorney is deceased, work with his/her executor in taking care of these matters.

18. Review and analyze technology systems for compatibility with Acquiring Attorney's systems. Because of the constant change in technology, the Affected Attorney or his/her staff should participate in transferring over not only current technology in use but also provide access to systems that have historically been used by the attorney but which are not current. A significant amount of client information exists in the old files and systems. Obtain passwords. Review "vendor" relationships with the Affected Attorney's vendors. Were prepayments made for services, products that are not going to be used? Are there outstanding bills for storage of files, stationery, supplies, etc. that must be paid, and if so, who is responsible?

19. Review business insurance policies. When are renewal policies due? Which policies can be renewed and which can be cancelled, and by what date? Some policies may be cancelled mid-term and a pro-rata premium refund may be available, depending on the type of coverage. Also, if a Business Overhead Expense (BOE) policy is in place, and if the Affected Attorney suffered a period of covered disability prior to the office closing, benefits may be available for some office expense.

APPENDIX E

CHECKLIST OF CONCERNS WHEN ASSUMING TEMPORARY RESPONSIBILITY OF ANOTHER ATTORNEY'S PRACTICE WHETHER RESULTING FROM THE DISABILITY OR SUSPENSION OF THE OTHER ATTORNEY

The term "Responsible Attorney" refers to the attorney who is assuming temporary responsibility for another attorney's practice.

1. If there is sufficient notice, discuss with the disabled or suspended attorney the status of open files—what has been completed, what has not, what has been billed, etc.

2. Consider who will be responsible for the overhead costs involved in managing the practice for the interim period. Address compensation of the Responsible Attorney.

3. Where the Responsible Attorney does not have the expertise in one or more of the areas in which the disabled or suspended attorney practiced, the Responsible Attorney should enlist the assistance of other practitioners. The Responsible Attorney may seek such assistance through the court (if court appointed) or through the bar association.

4. Immediately determine responsibility or the lack of responsibility for the IOLA and attorney escrow accounts. If there is a second signatory on the account, contact that attorney immediately. Arrange for an audit of the account to determine whether there are adequate funds in the accounts for the clients.

5. Consider and recognize the personalities and practice habits of the disabled or suspended attorney. For example, if the attorney met with clients in their homes or places of business, or if the staff was actively involved in the attorney's client relations, you should consider continuing in this same manner or advising the clients of your practices. Clearly advise clients of their rights to seek new counsel of their own choosing. Give as much information as possible to the client as to the expected return of the disabled or suspended attorney to practice as well as the likelihood of that happening. Take great care to properly advise the clients in this regard. Incorrect information given to the client may have an adverse effect on the client's case, and an adverse effect on the practice. Seek court approval and direction to the extent possible, if you are making decisions and giving advice which can result in a client seeking other counsel.

6. Consider whether to maintain the same fee policy if the Responsible Attorney is to render services for a client. If possible, determine in advance whether hourly rates or set fees will be used, and at what amounts; whether to use retainer agreements. Disclosure of these items is required under the disciplinary rules [DR 2-111] governing the sale of a law practice but there is little direction as to how fees are to be handled in the case of a temporary departure from the practice of law. If time and the disabled or suspended attorney's condition allows, that attorney should introduce the Responsible Attorney to non-lawyer staff members, referral sources such as insurance agents, bankers, realtors, accountants with whom that attorney worked. If the disabled or suspended attorney is not available to assist in this capacity, the Responsible Attorney should contact these people by the attorney, not only for purposes of preserving client relations, but also to determine location of clients, history of clients, etc. Many clients work with a team of advisors and, with the

client's consent, the Responsible Attorney should have discussions with each of these other professionals.

7. Immediately notify the attorney's accountant and schedule a meeting in order to have a full understanding of the financial reporting policy and habits of the disabled or suspended attorney. If the disabled or suspended attorney did his or her own accounting and tax preparation, the Responsible Attorney's accountant should be given immediate access to those books and records that may be available to determine tax and financial liabilities of the disabled or suspended attorney. The Responsible Attorney should decide how financial records will be maintained during this temporary period of time of managing the practice of the disabled or suspended attorney.

8. Review "vendor" relationships with the disabled or suspended attorney's vendors. Determine whether prepayments have been made for services and products that will not be used, and whether bills for storage of files, stationery, supplies, etc. must be paid.

9. Immediately address open litigation matters. Check the statute of limitations on each file. There are numerous litigation-related statutes of limitations, ranging from a ninety-day notice of claim to perfecting an appeal in nine months, to three years in filing various tort actions. In other practice areas, tax forms, Article 78 proceedings, administrative appeals, construction liens, and grievances to real property tax assessments, all must be filed or served by specific dates. The list is endless. Recognize, understand and comply with time limitations on each file.

   On cases in suit, expect a full and active litigation calendar awaiting compliance. Immediately review upcoming trial dates, expert disclosure and note of issue filing deadlines, court dates, appearances, depositions, motion return dates, brief, pleading, and discovery document filing dates. Ask for a run of the calendar for the next six months. Also, expect that some active and upcoming dates may not be docketed on the calendar. Discover these by reviewing each case file, and communicating with opposing counsel or the court. In civil litigation, many cases run by judicial preliminary conference scheduling order, which directs that each phase of the case occur by a certain date. Check these immediately in every case. If extensions are needed on the preliminary conference scheduling order, issue letters to this effect well before the close of the discovery schedule. Determine what can be adjourned, and what needs to be dealt with. Courts and opposing counsel are generally cooperative about adjourning matters when disability strikes, but need as much advance notice as possible.

10. Reassure the existing clients that their cases are being handled properly, and that the disabled or suspended lawyer will return to the practice soon, if that is the case. Consider meeting the clients personally to reassure them and to answer their questions. After taking care of the immediate concerns, review each file in detail. If the absent lawyer will be out for a significant length of time but will return at some point, and the clients have not engaged other counsel, as the Responsible Attorney, one of your concerns will be to maintain the revenue stream to keep the practice financially healthy. Consider writing and docketing an internal case management plan for each file. This should move the files ahead in an orderly and sequenced fashion and flag relevant compliance dates.

11. The disabled or suspended lawyer may or may not be available to discuss individual cases. If he or she is, take copious notes and seek to understand the case management plan for each case. Often the disabled or suspended lawyer will know what cases need the most immediate attention, and will be able to prioritize his/her caseload to assist you in your caretaker responsibilities.

APPENDIX F

AGREEMENT TO CLOSE LAW PRACTICE IN THE FUTURE

This Agreement is entered into this ___ day of _____, 200__, by and between _____ ("Planning Attorney"), an individual admitted and licensed to practice as an attorney in the Courts of the State of New York and whose office for the practice of law is located at _____, and _____ ("Closing Attorney"), an individual admitted and licensed to practice as an attorney in the Courts of the State of New York and whose office for the practice of law is located at _____.

RECITALS

WHEREAS, Planning Attorney is a sole practitioner engaged in the practice of law; and

WHEREAS, Planning Attorney recognizes the importance of protecting the interests of his clients in the event that he is unable to practice law by reason of his death, disability, incapacity or other inability to act; and

WHEREAS, Planning Attorney wishes to plan for the orderly closing of his law practice if he is unable to practice law for the above stated reasons; and

WHEREAS, Planning Attorney has requested Closing Attorney to act as his agent to take all necessary actions to close Planning Attorney's practice and Closing Attorney has consented to this appointment; and

WHEREAS, Planning Attorney and Closing Attorney are entering into this Agreement to define their rights and obligations in connection with the closing of Planning Attorney's practice.

1. **Effective Date**. This Agreement shall become effective only upon Planning Attorney's death, disability, incapacity or other inability to act, as established by paragraph 2. The appointment and authority of Closing Attorney shall remain in full force and effect as long as it is necessary or convenient to carry out the terms of this Agreement, or unless sooner terminated under paragraphs 8 or 9.

2. **Determination of Death, Disability, Incapacity**. Closing Attorney shall make the determination that Planning Attorney is dead, disabled, incapacitated or otherwise unable to practice law, and if disabled or incapacitated, that such disability or incapacity is permanent in nature or likely to continue indefinitely. Closing Attorney shall base his determination on reliable evidence such as communications with the members of Planning Attorney's family and written opinions of licensed physicians and other medical professionals who diagnosed or treated Planning Attorney. As part of the process of determining whether the Planning Attorney is disabled, incapacitated, or otherwise unable to continue the practice of law, all individually identifiable heath information and medical records may be released to Closing Attorney, even though the authority of the Closing Attorney has not yet become effective. This release and authorization applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") 42 U.S.C. 1320d and 45 C.F.R. 160-164.[1] Closing Attorney may also

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1. To assure compliance with HIPAA, the Planning Attorney, upon execution of the Agreement To Close Law Practice, should sign two written authorizations, one to his or her health care provider, and one leaving the provider line blank, giving the identity of the Closing Attorney and authorizing the disclosure of information relating to the Planning Attorney's capacity to practice law upon request by the Closing Attorney. A sample authorization is attached to the end of this document.

consider the opinions of colleagues, employees, friends or other individuals with whom Planning Attorney maintained a continuous and close relationship. Closing Attorney shall sign an affidavit stating the facts upon which his determination is based, and such affidavit shall, for the purposes of this agreement, be conclusive proof that the Planning Attorney is disabled, incapacitated, or otherwise unable to continue the practice of law.

[or consider having the family or physicians determine incapacity, and including a measurable standard such as a determination by two physicians that Planning Attorney is incapable of conducting law practice by reason of incapacity]

3. **General Power and Appointment of Closing Attorney as Attorney-In-Fact.** Upon the determination that Planning Attorney is unable to continue the practice of law by reason of death, disability, incapacity or other inability to act as provided herein, and is unable to close his own practice, Planning Attorney consents to and authorizes the losing Attorney to take all necessary actions to close Planning Attorney's law practice. Planning Attorney appoints Closing Attorney as his attorney-in-fact with full power to do and accomplish all of the actions expressed and implied by this Agreement as fully and completely as Planning Attorney would do personally but for his inability.

4. **Specific Powers.** Planning Attorney consents to and authorizes the following actions by Closing Attorney in addition to any other actions Closing Attorney in his sole discretion deems necessary to carry out the terms of this Agreement.

   a. **Access to Planning Attorney's Office**. To enter Planning Attorney's office and use his equipment and supplies as needed to close Planning Attorney's practice.

   b. **Designation as Signatory on Financial Accounts.** To replace Planning Attorney as signatory on all of Planning Attorney's law office accounts with any bank or financial institution, including without limitation, attorney trust, escrow or special accounts, checking accounts, and savings accounts. Planning Attorney's bank or financial institution may rely on this authorization unless such bank or financial institution has actual knowledge that this Agreement has been terminated or is no longer in effect.

   c. **Opening of Mail.** To receive, sign for and open Planning Attorney's law practice mail and deliveries by courier and to process and respond to them, as necessary.

   d. **Possession of Property**. To take possession, custody and control over all of Planning Attorney's property relating to his law practice, real and personal, including client files and records.

   e. **Access to and Inventory/Examination of Files**. To enter any storage location where Planning Attorney maintained his files and to inventory and examine all client case files, including client wills, property and other records of Planning Attorney. If Closing Attorney identifies a conflict of interest with a specific file or client, he shall assign the file to the Successor Closing Attorney in accordance with paragraph 8(b).

   f. **Notification to Clients**. To notify clients, potential clients and those who appear to be clients, of Planning Attorney's death, disability, incapacity or other inability to act, and to take whatever action Closing Attorney deems appropriate to protect the interests of the clients, including advising the clients to obtain substitute counsel.

g. **Transfer of Files**. To safeguard files and arrange for their return to clients; to obtain consent from clients to transfer files to new attorneys, to transfer files and property to clients or their new attorneys; to obtain receipts therefor.

h. **Storage of Files and Attorney's Records**. To arrange for storage of closed files, unclaimed files, and records that must be preserved for seven years under Disciplinary Rule 9-102 (d) of the Code of Professional Responsibility.

i. **Transfer of Original Documents**. To arrange for and transfer to clients all original documents, including wills, trusts and deeds.

j. **Extensions of Time**. To obtain client's consent for extensions of time, to contact opposing counsel and courts/administrative agencies to obtain extensions of time, and to apply for extensions of time if necessary pending employment of new counsel by clients.

k. **Litigation**. To file motions, pleadings, appear before court, and take any other necessary steps where the clients' interests must be immediately protected pending retention of other counsel.

l. **Notification to Court and Others.** To contact all appropriate agencies, courts, adversaries and other attorneys, professional membership organizations such as the New York State Bar Association or local bar associations, the Office of Court Administration, and any other individual or organization that may be affected and advise them of Planning Attorney's death or other inability to act and that Planning Attorney has given this authorization to Closing Attorney.

m. **Collection of Fees and Return of Client Funds.** To send out invoices for unbilled work by Planning Attorney and outstanding invoices; to prepare an accounting for clients on retainer, including return of client funds; to collect fees and accounts receivables on behalf of Planning Attorney or Planning Attorney's estate; to prepare an accounting of each client's escrow fund and arrange for transfer of escrow funds, including obtaining consent from client to transfer escrow funds and acknowledgment of receipt of escrow funds by new counsel or client.

n. **Payment of Business Expenses and Creditors**. To pay business expenses such as office rent, rent for any leased equipment, library expenses, salaries to employees or other personnel, to determine the nature and amount of all claims of creditors, including clients, of Planning Attorney and to pay or settle same.

o. **Personnel**. To continue the employment of Planning Attorney's employees and other personnel to the extent necessary to assist the Closing Attorney in the performance of his duties, to compensate and to terminate such employees or other personnel; to employ or dismiss agents, accountants, attorneys or others and to compensate them.

p. **Termination of Obligations**. To terminate or cancel business obligations of Planning Attorney, including office lease; lease of equipment such as copier, computer, furniture; library, magazine or newspaper subscriptions.

q. **Insurance**. To purchase, renew, maintain, cancel, make claims against or collect benefits under fire, casualty, professional liability, or other office insurance of

Planning Attorney; to notify any professional liability insurance carriers of Planning Attorney's death, disability, incapacity or other inability to act; to cooperate with such insurance carriers regarding matters related to Planning Attorney's coverage, including addition of Closing Attorney as an insured under said policy.

r. **Taxes**. To prepare, execute or file income, information or other tax returns or forms and to act on behalf of Planning Attorney's law practice in dealing with the Internal Revenue Service, any division of the New York State Department of Taxation and Finance, or any office of any other tax department or agency.

s. **Settlement of Claims**. To settle or compromise, or submit to arbitration or mediation, all debts, taxes, accounts, claims, or disputes between Planning Attorney's law practice and any other person or entity; to commence or defend all actions affecting Planning Attorney's law practice.

t. **Execution of Instruments**. To execute, as Planning Attorney's attorney-in-fact, any deed, contract, affidavit or other instrument on behalf of Planning Attorney.

u. **Attorney as Fiduciary**. To resign any position which Planning Attorney holds as a fiduciary, such as executor or trustee, and to notify other named fiduciary, if any, and beneficiaries of the estate or trust; if the trust or will does not name a successor fiduciary, to apply to the court for appointment of a successor fiduciary; to confer with the personal representative of the Planning Attorney's estate with respect to the obligation of such personal representative to account for the assets of the estate or trust that Planning Attorney was administering.

v. **Power of Sale and Disposition**. To sell or otherwise arrange for disposition of Planning Attorney's furniture, books, or other personal property located in Planning Attorney's law office.

w. **Representation of Planning Attorney's Clients**. To provide legal services to Planning Attorney's clients, provided that Closing Attorney has no conflict of interest, obtains the consent of Planning Attorney's clients, and does not engage in conduct that violates Disciplinary Rule 2-103 of the Code of Professional Responsibility. If Planning Attorney's clients engage Closing Attorney to perform legal services, Closing Attorney shall have the right to payment for such services from such clients.

x. **Access to Safe Deposit Box**. To open Planning Attorney's safe deposit box used for law practice, to inventory same, and to arrange for return of property to clients.

5. **Preservation of Attorney-Client Privilege and Confidences and Secrets of Client**. Closing Attorney shall maintain the confidences and secrets of a client and protect the attorney-client privilege as if the Closing Attorney represented the clients of Planning Attorney.

6. **Sale of Planning Attorney's Practice**. In the event of Planning Attorney's death, disability, incapacity, or other inability to act, Closing Attorney shall have the power to sell Planning Attorney's law practice in accordance with Disciplinary Rule 2-111 of the Code of Professional Responsibility. In the case of the death of the Planning Attorney, the sale shall be approved by the personal representative of the deceased Planning

Attorney. Such power shall include, without limitation, the authority to sell all assets of the Planning Attorney's practice such as good will, client files and fixed assets such as furniture and books; to advertise Planning Attorney's law practice; to arrange for appraisals; and to retain professionals such as lawyers and accountants to assist Closing Attorney in the sale of the practice. Upon the sale of the practice, Closing Attorney will pay Planning Attorney or Planning Attorney's estate all net proceeds of sale.

[note: in case of death, Planning Attorney should provide in Will that sale of practice is to be handled by Closing Attorney; alternative would be to specifically authorize Executor to sell the practice in which case this power to Closing Attorney should be deleted from above provision in the event of sale by reason of death.]

Closing Attorney shall have the right to purchase, in whole or in part, Planning Attorney's practice, provided that the purchase price is the fair market value as determined by an appraiser and that the terms of the sale are approved by the Executor or Administrator of Planning Attorney's estate or an independent third party (But note potential issues—see DR 5-101 and 5-104).

[note: consider giving Closing Attorney first option to purchase. Also, terms and conditions of sale to Closing Attorney may be described in this Agreement or by separate agreement]

7. **Compensation.** Closing Attorney shall be paid reasonable compensation for the services performed in closing the law practice of Planning Attorney. Such compensation shall be based on time and Closing Attorney agrees to maintain accurate and complete time records for the purposes of determining his compensation. Closing Attorney's compensation shall be paid from Planning Attorney's law practice *(or from the estate of the deceased Planning Attorney, in which case provision should be made in Planning Attorney's Will for such payment).*

8. **Resignation of Closing Attorney and Appointment of Successor Closing Attorney.**

   a. Prior to the effective date of this Agreement, Closing Attorney may resign at any time by giving written notice to Planning Attorney. After the effective date of this Agreement, Closing Attorney may resign by giving written notice to Planning Attorney, or if Planning Attorney is deceased, to Planning Attorney's Executor or Administrator, subject to any ethical or professional obligation to continue or complete any matter undertaken by Closing Attorney.

   b. If Closing Attorney resigns or otherwise is unable to serve, Planning Attorney appoints _____ as Successor Closing Attorney, and Successor Closing Attorney consents to this appointment as evidenced by his signature to this Agreement. Successor Closing Attorney shall have all the rights and powers, and be subject to all the duties and obligations of Closing Attorney. During the tenure of Closing Attorney, Successor Closing Attorney shall review and take any necessary action with respect to those client files of Planning Attorney in which Closing Attorney identifies a conflict of interest.

   c. Closing Attorney or Assisting Attorney shall not be required to post any bond or other security to act in their capacity.

9. **Liability and Indemnification of Closing Attorney.** Closing Attorney shall not be liable to Planning Attorney or Planning Attorney's estate for any act or failure to act in the performance of his duties hereunder, except for willful misconduct or gross negligence. Planning Attorney agrees to indemnify and hold harmless Closing Party from any claims, loss or damage arising out of any act or omission by Closing Attorney under this Agreement, except for liability or expense arising from Closing Attorney's willful misconduct or gross negligence. This indemnification does not extend to any acts, errors or omissions of Closing Attorney while rendering or failing to render professional services as attorney for former clients of Planning Attorney.

10. **Revocation, Amendment and Termination.**

    a. Prior to the effective date of this Agreement, Planning Attorney may at any time remove the Closing Attorney, or revoke, amend or alter this Agreement by written instrument delivered to Closing Attorney and Successor Closing Attorney, provided that any amendment or modification to Closing Attorney's obligations hereunder and to his rate of compensation shall require Closing Attorney's written consent.

    b. This Agreement shall terminate upon (i) prior to the effective date of this Agreement, delivery of written notice of termination by Planning Attorney to Closing Attorney and Successor Closing Attorney; and (ii) after the effective date of this Agreement, delivery of a written notice of termination to Closing Attorney by the Executor or Administrator of Planning Attorney's estate upon a showing of good cause, or by a Guardian of the property of Planning Attorney appointed under Article 81 of the Mental Hygiene Law pursuant to court order.

11. **Miscellaneous.**

    a. This Agreement shall be governed and interpreted in all respects by the laws of the State of New York.

    b. Whenever necessary or appropriate for the interpretation of his Agreement, the gender herein shall be deemed to include the other gender and the use of either the singular or the plural shall be deemed to include the other.

    c. The paragraph headings are for convenience only and are not to be relied upon for interpretation of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

_____
Planning Attorney

_____
Closing Attorney

_____
Successor Closing Attorney

ACKNOWLEDGMENTS

GENERAL MEDICAL RECORDS RELEASE AND AUTHORIZATION FOR USE OR DISCLOSURE OF PROTECTED HEALTH INFORMATION

Patient Name: _____

Address: _____

Social Security Number: _____

I authorize the custodian of the records _____ to disclose/release the following information _____ [all medical records, including mental health, substance abuse and HIV/AIDS records] or [a subset of records]. These records are for services rendered [in the last two years] or: _____.

Please send the records listed above to [Agent]

Name: _____

Address: _____

Phone number: _____

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

The Authorization expires one (1) year from the date it is presented to the custodian of records.

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

_____ _____

Signature of Patient **Date**

_____

APPENDIX G
AUTHORIZATION AND CONSENT TO CLOSE OFFICE
(Short Form)

This Authorization and Consent is entered into between _____ and _____ .

I, _____, a sole practitioner who engages in the practice of law at offices located at _____ ("Planning Attorney") authorizes _____, who engages in the practice of law and has an office located at _____ ("Closing Attorney") 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 utilizing 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 files and records of my law practice and obtaining information about any pending matters that may require attention, except for those files in which Closing Attorney has a conflict of interest;
- 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 where their interests must be immediately protected and other legal counsel has not yet been retained;
- Contacting all appropriate persons, entities and professional organizations that may be affected and informing them that I have given this authorization;
- Signing checks on my trust account and providing an accounting to my clients of funds in trust; and
- Contacting my professional liability carrier concerning claims and potential claims.

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

For the purpose of this consent, death, disability, impairment, or incapacity shall be determined by evidence the Closing Attorney deems reasonably reliable, including but not limited to communications with my family, other representatives or a written opinion of one or more duly licensed physicians. Upon such evidence, the Closing Attorney is relieved from any responsibility or liability for acting in good faith in carrying out the provisions of this Authorization and Consent.

The Closing Attorney agrees 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. The Closing Attorney is appointed as my agent for purposes of preserving my clients' confidences and secrets, the attorney-client privilege, and the work product privilege. This authorization does not waive any attorney-client privilege.

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

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

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

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

The Closing Attorney may revoke this acceptance at any time prior to my death or disability, and after such time, Closing Attorney has the power to appoint a new Closing Attorney to serve in the Closing Attorney's place. If the Closing Attorney revokes this acceptance, the Closing Attorney must promptly notify me in writing. Prior to my death or disability, I may revoke this Authorization and Consent by written notification to Closing Attorney.

_____	_____
Planning Attorney	Date
_____	_____
Closing Attorney	Date

Acknowledgements

APPENDIX H

LIMITED POWER OF ATTORNEY TO MANAGE LAW PRACTICE AT A FUTURE DATE

I, _____ (name of principal), residing at _____, an attorney licensed and in good standing to practice law in the State of New York, with offices located at _____, do hereby appoint _____ (name of Agent), residing at _____, an attorney licensed and in good standing to practice law in the State of New York, with offices located at _____, as my agent and attorney-in-fact to act for me, in my name and in my behalf as hereinafter provided. This limited power of attorney shall become and remain effective, however, only upon and during a period of my incapacity by reason of my disappearance, disability, or other inability to act which renders me incapable of conducting my law practice in a competent manner. Such determination of incapacity shall be made by me or written certification by:

(i) a physician duly licensed to practice medicine who has treated me within one year preceding the date of such certification *[or consider two physicians]*,

OR

(ii) my Agent, who shall base his findings on reliable sources, including one or more members of my immediate family, a written opinion of one or more licensed physicians who diagnosed or treated me within one year preceding the date of my incapacity, my law firm colleagues and/or my office staff with whom I maintained a close and continuous relationship during the period immediately preceding my incapacity,

OR

(iii) [name and address of other person(s) and statement of conditions, if any.]

As part of the process of determining whether I lack decision-making capacity, all individually identifiable health information and medical records may be released to my Agent even though such representative's appointment has not yet become effective [*or, if the principal/ attorney has selected a person other than the Agent to make the determination of incapacity, insert such other person's name].* This release and authorization applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d and 45 C.F.R. § 160-164.[2]

I hereby appoint my Agent, for the sole and limited purpose and in my name and stead, of conducting all matters and managing all property, whether real or personal, that are related to or associated with my law practice in any way wherein I myself might act if I personally were

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2. To assure compliance with HIPAA, the principal/attorney, upon execution of this power of attorney, should sign two written authorizations, one to his or her health care provider, and one leaving the provider line blank, giving the identity of the person who will be making the decision that the principal/attorney is incapable of conducting his or her law practice (e.g., agent/attorney or family member). A sample authorization is attached to the end of this document.

present and to the extent that I am permitted by law to act through such an agent. These powers shall include, but shall not be limited to, the following:[3]

a. **Access to my Office**. To enter my office, take possession, custody and control of all my office property, real and personal, including client files, office equipment, supplies, and records and to use such property to manage and/or close my law practice;

b. **Designation as Signatory on Financial Accounts**. To replace me as signatory on all my law office accounts with any bank or financial institution, including without limitation attorney trust, escrow or special accounts and checking or savings accounts, and my banks or financial institutions may rely upon this authorization unless they have or acquire actual knowledge that this instrument has been revoked or is no longer in effect;

c. **Opening of Mail**. To receive, sign for and open my law practice mail and deliveries whether by courier or otherwise, and to process and respond to them as appropriate;

d. **Access To and Inventory/Examination of Files**. To enter any storage location where I maintain my files (whether in my office or off site); to inventory and examine all my client case files, property and records and, should (s)he identify a conflict of interest with a specific file or client, to assign such file upon client consent to my successor Agent named herein or to such other attorney as my Agent may deem appropriate;

e. **Notification to Clients**. To notify my clients, potential clients and those who appear to be my clients, of my disability, incapacity or other inability to act, and to take whatever action (s)he may deem appropriate to protect the interests of such persons and entities, including advising them to obtain substitute counsel;

f. **Transfer of Files**. To safeguard and return my clients' files upon request or as otherwise may be appropriate, or in the alternative to obtain consent from them to transfer their files to new counsel, all upon the acquisition of receipts therefore;

g. **Storage of Files and Attorney's records**. To arrange for the storage of such of my closed and unclaimed files and records as must be preserved for seven years pursuant to the provisions of Disciplinary Rule 9-102(d) of The Lawyer's Code of Professional Responsibility;

h. **Transfer of Property and Original Documents**. To transfer to my clients where appropriate, or to their designees, all their property and original documents, including wills, trusts and deeds;

i. **Access to Safe Deposit Box**. To open my safe deposit box used for my law practice and located at _____, to inventory same, and to arrange for return of property to clients.

j. **Notification to Courts and Others**. To advise all appropriate courts, agencies, opposing and other counsel, professional membership organizations such as the New York State Bar Association or local bar associations, the Office of Court Administration, and other appropriate individuals or entities, of my inability to act and of my Agent's authority to act in my behalf;

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3. *PLEASE NOTE THAT THE POWERS DESCRIBED IN THIS MODEL POWER OF ATTORNEY ARE BROAD AND SHOULD BE TAILORED TO THE SPECIFIC SITUATION AT HAND.*

k. **Extensions of Time**. To obtain consent from my clients for extensions of time, to contact opposing counsel and courts/administrative agencies to obtain extensions of time, and to apply for such extensions if necessary pending my clients' retention of new counsel;

l. **Litigation**. To file pleadings, motions and other documents, to appear before courts, administrative offices and agencies, and to take any and all other steps necessary to protect my clients' interests until their retention of other counsel;

m. **Collection of Fees and Return of Client Funds**. To dispatch invoices for my unbilled work; to collect fees and accounts receivable on my behalf; to prepare accountings for clients on retainer; to return client funds where appropriate; to prepare an accounting of each of my client's escrow funds and arrange for transfer of escrow funds, including the obtaining of consent from my clients to the transfer of such funds to new counsel or to my clients as appropriate;

n. **Payment of Business Expenses and Creditors**. To pay my business expenses, including office rent, rent for any leased equipment, library expenses, salaries to employees or other personnel; to determine the nature and amount of all claims of creditors, including my clients; and to pay or settle all such claims or accounts;

o. **Personnel**. To continue to employ such of my office staff as may be necessary to assist my Agent in the performance of his duties and to compensate them therefore; to terminate such employees or other personnel; and to employ such assistants, agents, accountants, attorneys or others as may be appropriate;

p. **Termination of Obligations**. To terminate or cancel my business obligations, including office and equipment leases, subscriptions and otherwise;

q. **Insurance**. To purchase, renew, maintain, cancel, make claims against or collect benefits under fire, casualty, professional liability insurance, or my other office insurance; to notify as appropriate all professional liability insurance carriers of my disability, incapacity or other inability to act; and to cooperate with such insurance carriers regarding matters related to my coverage, including the addition of my Agent as an insured under any such policies;

r. **Taxes**. To prepare, execute and file income, information or other tax returns, reports or other forms and to act on my behalf in dealing with the Internal Revenue Service, the New York State Department of Taxation and Finance, or any other federal, state and local tax departments, agencies or authorities;

s. **Disposition of Debts and Claims**. To prosecute, settle, defend, compromise, or submit to arbitration or mediation all debts, taxes, accounts, claims, or disputes involving my law practice and any other person or entity;

t. **Attorney as Fiduciary**. To resign any position which I hold as a fiduciary and to notify all other affected fiduciaries and beneficiaries thereof, and wherever appropriate to apply to any court of competent jurisdiction for the appointment of a successor fiduciary; and to account for the assets, income and disbursements attendant upon each such resigned fiduciary appointment;

u. **Power of Sale and Disposition**. To sell or otherwise arrange for the sale or other disposition of my office furniture, books or other office property.

v. **Representation of my Clients**. To provide legal services to my clients, provided that my agent has no conflict of interest, obtains the consent of my clients, and does not engage

in conduct that violates Disciplinary Rule 2-103 of The Lawyer's Code of Professional Responsibility. If my clients engage my Agent to perform legal services, my Agent shall have the right to payment for such services from such clients.

I hereby reserve the right to revoke this Limited Power of Attorney by written instrument, which shall not affect the validity of any actions taken by my Agent prior to such revocation.

To induce third parties to act hereunder, I hereby agree that any such third party receiving a duly executed original copy of this instrument, or a copy certified in such manner as to make it viable and effective as provided by law, may act hereunder, and that the revocation or termination of this instrument shall be ineffective as to any such third party unless and until such third party's knowledge or receipt of notice of such revocation or termination, and I, for myself, my heirs, executors, administrators, legal representatives, successors and assigns hereby agree to indemnify and hold harmless any such third party against any claim(s) that may arise against such third party by reason of his or her having so relied upon the provisions of this instrument.

If _____ (name of Agent) is unable or unwilling to serve as my Agent hereunder, or no longer practices law, I hereby appoint _____, an attorney licensed and in good standing to practice law in the State of New York, residing at _____, and with offices located at _____, to be my Agent for the limited purposes set forth herein,

This Limited Power of Attorney shall not be affected by my subsequent disability or incapacity, and shall be governed in all respects by the laws of the State of New York.

_____

(Name of Principal)

STATE OF NEW YORK)

)ss.:

COUNTY OF)

On this day of , 200__, before me, the undersigned, a notary public in and for said state, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, who acknowledged to me that (s)he executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of whom the individual acted, executed the instrument.

_____

Notary Public

GENERAL MEDICAL RECORDS RELEASE AND AUTHORIZATION FOR USE OR DISCLOSURE OF PROTECTED HEALTH INFORMATION

PATIENT NAME:

_____

ADDRESS:

_____

SOCIAL SECURITY NUMBER:

_____

I AUTHORIZE THE CUSTODIAN OF THE RECORDS _____ TO DISCLOSE/RELEASE THE FOLLOWING INFORMATION _____ [ALL MEDICAL RECORDS, INCLUDING MENTAL HEALTH, SUBSTANCE ABUSE AND HIV/AIDS RECORDS] OR [A SUBSET OF RECORDS]. THESE RECORDS ARE FOR SERVICES RENDERED [IN THE LAST TWO YEARS] OR: _____.

PLEASE SEND THE RECORDS LISTED ABOVE TO [AGENT]

NAME:

_____

ADDRESS:

_____

PHONE NUMBER:

_____

THE INFORMATION MAY BE USED/DISCLOSED TO ASSIST IN THE DETERMINATION OF MY MENTAL OR PHYSICAL CAPACITY TO PRACTICE LAW.

THE AUTHORIZATION EXPIRES ONE (1) YEAR FROM THE DATE IT IS PRESENTED TO THE CUSTODIAN OF RECORDS.

I UNDERSTAND THAT AFTER THE CUSTODIAN OF RECORDS DISCLOSES MY HEALTH INFORMATION, IT MAY NO LONGER BE PROTECTED BY FEDERAL PRIVACY LAWS. BY SIGNING BELOW I REPRESENT AND WARRANT THAT I HAVE AUTHORITY TO SIGN THIS DOCUMENT AND AUTHORIZE THE USE OR DISCLOSURE OF PROTECTED HEALTH INFORMATION AND THAT THERE ARE NO CLAIMS OR ORDERS PENDING OR IN EFFECT THAT WOULD PROHIBIT, LIMIT OR OTHERWISE RESTRICT MY ABILITY TO AUTHORIZE THE USE OR DISCLOSURE OF THIS PROTECTED HEALTH INFORMATION.

_____ _____

SIGNATURE OF PATIENT **DATE**

APPENDIX I

PCS AND PLLCS: APPOINTING THE APPROPRIATE AGENT TO MANAGE A SOLO LAW PRACTICE IN THE EVENT OF A DEATH, DISABILITY OR OTHER INABILITY TO PRACTICE LAW

When an attorney practices law as a solo practitioner, he or she is able to delegate a great deal of authority to act on the attorney's behalf through a power of attorney. However, if the attorney practices in the form of an entity such as Professional Service Corporation ("PC") or a Professional Limited Liability Company ("PLLC") in which he or she is the only owner, it is necessary to have the appropriate entity authorizations in place before someone can act on behalf of the entity.

If the attorney and the entity have not properly planned ahead of time for an unexpected death, illness or other inability of the attorney to carry on his or her affairs, the PC or the PLLC is not able to continue in practice during the incapacity because there is no one who can legally act on behalf of the entity. Checks cannot be signed, employees cannot be paid, the practice cannot be sold, no one can act on behalf of clients without court involvement, etc. This can be easily remedied during the long term planning process by preparing the appropriate entity resolutions.

The PC or PLLC will have resolutions in place that clearly state when and how an Assisting Attorney may act on behalf of the entity. Because these are actions of the entity which is controlled by the sole owner, they can be changed at any time by the owning attorney.

Sample minutes of a PC that accomplish this purpose are set forth in this section. Similar documents should be prepared for a single member PLLC.

In lieu of a formal meeting, the appointment of an Assisting Attorney by a sole practitioner who is the sole shareholder/director of a corporation may be accomplished by a Consent of Shareholder, pursuant to BCL Section 615, or consent of the Board of Directors for Action Without a Meeting, pursuant to BCL Section 708.

WAIVER OF NOTICE OF SPECIAL JOINT MEETING OF THE SOLE SHAREHOLDER AND SOLE DIRECTOR OF [NAME OF CORPORATION]

The undersigned, being the sole Shareholder and sole member of the Board of Directors of [NAME OF CORPORATION], a New York professional corporation, does hereby waive notice of the time, place and purpose of the special joint meeting of the sole Shareholder and sole member of the Board of Directors of said corporation, and does hereby consent that the same be held at the office of the Corporation, [CITY], New York, on [DATE OF MEETING], at [TIME], for the following purposes:

1. To appoint an agent to act on behalf of the Corporation in the event of the death, disability or incapacity of the sole Shareholder of the Corporation; and

2. For the transaction of such other business as may properly come before the meeting.

SHAREHOLDER: DIRECTOR:

_____

[Note: Similar Documentation Would Be Utilized for a PLLC]

MINUTES OF THE SPECIAL JOINT MEETING OF THE SOLE SHAREHOLDER AND SOLE DIRECTOR OF [NAME OF CORPORATION]

MINUTES OF THE SPECIAL JOINT MEETING OF THE SOLE SHAREHOLDER AND SOLE DIRECTOR of [NAME OF CORPORATION], a New York professional corporation, held at [CITY], New York, on [DATE OF MEETING], at [TIME].

The following was present, being the sole Shareholder and sole member of the Board of Directors of the Corporation: _____.

The meeting was called to order and _____ acted as Chair and as Secretary of the meeting.

The Chair then stated that a quorum was present and the meeting was ready to transact business.

The Secretary presented to the meeting a written Waiver of Notice signed by the sole Shareholder and sole Director of this Corporation. The Chair directed that such Waiver be affixed to the minutes of this meeting.

The Chair stated that in the event the sole shareholder of the Corporation is no longer able to practice law, whether on a permanent or a temporary basis, it is important to have a designee who could act in the capacity of the sole Shareholder. He noted as a corporation, the sole Shareholder and Director could appoint a licensed attorney who would act in the position of President of this Corporation until such time as the practice of the Corporation is sold or in the case of temporary incapacity, the sole Shareholder is able to return to practice. He recommended that _____ be appointed to this position in such an event.

The Chairman further stated that this individual would be appointed to act on behalf of the Corporation and to perform any and all duties, take any and all actions and to execute any and all documents necessary in the event the sole Shareholder of the Corporation can no longer perform the day-to-day operations of the Corporation due to death, disability or incapacity. After thorough discussion, upon motion duly made, seconded and unanimously adopted, it was

> RESOLVED, That _____, is hereby appointed as an agent of the Corporation to act on behalf of the Corporation and to perform any and all duties, to take any and all actions and to execute any and all documents and agreements necessary which are associated with the maintenance of the Corporation's practice of law or the sale, winding-up, liquidation and/or dissolution of the Corporation in the event of the death, disability or incapacity of the sole Shareholder of the Corporation, and it was
>
> FURTHER RESOLVED, that this Corporation be authorized and directed to enter into any Agreements and the officers of this Corporation are directed and authorized to execute and deliver any documentation that may be necessary to effectuate the foregoing resolution, and it was

FURTHER RESOLVED, that the Secretary of this Corporation be directed to append to the minutes of this meeting and to include in the records of the Corporation any and all agreements and documentation to which the Corporation is a party that evidence the appointment of _____ in the capacity set forth in the foregoing resolutions.

There being no further business to come before the meeting, it was, upon motion duly made, seconded and unanimously adopted, adjourned.

_____

, Secretary

APPENDIX J

LETTER FROM CLOSING OR CARETAKER ATTORNEY ADVISING THAT LAWYER IS UNABLE TO CONTINUE IN PRACTICE

Re: [Name of Case]

Dear [Name]:

Due to _____ (reason for ill health),

[Affected Attorney] is no longer able to continue in the practice of law. You will need, therefore, to retain the services of another attorney to represent you in your legal matter(s), and I recommend you do so immediately so that your legal interests may be protected. I will assist [*Affected Attorney*] in closing [his/her] practice.

You will need [a copy/copies] of your file(s). Accordingly, I enclose a written authorization for your file(s) to be released directly to your new attorney. You or your new attorney may forward this authorization to us and we will release your file(s) as instructed. If you prefer, you may come to *[address of office or location for file pick-up]* and pick [it/them] up so that you may deliver [it/them] to your new attorney. In either case it is imperative that you act promptly, and in no case later than [provide date] so that all of your legal rights may be preserved.

Your closed file(s) if any, will be stored at *[location].* If you need a closed file, you may contact me at the following address and phone number until [date]:

_____

[Name] [Address] [Phone]

After that time, you may contact [*Attorney in charge of closed files*] for your closed file(s) at the following address and phone number:

_____

[Name] [Address] [Phone]

You will shortly receive a final accounting from *[Affected Attorney], which* will include any outstanding balance(s) you owe [him/her], and an accounting of any funds in your client trust account.

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

Thank you.

Sincerely,

[Assisting Attorney] [Firm]

APPENDIX K

REQUEST FOR FILE

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

_____

_____

_____

_____ _____

[Client] [Date]

APPENDIX L

ACKNOWLEDGMENT OF RECEIPT OF FILE

I hereby acknowledge that I have received [a copy/copies] of my file(s) from the law office of [name].

_____ _____

[Client] [Date]

APPENDIX M

AUTHORIZATION FOR TRANSFER OF CLIENT FILE

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

_____

_____

_____

_____ _____

[Client] [Date]

APPENDIX N

FAQS RE DOCUMENT DESTRUCTION AND PRESERVATION

Question: How long does a lawyer or law firm have to keep closed files?

Answer: Lawyers and law firms have to keep different files and documents for different periods of time. For example, the Code of Professional Responsibility requires lawyers to keep escrow and trust account records for seven years. See DR 9-102(D); 22 NYCRR § 1200.46(d).

DR 9-102(D) requires lawyers to keep for seven years copies of all retainer and compensation agreements with clients, client bills and all "records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed." The Rule requires lawyers to keep copies of all retainer and closing statements filed with the Office of Court Administration for seven years. Although the Rule does not specify this, it would be prudent to maintain such OCA filings for seven years after the matter is closed.

DR 9-102(D) also requires lawyers to keep their operating account bank records for seven years.

Question: What bank records are covered by DR 9-102(D)?

Answer: A lawyer or law firm should keep all monthly statements, cancelled checks, deposit slips, checkbooks, check stubs, ledgers and reconciliation statements for all special, trust, IOLA and escrow accounts, as well as for all operating accounts. As a precaution, a lawyer or law firm should maintain such records for any other fiduciary account the lawyer or firm maintains.

Question: What records do I have to keep for conflicts checking purposes?

Answer: The Code of Professional Responsibility requires lawyers and law firms to maintain conflicts check systems and "keep records of prior engagements." See DR 5-105(E); 22 NYCRR § 1200.24(e). Lawyers and law firms should keep enough information about client matters (open and closed) to determine, for example, whether they can represent a new client against a former client or concurrent clients with "differing interests." Lawyers considering a new representation need to be able to determine whether it is "substantially related" to a prior representation. It is advisable to keep the firm's client database (whether that is maintained on index cards or on a sophisticated computer) up to date, with complete information about client identity (included related entities) and the nature of the matter for which the lawyer or law firm was retained. These records must be maintained for as long as the lawyer is in practice or the law firm (or its successors) in business. After all, conflicts may follow lawyers from firm to firm and there is no fixed period for maintaining the information. Thus, a prudent lawyer should maintain it for as long as necessary, namely, as long as the lawyer is in practice. For guidance on former client conflicts, see DR 5-108; 22 NYCRR § 1200.27.

Question: Can a lawyer simply have a document destruction policy and get rid of all closed files after six months?

Answer: The answer is yes and no. Six months sounds like much too short a time frame. The statute of limitations for legal malpractice actions is three years and it can be tolled by continuing representation of a client, even on unrelated matters. There is no statute of limitations for disciplinary complaints, which can be filed many years after a case is over. It is wise to keep client files for at least six years. There is another consideration. Before any files are destroyed by the firm, the clients should be consulted. In *Sage Realty Corp., et al. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997), the Court of Appeals held that the client was entitled to the entire file, except for internal law firm documents. The firm should give the clients an opportunity to pick up their files before destroying them. Helpful guidance also can be found in NYSBA Opinion 623 (1991) and NYSBA Opinion 460 (1977).

Question: What about old original wills? Can those just be thrown out on the reasonable assumption that they are no longer needed because the clients have died or found new counsel?

Answer: If a lawyer or law firm has retained original wills, they must be preserved or returned to the testators for safekeeping. Lawyers who retain original wills should make arrangements for someone else to safeguard them after they retire (or in the event of disability). In some cases, lawyers may be able to file them with appropriate courts. Original wills, like contracts, property deeds, trust instruments and other documents that a client might need to establish "substantial personal or property rights," or other original documents like birth and marriage certificates and passports, must be returned to the client or safeguarded by the lawyer. Failure to do so can result in professional discipline for failure to safeguard a client's property or damages for breach of fiduciary duty.

Question: Is there anything else that a lawyer or law firm should consider in designing a document retention program or policy?

Answer: Yes. First, no documents or files should be discarded if they might be necessary to the firm's defense of its own conduct or its handling of a matter. A firm should be particularly careful not to destroy documents that show that the firm committed malpractice or violated the ethics rules. Second, it is very important that client confidentiality be preserved during any document or file destruction. Shredding is advisable, since anything else may lead to disclosure of client confidences or secrets and liability for the firm. Similar caution should be used when computer equipment is replaced. No computer should be disposed of before the hard drive has been carefully erased, scrubbed or shredded, which can be accomplished simply by using available software programs. Just deleting files and documents won't do, since a person with sufficient computer expertise can retrieve most of those files and documents with a "restore" function. Expert advice is strongly recommended.

APPENDIX O

LETTER FROM PLANNING ATTORNEY ADVISING THAT LAWYER IS CLOSING HIS/HER OFFICE

Re: [Name of Case]

Dear [Name]:

Please be advised that as of *[date],* I will be closing my law practice due to *[provide reason, if possible].* I will be unable, therefore, to continue to represent you in your legal matter(s). I recommend that you immediately retain new counsel to handle your matter(s). You may 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 to the extent that I can. Also, our local bar association [phone number] and the New York State Bar Association [phone number] provide lawyer referral services that you may utilize.

When you select your new attorney, please provide me with written authority to transfer your file(s) to [him/her]. If you prefer, you may come to our office and pick up [a copy/copies] of your file(s), and deliver [it/them] to your new attorney. In either case, it is imperative that you obtain a new attorney as soon as possible, and in no case later than [date], so that your legal rights may be preserved. *[Insert appropriate language regarding time limitations or other critical time lines of which the client should be aware.]*

I *[or: insert name of the attorney who will store files]* will continue to store my copy of your closed file(s) for seven years. After that time, I [or, insert name of other attorney if relevant] may destroy my [copy/copies] unless you notify me forthwith in writing 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/copies] of your closed file(s), please let me know immediately and I will make alternative arrangements.]

If you or your new attorney need [a copy/copies] of your closed file(s), please feel free to contact me.

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

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 may reach me at the following phone number and address:

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

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

Thank you.

Sincerely,

[Attorney] [Firm]

APPENDIX P

LETTER FROM FIRM OFFERING TO CONTINUE REPRESENTATION

Re: [Name of Case]

Dear [Name]:

Due to _____ (reason for ill health)

[*Affected Attorney*] is no longer able to continue representing you in your legal matter(s). A member of this firm, [name], is available to continue handling your matter(s) if you wish. You have the right, however, to select any attorney of your choice to represent you.

If you wish our firm to continue handling your matter(s), please sign the authorization at the end of this letter and return it to us.

If you wish to retain another attorney, however, please provide us with written authority to release your file(s) directly to [him/her]. If you prefer, you may come to our office and pick up [a copy/copies] of your file(s) and deliver [it/them] to your new attorney. 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 a written authorization for us either to represent you or to transfer your file(s) by [date].

I wish to make this transition as easy as possible. Please feel free to contact me with any questions you may have.

Thank you.

Sincerely,

[*Assisting Attorney*]

Enclosures

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

_____ _____

[Client] [Date]

APPENDIX Q

LAW OFFICE LIST OF CONTACTS

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

ATTORNEY NAME: Social Security#:

FIRM NAME:

OCA Registration #: Federal Employer ID#: CAF #:

Date of Birth:

Office Address:

Office Phone:

Office Box:

Home Address:

Home Phone:

Cell Phone:

SPOUSE:
Name:

Work Phone:

Cell Phone:

Employer:

FORMER EMPLOYER WITHIN PREVIOUS FIVE YEARS
Name:

Office Address:

Office Phone:

OFFICE MANAGER:
Name:

Home Address:

Home Phone:

Cell Phone:

COMPUTER AND TELEPHONE PASSWORDS:
(Name of person who knows passwords or location where passwords are stored, such as a safe deposit box)
Name:

Home Address:

Home Phone:

Work Phone:

Cell Phone:

SECRETARY:
Name:

Home Address:

Home Phone:

Cell Phone:

BOOKKEEPER:
Name:

Home Address:

Home Phone:

Cell Phone:

LEGAL ASSISTANT:
Name:

Home Address:

Home Phone:

Cell Phone:

LANDLORD:
Name:

Address:

Phone:

LOCATION OF OFFICE LEASE:

DATE LEASE EXPIRES:

NAMED EXECUTOR:
Name:

Address:

Phone:

ATTORNEY FOR SPECIAL MATTERS:
Name:

Office Address:

Office Phone:

ACCOUNTANT:
Name:

Office Address:

Office Phone:

ATTORNEY ENGAGED TO CLOSE PRACTICE:
Name:

Office Address:

Office Phone:

Location of Agreement Engaging Attorney to Close Practice:

ATTORNEYS TO ASSIST WITH PRACTICE CLOSURE (if none appointed):

First Choice:

Office Address:

Office Phone:

Second Choice:

Office Address:

Office Phone:

Third Choice:

Office Address:

Office Phone:

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

Address:

Phone:

PROCESS SERVICE COMPANY:
Name:

Address:

Phone:

Fax:

Contact:

OFFICE-SHARER OR "OF COUNSEL":
Name:

Address:

Office Phone:

OFFICE-SHARER OR "OF COUNSEL":
Name:

Address:

Office Phone:

Cell Phone:

OFFICE PROPERTY/LIABILITY COVERAGE:
Insurer:

Address:

Phone:

Fax:

Policy No.:

Broker or other contact person:

LEGAL MALPRACTICE COVERAGE:
Insurer:

Address:

Phone:

Fax:

Policy No.:

Broker or other contact person:

HEALTH INSURANCE:
Insurer Name:

Address:

Phone:

Fax:

Policy No.:

Persons Covered:

Contact Person:

DISABILITY INSURANCE:
Insurer Name:

Address:

Phone:

Fax:

Policy No.:

Broker or other contact person:

LIFE INSURANCE:
Insurer Name:

Address:

Phone:

Fax:

Policy No.:

Broker or other contact person:

WORKERS' COMPENSATION INSURANCE:
Insurer Name:

Address:

Phone:

Fax:

Policy No.:

Contact Person:

OTHER INSURANCE:
Insurer Name:

Address:

Phone:

Policy No.:

Fax:

Broker or other contact person:

PENSION:
Administrator:

Address:

Phone:

Institution:

Address:

Phone:

Account #:

STORAGE LOCATION:
Storage Company for Location: Locker or Room #:

Address:

Phone:

Obtain Key From:

Address:

Phone:

Items Stored:

SAFE DEPOSIT BOXES (BUSINESS):
Institution:

Address:

Phone:

Fax:

Obtain Key From:

Address:

Contact Person:

SAFE DEPOSIT BOXES (PERSONAL):
Institution:

Box No.:

Address:

Phone:

Obtain Key From:

Address:

Contact Person:

LEASES:

Item Leased:

Lessor:

Address:

Phone:

Expiration Date:

Item Leased:

Lessor:

Address:

Phone:

Expiration Date:

Item Leased:

Lessor:

Address:

Phone:

Expiration Date:

LAWYER TRUST ACCOUNT:
IOLA:

Institution:

Address:

Phone:

Account Number:

Other Signatory:

Address:

Phone:

OTHER CLIENT ACCOUNTS:
Name of Client:

Institution:

Address:

Phone:

Account Number:

Other Signatory:

Address:

Phone:

GENERAL OPERATING ACCOUNT:
Institution:

Address:

Phone:

Account Number:

GENERAL OPERATING ACCOUNT:
Other Signatory:

Address:

Phone:

OTHER ATTORNEY ACCOUNTS:
Institution:

Address:

Phone:

Account Number:

Other Signatory:

Address:

Phone:

BUSINESS CREDIT CARDS:

Institution:

Address:

Phone:

Account Number:

Other Signatory:

Address:

Phone:

Institution:

Address:

Phone:

Account Number:

Other Signatory:

Address:

Phone:

MAINTENANCE CONTRACTS:

Item Covered:

Vendor Name:

Address:

Phone:

Expiration:

Item Covered:

Vendor Name:

Address:

Phone:

Expiration:

Item Covered:

Vendor Name:

Address:

Phone:

Expiration:

OTHER IMPORTANT CONTACTS:

Name:

Address:

Phone:

Reason for Contact:

Name:

Address:

Phone:

Reason for Contact:

Name:

Address:

Phone:

Reason for Contact:

PROFESSIONAL MEMBERSHIP ORGANIZATIONS:
Name:

Address:

ID #:

ALSO ADMITTED TO PRACTICE IN THE FOLLOWING STATES, JURISDICTIONS, AND BEFORE THE FOLLOWING COURTS:

State of:

Bar Address:

Phone:

Bar ID #:

State of:

Bar Address:

Phone:

Bar ID #:

State of:

Bar Address:

Phone:

Bar ID #:

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APPENDIX R

CHECKLIST FOR THE EXECUTOR OF A SOLO PRACTITIONER

If you have been appointed as the Executor of the estate of an attorney who is practicing as a solo practitioner at the time of his or her death, it is important to quickly address many issues that are unique to the deceased practitioner's practice. This is especially true if the death of the solo practitioner was sudden and unexpected. A solo practitioner's practice is unique in that it cannot continue to operate during the administration of an estate without a licensed and qualified attorney in place to take care of client matters. **Therefore, the very first thing that should be done is to retain legal counsel immediately. You must under no circumstances review the files yourself since to do so might violate attorney-client privilege.**

If a solo practitioner has died, his or her clients for whom services were being performed at the time of death must be advised immediately. In addition, steps must be taken to insure that those clients are properly advised as to the status of their matter and how they may retain substitute counsel. This must be done in a manner that will preserve the attorney client privilege that existed between the attorney and the client. This checklist is intended to address those matters that are unique to being the executor of an attorney's estate. It is not, however, an exhaustive list of all matters that are to be handled by an executor of an estate. The estate's legal counsel should be consulted to insure that your duties are properly carried out during the administration of the estate.

As stated below, all of these issues should be addressed while the attorney is alive and well. Many matters involving an attorney's practice are time sensitive and if not handled properly in the event of death, the estate may find itself faced with unnecessary liability. Hopefully, this checklist can act as a planning tool as well as a tool to be used in a time of crisis upon an attorney's death.

1. **Retain legal counsel immediately.** Legal counsel should be retained immediately to review the open matters that were being handled by the deceased attorney. If the attorney has designated an attorney to handle the closing of his or her office that attorney should be contacted immediately. The attorney's will should be reviewed to determine if there was a specific attorney designated. If not in the will, it is possible that someone working with the attorney as an employee may have that information.

   A designated attorney can insure that the attorney-client privilege is maintained for the protection of the client. Hopefully, he or she has also had conversations with the attorney so that they are aware of what needs to be done with respect to closing or transferring the practice.

2. **Work with staff.** If the attorney had a secretary or assistants working with him or her at the time of death, contact them and determine what emergencies must be attended to and what needs to be done to begin the closing process.

   If possible, retain and compensate staff during the closing phase of the practice. In many cases, staff members have a relationship with the clients of the practice and a great deal of knowledge that will be helpful to you as executor and to any attorney designated or appointed.

3. **Preservation of the practice.** Although the attorney has died, it may be important to the attorney's estate and his or her family to ensure that the value of the practice is maintained in order to allow the estate to sell the practice to another attorney or law firm, if that is a viable option. If an Assisting Attorney has been designated as described above, he or she may be the intended transferee. Consult with legal counsel for the estate to be certain that the proper steps are being taken to maintain the value of the practice within the estate.

4. **Contact accountant.** Contact the deceased attorney's accountant immediately to insure that work in process is properly billed, that receivables are collected and that all financial matters involving the practice are properly taken care of as soon as possible. All trust accounts should be carefully reviewed by estate counsel and the accountant for the firm to ensure that funds are properly handled during the administration of the estate.

5. **Office matters.** Contact the landlord and, if necessary, arrange for the assignment of the lease to the Assisting Attorney or firm, the termination of the lease or the subletting of the lease to another party.

   Contact all vendors and stop services as soon as possible. This would include publishers who are providing services to the attorney's library. Cancel all subscriptions. Contact law schools, libraries or colleges to determine whether they would be interested in purchasing or receiving a donation of the library (if it is not to be transferred to another attorney).

   Contact equipment leasing companies (including vehicle leasing companies) as soon as possible. In some cases, vehicle lease arrangements, among others will provide for a termination of the lease in the event of death. This should be investigated. If leases cannot be terminated without penalty, subleasing should be considered. Otherwise, it will be necessary to set aside enough funds in order to pay the leasing fees for the duration of the lease terms.

   Notify utility companies of the change in the customer. During the administration of the estate, it may be necessary to have the estate as the customer.

   Contact all associations with which the attorney had memberships and terminate the memberships. This would include the New York, American and any local or specialty bar associations. Office staff should be helpful in determining what memberships are in effect.

   Continue malpractice insurance if necessary. Most policies will provide that the insured must be insured at the time a claim is made against the attorney. Therefore, obtain "Reporting Endorsement Coverage" which will provide protection to the attorney's estate until all applicable statutes of limitations expire. The carrier may provide such coverage at no cost in the event of death. This should be determined immediately.

6. **The Advisory Team.** There will, of course, be many matters that must be handled during the administration of an estate. The items listed above are only a few of the many matters that must be addressed. However, a solo practitioner's practice is unique in that it cannot continue to operate during the administration of an estate without a licensed and qualified attorney in place to take care of clients' matters. Because it may not be possible for someone to immediately step in and take over a practice, it is extremely important that a team of qualified advisors be quickly assembled to insure that the practice and its clients are protected.

7. **Plan Ahead.** A practice and its value can quickly disappear without proper administration at the time of death. In addition there can be significant liability for the estate if the practice is not properly taken care of in such a time of crisis. If a solo practitioner has requested that you act as the executor or trustee for his or her estate, you should address all of these items with the attorney during the estate planning stages. None of these matters should be left until the time of death to address.

APPENDIX S
SPECIAL PROVISIONS FOR ATTORNEY'S WILL
INSTRUCTIONS REGARDING MY LAW PRACTICE

I currently practice law as a solo practitioner. In order to provide a smooth transition for my clients and to assist my family, I am providing these guidelines to my Executor and any attorney(s) representing my Executor.

If my practice can be sold to a competent lawyer, I authorize my Executor to make such sale for such price and upon such terms as my Executor may negotiate, subject, however, to compliance with New York's Lawyer's Code of Professional Responsibility and other applicable provisions of law. If such sale is possible, I believe that it will provide maximum benefits for my clients as well as my employees and family. [It is my preference that the practice be sold to my associate, _____[name], if satisfactory terms can be reached with respect to such a sale; (or It is my wish that my Executor first consider a sale of my practice to my colleague, _____[name], if satisfactory terms can be reached with respect to such a sale . . .).

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

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

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

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

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

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

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

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

(ii) Obtain access to my safe deposit boxes and obtain possession of items belonging to clients.

(iii) Take possession and control of all assets of my law practice including client files and records.

(iv) Open and process my mail.

(v) Examine my calendar, files, and records to obtain information about pending matters that may require attention.

(vi) Notify courts agencies, opposing counsel, and other appropriate entities of my death and, with client consent, seek and obtain extensions of time.

(vii) Notify clients and those who appear to be clients of my death and that it is in their best interests to obtain other counsel.

(vii) Obtain client consent to transfer client property and assets to other counsel.

(viii) Provide clients with their property and assets and copies of material in their files and return unearned retainers and deposits.

(ix) File notices, motions and pleadings on behalf of clients who cannot be contacted prior to immediately required action.

(x) Contact my malpractice carrier concerning claims or potential claims, to notify of my death, and to obtain extended reporting or "tail" coverage.

(xi) Dispose of closed and inactive files by delivery to clients, storage, and arranging for destruction, remembering that records of my trust account are to be preserved for at least seven years after my death as required by the New York Lawyer's Code of Professional Responsibility or other provisions of law, and files relating to minors should be kept for five years after the minor's eighteenth birthday.

(xii) Send statements for unbilled services and expenses and assist in collecting receivables.

(xiii) Pay current liabilities and expenses of my practice, terminate leases, and discontinue subscriptions, listing, and memberships.

(xiv) Determine if I was serving as registered agent for any corporations and, if so, notify the corporation of the need to designate a new registered agent (and perhaps registered address).

(xv) Determine if I was serving as an Executor or Trustee of any estate or trust, or in any other fiduciary capacity and, if so, determine the appropriate parties to be notified of the need, if any, to designate a successor fiduciary; take the steps deemed necessary to obtain discharge of my responsibilities in such fiduciary capacity.

(xvi) Rent or lease alternative space if a smaller office would serve as well as my present office.

In performing the foregoing, my Executor is to preserve client confidences and secrets and the attorney-client privilege and to make disclosure only to the extent necessary for such purposes. For example: Client files are to be reviewed only by employees of my firm, to whom attorney-client privilege attaches (e.g., my secretary, my paralegal, my associates (if any), or attorneys retained by my Executor to assist him in closing the practice). It is for this reason that I have authorized my Executor to retain the services of these personnel, and to give them sufficient incentives to remain in the employ of the firm through its wind-up. Though there are special rules permitting disclosure of certain client information in connection with the sale of a practice, my Executor is to abide scrupulously with such rules. My Executor shall rely, without

independent investigation, on employees of my firm to (i) supply data concerning the outstanding fees owed by my clients at the time of my death, and the unused retainers paid by clients for which services have not yet been rendered; (ii) to communicate with clients concerning the disposition of their files; and (iii) to review clients' files in response to any inquiries that arise in the course of my estate's administration.

My Executor shall be indemnified against claims of loss or damage arising out of any omission where such acts or omissions were in good faith and reasonable believed to be in the best interest of my estate and were not the result of gross negligence or willful misconduct, or, if my Executor is an attorney licensed to practice in New York, such acts or omissions did not relate to my Executor's representation of clients as an attorney retained by those clients. Any such indemnity shall be satisfied first from assets of my law practice, including my malpractice insurance coverage.

APPENDIX T

TRANSFER OF A LAW PRACTICE

For all time prior to the last decade, lawyers in America were perhaps the only corps of professional people who were prohibited from recognizing any financial value from their good names and the goodwill of their practices. We were told that clients were not chattels or vendible commodities, that lawyers were not tradesmen, and that the sale of law practices would necessarily involve the disclosure of client confidences and secrets, a serious violation of a core principle of our profession. Lawyers, therefore, had nothing to sell but their desks, their chairs, their typewriters and their libraries.

In 1989, however, the Supreme Court of California promulgated a new rule of professional conduct that for the first time permitted the sale of the goodwill aspects of a deceased lawyer's practice by his or her surviving spouse or estate. In 1990, given that impetus, the American Bar Association adopted a new Rule 1.17 to its Model Rules of Professional Conduct that proposed, even more expansively, to permit the sale of law practices. Since the ABA has no authority to promulgate rules enforceable in any of our jurisdictions, each had to decide for itself whether it would follow California's and the ABA's lead. Indeed, it was not long before a substantial number of them did, and now no fewer than 41 jurisdictions permit such transfers, whether by rule or otherwise, New York included. New York's rule governing the sale of a law practice can be found at 22 NYCRR §1200.15-a. It is more readily recognizable as Disciplinary Rule (or DR) 2-111. See also Ethical Considerations (or ECs) 2-34 to 2-36.)

What the rule means, in general terms, is that lawyers, their personal representatives and their estates may transfer for value, under specifically stated limited conditions, not only the property comprising the physical plants in which they practice, but also the value of their own good names, their reputations and the cases and matters they have in their offices, and they can do so whether upon a lawyer's retirement, disability, or death. Attorneys licensed to practice in more than one jurisdiction, therefore, should take extreme care to identify the conditions under which they may transfer their respective practices for value. The following information pertains only to the New York rule.

Who May Transfer a Law Practice for Value?

Lawyers retiring from the private practice of law, or law firms one or more of whose members are retiring from the private practice of law within the firm, or the personal representatives of deceased, disabled or "missing" lawyers may sell the lawyers' or firms' law practices, including their goodwill.

We deal here primarily with solo practitioners, however. For many years, law firm partners have found legitimate ways, though not authorized by rule, to transfer the value of their practices upon retirement, disability or death, usually by means of in-house contractual arrangements with their long existing or even newly acquired partners or associates. Until now, solo practitioners have never had that opportunity, and that was the inequity of the former rule. Now they may do so.

But not only may solo practitioners or their personal representatives, by specific rule, and for value, transfer the goodwill and other proprietary aspects of their practices upon retirement, disability or death; so also may non-solo law firms by specifically stated means. It would appear, therefore, that the inclusion in the new rules of a specific grant of right to members of non-solo law firms represents merely the drafters' acknowledgment of the existence of an already acceptable, long-standing end, but not necessarily its means.

Interestingly, the rule also applies to situations wherein lawyers are missing, but it does not define the term "missing." We will use "missing" to refer to attorneys absent without explanation of reason for more than 21 days.

To Whom May a Law Practice be Transferred for Value?

A private practice may be sold to one or more other lawyers or law firms. That obviously includes any practitioner licensed and in good standing to practice law in the State of New York and any similarly situated New York law firm. Does it mean that a practice may be sold to a non-New York lawyer or law firm? The rule doesn't address the question, but since those unlicensed in New York are generally considered not to be lawyers for purposes of practicing here, presumably they would be excluded.

What about multi-jurisdictional firms, i.e., those with offices in more than one jurisdiction, where each such office is staffed by attorneys licensed to practice in the state wherein they are assigned by the firm as, for example, in New York? Presumably they would qualify for such purpose.

And what about firms whose professional staffs are not licensed to practice in New York and who do not have a presence here? Under newly proposed multi-jurisdictional practice rules, out-of-state attorneys would be authorized to represent clients in New York in specially restricted ad hoc situations. Would they qualify as purchasers? Obviously the rule does not address that unforeseen issue either, but again, since unlicensed out-of-state lawyers cannot maintain ongoing practices in New York, presumably the application of the rule would prohibit such transfers to them as well.

Clients' Confidences and Secrets; Conflicts

Most sensitive is the issue of clients' confidences and secrets. Rule 2-111(B) states the conditions under which confidences and secrets may be disclosed in the course of negotiations involving the transfer of law practices. It is a critical section of the Code that cannot be ignored. Initially, Rule 2-111(B)(1) provides that the seller of a law practice may provide prospective buyers with any information not protected as a confidence or secret under DR 4-101. DR 4-101 is the key disciplinary rule in New York's Code of Professional Responsibility that governs the preservation of clients' confidences and secrets. It defines "confidence" as information protected by the attorney-client privilege under applicable law. It defines "secret" as other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to a client. DR 4-101 then recites when and when not confidences and secrets may be revealed by a lawyer. Reference to it is virtually mandatory in the practice transfer process.

DR 2-111(B)(2) then provides that, notwithstanding the provisions of DR 4-101, the seller may provide the prospective buyer with information as to the identity of his or her individual clients (the word "individual" not meant to exclude corporate, partnership or other similar entities) except where the seller has reason to believe that such information or the fact of such representation is itself a confidence or secret (which usually it is not). In that instance, if the client has first been advised of the identity of the prospective purchaser and has granted consent to the proposed disclosure, such information may be provided.

DR 2-111(B)(2) also states, again notwithstanding the provisions of DR 4-101, that the selling attorney may provide information concerning the status and general nature of an individual client's matter, together with information that is available in public court files and information concerning the financial terms of his or her attorney-client relationship and the payment status of the individual client's account. But there are rather complex qualifications. DR 2-111(B)(3) provides in substance that prior to disclosing any disclosable confidences or secrets, a selling attorney must provide the prospective purchaser with informa-

tion regarding matters involved in the proposed sale that [hopefully] will be sufficient to enable the prospective purchaser to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidences or secrets, however, the seller may make such disclosures as are necessary for the prospective purchaser to determine whether any conflicts of interest exist, subject, however, to the provisions of DR 2-111. If the prospective purchaser determines the existence of conflicts of interest prior to reviewing such information, or determines during the course of review that a conflict of interest exists, the prospective purchaser cannot review or continue to review the information unless the seller has obtained the consent of the client in accordance with the provisions of DR 4-101(C)(1). All that language easily lends itself to confusion in any given situation, and we clearly lack sufficient guidance to make it all meaningful.

Since the identity of clients is normally not deemed to be a confidence or secret, it would appear that the revelation of the identity of a seller's clients (presumably from a client list) would normally be among the first items of information to provide a prospective purchaser so that he or she might exclude conflicted clients from the transaction or at least render further consideration as to whether their representation would indeed present an impermissible conflict. Not necessarily so, however, under the Rule. It is particularly when the identity of a client is itself a confidence or secret that the complexity is at its greatest. No one said such transactions would always be simple.

What other identifications might be necessary? Certainly the identities of opposing parties. Some observers believe that the identity of all lawyers representing the parties, as well as of judges and hearing officers, should be disclosed. See *Simon's New York Code of Professional Responsibility Annotated* (West Group) at 338.

The protection of confidences and secrets has always been the core of our professional obligation to our clients, unlike in the accounting profession. That is primarily what our profession's eventual resistance to multidisciplinary practice with accountants was about.

The point to be made about DR 2-111(B)(3), particularly its second sentence, is that this segment of the negotiation process can be very delicate and the seller should take extreme care in disclosing the very kind of revelations that the prospective purchaser may require not only to determine whether a conflict exists, but whether he or she even wishes to pursue the business aspects of the proposed transaction. It clearly would not be difficult to fall into a violative trap that subsequently could result in disciplinary proceedings commenced by a discontented client.

It also is important to note that where confidences and secrets are disclosed to a prospective purchaser, he or she must maintain the same confidentiality of such information as if he or she represents the client. That appears clear enough from the rule and it should not be difficult to adhere to unless, of course, such information will somehow impact upon a prospective purchaser's representation of another client in another unrelated matter. Temptation frequently leads to misconduct.

"Reasonable Restrictions" and Geographic Considerations

DR 2-111(A) provides that a seller and buyer may agree upon reasonable restrictions on the seller's private practice of law notwithstanding any other provision of the Code of Professional Responsibility. Obviously this speaks to the seller's subsequent practice of law and thus to the issue of non-compete agreements. DR 2-111(A) also provides that "[r]etirement" shall include the cessation of the private practice of law in the geographic area, meaning the county and city, and any other county and city contiguous thereto, wherein the practice to be sold has been conducted.

DR 2-108(A) prohibits attorneys from participating in a partnership or being party to an employment agreement with other attorneys that restricts the right of any of them to practice law after the termination of a relationship created by the agreement except as a condition to payment of retirement benefits. DR 2-111(A) overrides that rule with respect to the sale of law practices. The right of clients to select their own lawyers has always been considered paramount to the right of lawyers to participate in non-compete agreements of their own. What is "reasonable" within the context of the sale of a law practice, of course, has never been tested in New York, at least not in published opinions up to this writing.

But DR 2-111(A) does define as reasonable a geographic area that includes the county and city wherein a lawyer practices, together with a county and city contiguous thereto. Thus, for example, a retiring New York City attorney would "reasonably" be restricted from practicing law in all five counties within the city, as well as in the City of Yonkers, and in Westchester and Nassau counties as well. Note in the rule the use of the mandatory third person "shall" as to the stated geographic areas. Whether a contractual restriction beyond the mandated geographic limits would be "reasonable" has not been decided but probably would be fact intensive.

Note also N.Y. State Bar Op. 707 (1998) which opines that a lawyer may not retire from one part of a law practice and continue to practice in another part within the same geographic area. DR 2-111(A) thus is said not to contemplate retirement from one or more areas of practice without retirement from all others within the same geographic area.

What does ". . . in which the practice to be sold has been conducted" mean? Does it mean the city or county of one's primary office? Does it mean, more likely, any office locale from which one practices? Does it mean any city or county wherein a lawyer regularly or even occasionally has appeared during the course of his or her private practice even though it is not the city or county wherein this office is located? If a Queens County litigator appears regularly throughout Long Island but maintains his or her only office in Queens, can he or she be foreclosed by agreement from practicing in Suffolk County? Would that be a "reasonable" restriction? We do not yet know. If a lawyer maintains offices in several counties throughout New York State, as some do, are the geographic areas wherein those offices are located included within the rule? May a lawyer retire from the practice of law in Westchester County where he or she maintains an office, but not in Albany County where he or she also maintains an office? Such issues have not yet been determined by precedent.

Notification to Clients

When financial evaluations finally have been completed along with other details of the transaction and a basic agreement has been reached for it to be consummated, it is necessary for both participants, jointly and in writing, to notify each of the seller's clients of the proposed sale. DR 2-111(C). Such notice must include a statement as to the client's right to retain other counsel or to take possession of his, her or its file, and also as to the fact that the client's consent to such a file transfer will be presumed if the client, upon such notice, neglects to take action or fails otherwise to object to it within ninety days from the sending of such notice, subject, however, to any court rule or statute mandating express approval by a client or a court. That imposes upon each client the obligation to take an affirmative step to prevent the transfer of his or her file to the purchasing attorney if that is desired. The rule obviously is intended to avoid prevention of the transaction merely by reason of a client's neglect, inaction or lack of concern in the approval process. And, of course, despite their own neglect, inaction or lack of concern resulting in the transfer of their files to the purchasing attorney, clients may thereafter always terminate the services of the purchasing attorney.

With regard to fees, clients must also be notified in writing, jointly by both the seller and the buyer, that the existing fee arrangement with the selling attorney will be honored, or that proposed fee increases will be imposed. Obviously that is of particular concern to clients in the grant or withholding of consent. It is important to note that the fee charged to a client by the purchaser cannot be increased by reason of the sale unless permitted in the original retainer agreement with the client or otherwise specifically agreed to by the client. DR 2-111(E).

The joint written notice to each of the seller's clients must also include the identity and background of the purchasing attorney, the location of his or her principal office address, his or her bar admission(s), his or her number of years in practice within the jurisdiction, whether the prospective purchaser has ever been disciplined for professional misconduct or convicted of a crime, and whether the prospective purchaser intends to re-sell the practice.

Finally, attorneys should be aware that the rules that for decades proscribed the sale of a law practice revolved primarily upon issues attendant upon improper disclosure of confidences and secrets. The current rule that permits the transfer of law practices is clearly in derogation of the prior philosophy. Accordingly, the current rule should ideally be construed strictly and should be expected to result in disciplinary action should it be violated. All doubts as to the propriety of a proposed transfer, or of any ingredient of it, should reasonably be resolved against the transfer.

Valuation

A fundamental consideration in the entire negotiation process involves the question as to what value may be ascribed to a selling practice. That is an issue requiring outside expertise in most instances. It is not the purpose of this material to describe the various means by which a practice may be appraised. Suffice it to say that the determination may become very complex. The reader is referred to various of the materials listed at the end of this segment.

Conclusion

The rules relating to the transfer of law practices in New York are relatively new and, at this writing, are not yet the subject of judicial interpretation. Nor do we yet have any authoritative statistics as to the extent to which DR 2-111 has been utilized. The rule was intended primarily to place solo practitioners on a equal footing with non-solo practitioners in terms of their ability to obtain monetary value from their years of private practice. It probably is fair to state that most solo practitioners are general practitioners, and that most of them have relatively few institutional clients. Assuming that to be true, one cannot help but wonder what monetary value most solo practices may have where they consist of an ever-changing clientele, and where (unlike non-solo firms wherein a continuing firm name and its continuing professional staff may provide value) the good will aspect of the practice to be sold consists exclusively of the character and professional reputation of the selling attorney who, upon sale, will no longer be an element of the practice. That factor, it would seem, tends to place the solo practitioner on something other than the equal footing that the rule was intended to provide. But for those who can somehow find value to sell, the rule exists to be used. While nothing may be gained from it in many situations, nothing can be lost, and all solo practitioners should at least consider the marketable value of their practices before simply shutting down.

References

New York's Lawyer's Code of Professional Responsibility, DR 2-111 and DRs cited therein, and ECs 2-34, 2-35 and 2-36.

N.Y. State Bar Ethics Op. 707 (1998).

N.Y. State Bar Ethics Op. 699 (1998).

N.Y. City Bar Ethics Op. 1999-04 (1999).

ABA Model Rules of Professional Conduct, Rule 1.17

Edward Poll, *The Business of Buying, Selling, Merging or Closing a Law Practice,* published by the American Bar Association.

Robert L. Ostertag, *$ale of a Law Practice*, GPSOLO (ABA) Vol. 17, No. 1 (Feb. 2000) at 22.

APPENDIX U

CHECKLIST OF CONCERNS WHEN ASSUMING THE RESPONSIBILITY OF ANOTHER ATTORNEY'S PRACTICE WHETHER RESULTING FROM THE PURCHASE OF THE PRACTICE OR TERMINATION OF THE OTHER ATTORNEY'S PRACTICE

The term "Acquiring Attorney" refers to the attorney purchasing the law practice. "Terminating Attorney" refers to the attorney selling or otherwise terminating the practice.

1. Status of Files. If possible, the Acquiring Attorney and the Terminating Attorney should discuss the status of open files – what has been completed, what has not, what has been billed, etc.

2. Consider the overhead costs involved in acquiring a practice or the responsibility for a practice for an interim period.

3. Where the Acquiring Attorney does not have the expertise in one or more of the areas in which the Terminating Attorney practiced, he should refer such matters to other practitioners.

4. Immediately determine responsibility or the lack of responsibility for the IOLA and attorney escrow accounts. Rights and obligations of the Acquiring Attorney must be known – potential liability is significant.

5. Consider and recognize the personalities and practice habits of the Terminating and Acquiring Attorney. For example, if the Terminating Attorney met with clients in their homes or places of business, or if the staff was actively involved in the Terminating Attorney's client relations, etc., the Acquiring Attorney should consider continuing in this same manner or advising the clients of the Acquiring Attorney's practices.

   Consider whether to maintain the same fee policy as the Terminating Attorney. If possible, determine in advance whether hourly rates or set fees will be used, and at what amounts; and, whether to use retainer agreements. Disclosure of these items is required under the disciplinary rules governing the sale of a law practice. [see DR 2-111].

7. If time and the Terminating Attorney's condition allow, that attorney should introduce the Acquiring Attorney to nonlawyer staff members, and referral sources such as insurance agents, bankers, realtors, accountants with whom the Terminating Attorney worked. If the Terminating Attorney is not available to assist in this capacity, the Acquiring Attorney should make immediate contact with those individuals, not only for purposes of preserving client relations, but to determine location of clients, history of clients, etc. Many clients work with a team of advisors and with the client's consent, the Acquiring Attorney should have discussions with each of these other professionals.

8. Review and analyze the Terminating Attorney's technology systems for compatibility with Acquiring Attorney's systems. Because of the constant change in technology, the Terminating Attorney or his or her staff should not only participate in transferring over current technology in use, but also should provide access to systems that historically have been used by the Terminating Attorney but which are not kept current. There is a significant amount of client information in the old files and systems.

9. If a sale of the practice, whether by the terminating attorney or the estate, DR 2-111 must be fully reviewed and understood. There are critical notice and time requirements which must be followed.

10. Immediately notify the Terminating Attorney's accountant and/or bookkeeper and schedule a meeting in order to fully understand the financial reporting policy and habits of the Terminating Attorney. If the Terminating Attorney did his or her own accounting and tax preparation, the Acquiring Attorney's accountant should be given immediate access to those books and records that may be available to determine tax and financial liabilities of the Terminating Attorney and the Acquiring Attorney.

11. Contact firms or practices with which the Terminating Attorney was associated to determine whether any files remain with those practices. This will save the Acquiring Attorney a significant amount of time "searching" for files demanded by clients for past representation by the terminating attorney. Also determine who bears the cost and the responsibility for acquiring or copying those files: the Acquiring Attorney, the Terminating Attorney or the court or other agency that has taken over the primary responsibility for the Terminating Attorney's practice.

12. Consider file storage. The older the practice, the more time and expense will be involved in file review and management.

13. Determine whether "closed" files contain valuable documents such as wills, agreements, etc. Practices differ: one attorney's "closed" files may be considered another attorney's "open and continuing" files. For example, an attorney may habitually notify clients following every service that the representation has ceased and closes a file. Others may never take this step and always assume that the client may be coming back for further representation.

14. In returning files, ensure that you are returning files to the "client." Obtain appropriate consents before returning files to individual spouses.

15. Review "vendor" relationships with the Terminating Attorney's vendors to determine whether prepayments were made for services or products that are not going to be used and whether bills are due for storage of files, stationery, supplies, etc.

16. In open estate files, determine whether the Terminating Attorney's practices are consistent with the acquiring attorney's practices with respect to what services are covered on a quoted fee. For example, is a fee for probate limited to just the probate of the will or does it cover estate tax return preparation, will contests, etc. Carefully review retainer letters and send modifications if necessary. Note that the DR's require a notice as to whether the Acquiring Attorney is going to honor the Terminating Attorney's retainer/engagement agreements and arrangements. Arrangements differ. As the Acquiring Attorney, make sure you know what you are agreeing to before stating that you are honoring "all" the arrangements with all the clients.

17. Review accounts receivable when you are purchasing an attorney's practice. You may need to take steps with clients who have a poor payment history.

18. Consider referring a client to another attorney. Know your limitations, both with time and expertise. You need not assume all clients as an Acquiring Attorney.

19. When returning files to clients who have requested them, make a decision as to what you are returning. Will it be everything in the file? Are you responsible for anything in the file for which you will want to retain copies for your own liability protection? Are there documents that should be retained for the benefit of the terminating attorney so that he or his estate could defend any claims against them? Proceed with caution.

20. Continuing liability insurance. If the attorney has died or has retired from practice, reporting endorsement coverage or "tail coverage" should be obtained. In the event of death, the policy may provide reporting endorsement coverage for a period of time at no additional cost.

APPENDIX V

SAMPLE ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT is entered into as of the __ day of [date], by and between _____, as surviving spouse of _____, ESQ. and Executor-Nominee of the ESTATE OF _____, ESQ. (hereinafter collectively referred to as "Seller") and _____ ("Purchaser"), a New York professional corporation.

W I T N E S S E T H :

WHEREAS, on [date] _____, Esq. ("_____") died in _____, New York (for purposes of this Agreement, the defined term of "Seller" shall include _____); and

WHEREAS, at the time of _____'s death, _____ had in his possession and owned certain Assets (as defined below) which assets are now in the possession of Seller; and

WHEREAS, Seller desires to sell the Assets and Purchaser desires to purchase the Assets.

NOW, THEREFORE, in consideration of the mutual promises and premises contained herein, the sum of One Dollar ($1.00), each to the other paid in hand, and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Sale of Assets. In accordance with the terms and conditions contained herein, Seller shall sell to Purchaser, and Purchaser shall purchase from Seller, all of the Seller's clients records and files pertaining to _____'s client files and matters as such records and files were utilized by _____ in the operation of his practice of law ("Business"). Notwithstanding the foregoing, Purchaser shall have the right to reject any client file which would result in a conflict of interest to Purchaser or for any other reason as determined by Purchaser. In the event Purchaser elects to reject or decline any client matter or file, Purchaser will use its reasonable best efforts to assist the client in engaging substitute legal counsel.

2. Definitions. Whenever used in this Agreement:

(a) "Assets" shall mean those assets of the _____ utilized in the operation of his business and in _____'s possession or under _____'s control on the date of his death, as specifically set forth on **Schedule 2(a) and Schedule 13(g)**, attached hereto and made a part hereof, including but not limited to Seller's client records (in paper and electronic formats), telephone numbers and goodwill.

(b) "Closing Date" means the execution date of this Agreement.

(c) "Closing Place" shall be at the offices of Seller, in _____[city], New York, or such other place as the parties may mutually agree.

(d) "Liabilities" shall mean all liabilities of Seller, including but not limited to, any liabilities to employees of any nature, accounts payable, payroll taxes, promissory notes or liabilities for taxes based on income, sales, use, employment or otherwise.

3. Purchase Price and Allocation.

(a) Purchase Price. The purchase price for the Assets to be purchased hereunder shall be _____ and 00/100 Dollars ($_____) ("Purchase Price").

(b) Allocation. The Purchase Price shall be allocated among the Assets in accordance with **Schedule 3(b)**. Seller and Purchaser jointly shall complete and separately file Form 8594 with their respective federal income tax returns for the tax year in which the Closing Date occurs in accordance with such allocation and the IRS guidelines, and neither Seller nor Purchaser shall, without the written consent of the other, take a position on any tax return or before any governmental agency charged with the collection of any such tax, or in judicial proceeding, that is in any manner inconsistent with the terms of such allocation.

4. Method of Payment. Upon execution of this Agreement, the Purchase Price shall be paid in thirty-six (36) equal monthly installments commencing on the ____ (__) day of _____ 200__ of _____ and 00/100 Dollars ($_____) each and a final payment on the _____ (____) day of _____ 200__ of _____ and 00/100 Dollars ($_____) pursuant to the terms and conditions of a promissory note, attached hereto as **Exhibit A**, and made a part hereof (the "Note"). Interest on the outstanding balance shall be computed at the rate of _____ percent (___%) per annum. An amortization schedule shall be attached as a Schedule to the Note.

5. Exclusion of Seller's Other Assets. Purchaser is not acquiring any right, title or interest in or to the following:

(a) Seller's cash or cash equivalents;

(b) Any personal belongings of Seller;

(c) Seller's Accounts Receivable; and

(d) Seller's office equipment and office supplies.

6. Accounts Receivable. Purchaser shall not purchase, and Seller shall not sell, any right, title, or interest in Seller's accounts receivable ("Accounts Receivable"). Seller shall continue to collect his outstanding Accounts Receivable after the Closing. If, at any time after the Closing Date, Purchaser shall collect or receive any monies, in any manner whatsoever, in payment of any of Seller's Accounts Receivable, Purchaser shall immediately forward such amount(s) to Seller at no cost to Seller.

7. Assumption of Liabilities. Purchaser shall not assume any Liabilities of Seller whether firm or contingent, known or unknown. In addition to the foregoing, Purchaser shall not assume Seller's IOLA accounts. _____ and _____, Esq. were co-signatories on IOLA funds for the benefit of Seller's clients, as such account, client sub-accounts and a general ledger of such are set forth on **Schedule 7**, attached hereto and made a part hereof. **Schedule 7** shall be certified by Seller as to the correctness thereof. Purchaser shall use its reasonable best efforts to comply with the provisions of Disciplinary Rule 9-102(G) of the New York Attorney's Code of Professional Responsibility pertaining to the designation of successor signatories with respect to Seller's IOLA funds provided, however, that Purchaser shall not assume or be liable for any inaccuracies or liability with respect to such accounts. Seller will indemnify and hold Purchaser harmless for any and all liability, cause of action or loss with respect to such IOLA account.

8. Transfer of Client Records. At Closing, Seller shall deliver to Purchaser his files and records (including but not limited to all electronic records related to such files) relating to all clients included on **Schedule 2(a) and Schedule 13(g)** for which Seller has provided services. **Schedule 2(a) and Schedule 13(g)** shall include a list of all client names and all addresses of such clients. Seller and Purchaser shall comply with Disciplinary Rule 2-111 of the New York Attorney's Code of Professional Responsibility (22 NYCRR §1200.15-a) ("DR 2-111") pertaining to the sale of a law practice in all respects, including the written notice to each of Seller's clients. Seller will cooperate with Purchaser and assist Purchaser with obtaining any client consents that may be required in order to transfer any client property to Purchaser.

9. Delivery of Documents.

(a) At the Closing, Seller shall deliver to Purchaser the following:

(i) a bill of sale and an assignment which effectively transfer, assign and convey to Purchaser good and marketable title to all of the Assets free and clear of all mortgages, pledges, liens, security interests, restrictions, or other encumbrances;

(ii) all Assets subject to the terms of this Agreement; and

(iii) all other documents, instruments or writings required to be delivered to Purchaser at or prior to the Closing pursuant to this Agreement and such other certificates of authority and documents as Purchaser may reasonably request.

(b) At the Closing, Purchaser shall deliver to Seller the following:

(i) the Promissory Note;

(ii) cash or a certified check for sales tax pursuant to this Agreement;

(iii) all other documents, instruments or writings required to be delivered to Seller at or prior to the Closing pursuant to this Agreement and such other certificates of authority and documents as Seller may reasonably request.

10. Seller's Representations and Warranties. Seller makes the following representations and warranties to Purchaser, each of which is true and correct on the date hereof, shall remain true and correct to and including the Closing Date, shall be unaffected by any investigation heretofore or hereafter made by Purchaser, or any knowledge of Purchaser other than as specifically disclosed in the disclosure schedules delivered to Purchaser at the time of the execution of this Agreement, and shall survive the Closing of the transaction provided for herein.

(a) Authority. This Agreement constitutes a valid and binding agreement of Seller in accordance with its terms and does not require any consent, notification to or other action of any person, entity or governmental agency other than filings with respect to sales and other transfer taxes. Seller has complete power to own and to sell, transfer and deliver all assets to be transferred hereunder and instruments to be executed to vest effectively in Purchaser good and marketable title to the Assets.

(b) Effect of Agreement. The execution, delivery and performance of this Agreement by Seller is not conditioned on or prohibited by, and will not conflict with or result in the breach of the terms, conditions or provisions of, or constitute a default under any law applicable to Seller or any agreement or instrument to which Seller is a party or is otherwise subject.

(c) Licenses and Permits. At the time of _____'s death, _____ was in compliance with all permits, licenses, franchises and authorizations necessary for the operation of his law practice (the "Business") as operated and all such permits, licenses, franchises and authorizations were, at the time of _____'s death, valid and in full force and effect. All applications, reports and other disclosures relating to the operation of the Business required by the appropriate governmental bodies have been filed or will have been filed by the Closing in a timely manner.

(d) Assets.

(i) **Schedule 2(a)** hereof contains a complete and accurate list, as of the date hereof, of certain assets owned or leased by Seller which are used or useful in the operation of the Business and which are being purchased by Purchaser.

(ii) On the Closing Date, Seller shall have good and marketable title to all the Assets, free and clear of all mortgages, liens (statutory or otherwise), security interests, claims, pledges, licenses, equities, options, conditional sales contracts, assessments, levies, easements, covenants, reservations, restrictions, exceptions, limitations, charges, encumbrances or any rights of any third parties of any nature whatsoever (collectively, "Liens").

(iii) All tangible assets constituting Assets hereunder are in good operating condition and repair, free from any defects (except such minor defects as do not interfere with the use thereof in the conduct of the normal operations of Seller), have been maintained consistent with Seller's historical practice and are sufficient to carry on the business of Seller as conducted during the preceding twelve (12) months.

(f) Insurance. All of the Assets used or useful in the operation of the Business which are to be conveyed to Purchaser hereunder and which are of an insurable character are insured above deductible limits by financially sound and reputable insurance companies against loss or damage by fires and other risks to the extent and in the manner customary for such assets. Copies of the pertinent insurance policies have been delivered to Purchaser and are in full force and effect. Seller will maintain such insurance between the date hereof and the Closing Date. There are no pending claims. No notice of cancellation or termination has been received with respect to any such policy.

(g) Litigation. There is as of the date hereof no suit, action or legal administrative arbitration or other proceeding or governmental investigation (including workers' compensation claims) pending or threatened against the Seller, including without limitation, any malpractice suit, action or legal proceeding against Seller.

(h) Taxes. Seller has duly filed with the appropriate federal, state and local governmental agencies all tax returns and reports which are required to be filed by Seller, and has paid in full all taxes (including interest and penalties) owed by Seller arising prior to the Closing Date. Seller is not a party to any pending action or proceeding, nor, to the best knowledge of Seller, is any action or proceeding threatened, by any governmental authority for assessment or collection of taxes, and no claim for assessment or collection of taxes has been asserted against Seller.

(i) Contracts. Each contract, agreement, lease and commitment to which Seller is a party is in full force and effect and constitutes a valid and binding obligation of, and is legally enforceable in accordance with its terms against, the parties thereto. There are no leases that affect any of the Assets.

(j) Financial Statements. Seller has delivered to Purchaser true and complete copies of the income tax returns of Seller relating to the operation of the Business consisting of tax returns as of December 31, of the three (3) most recent years, and the related statements of income and cash flows since such dates (the "Recent Balance Sheet"). All of such financial statements (including all notes and schedules contained therein or annexed thereto) are true, complete and accurate, have been prepared in accordance with Seller's historical practices applied on a consistent basis, have been prepared in accordance with the books and records of Seller, and fairly present, in accordance with Seller's historical practices, the assets, liabilities and financial position, the results of operations and cash flows of Seller as of the dates and for the years and periods indicated. Seller shall prepare his 2001 Form 1040 Schedule "C" and any interim statements in accordance with his historical practice and shall deliver the same to Purchaser immediately upon completion.

(k) Accounts Payable. There are no accounts payable of the Seller regarding the Business.

(l) Client Relations. There exists no condition or state of facts or circumstances involving the Seller's clients that Seller can reasonably foresee could adversely affect the Business after the Closing Date. To Seller's knowledge, the Business may be maintained after the date hereof in the same manner in all respects (financial and otherwise) as at the time of _____'s death.

(m) Absence of Certain Changes. Since [date], Seller has operated the business in the ordinary course consistent with historical practice.

(n) Absence of Undisclosed Liabilities. Except as and to the extent specifically disclosed in the Recent Balance Sheet, Seller does not have any liabilities relating to the operation of the Business.

(o) General Representation and Warranty. Neither this Agreement nor any other document furnished by Seller in connection with this Agreement contains any untrue statement of a material fact or omits to state any material fact necessary to make the statements contained herein or therein not misleading in any material respect. There is no fact or circumstance known to Seller which materially adversely affects, or in the future, as now reasonably foreseeable, is likely to materially adversely affect the condition (financial or otherwise), properties, assets, liabilities, business, operations or prospects of the Business which has not been set forth in this Agreement or the schedules hereto.

(p) Disclosure. No representation or warranty by Seller in this Agreement, nor any statement, certificate, schedule, document or exhibit hereto furnished or to be furnished by or on behalf of Seller pursuant to this Agreement or in connection with the transactions contemplated hereby, contains or shall contain any untrue statement of material fact or omits or shall omit a material fact necessary to make the statements contained therein not misleading.

11. Representations, Warranties and Covenants of Purchaser. Purchaser does hereby represent and warrant that:

(a) Organization of Purchaser. Purchaser is duly organized, validly existing, and in good standing under the laws of the State of New York. Purchaser has full power and authority to own its assets and to carry on its business as presently conducted.

(b) Authority to Purchase. Purchaser has all necessary right, authority and power to execute and deliver this Agreement and to consummate the transaction contemplated hereunder. The execution and delivery of this Agreement and the performance by Purchaser of its obligations hereunder (i) have been duly and validly authorized by the shareholders and directors of Purchaser and no other corporate or other approvals are required and (ii) to Purchaser's knowledge, will not materially violate any provision of law and will not conflict with, result in a breach of any of the terms, conditions or provisions of, or constitute a default (or an event which with the giving of notice or the lapse of time or both would constitute a default) under or pursuant to any corporate charter, bylaw, indenture, note, mortgage, lease, license, permit, agreement or other instrument to which Purchaser is a party. When executed and delivered by Purchaser, this Agreement is a legal, valid and binding obligation of Purchaser, enforceable in accordance with its terms.

(c) Litigation. There is no litigation pending or threatened against Purchaser.

(d) Accuracy of Representations and Warranties on the Closing Date. Each of the representations and warranties set forth in this Paragraph 11 shall be true and correct as of the Closing Date with the same force and effect as though made at and as of the Closing Date.

12. Rights of Indemnification.

(a) Survival of Covenants, Warranties and Representations. All covenants, agreements, representations and warranties of the parties under this Agreement, in any Schedule or certificate or other document delivered pursuant hereto, shall remain effective through and shall survive the Closing Date as provided for herein regardless of any investigation at any time made by or on behalf of Purchaser or of any information Purchaser may have with respect thereof.

(b) Indemnification of Purchaser. Seller shall defend, indemnify and hold Purchaser harmless from and against (1) any and all claims, liabilities and obligations of every kind and description, contingent or otherwise, arising from or relative to (A) the operation or ownership of the Business or the Assets prior to or on the Closing Date, irrespective of when asserted and (B) a breach of any of Seller's representations, warranties or covenants hereunder, and (2) any and all actions, suits, proceedings, damages, assessments, judgments, costs and expenses (including reasonable attorneys' fees) incident to any of the foregoing.

(c) Indemnification of Seller. Purchaser shall defend, indemnify and hold Seller harmless from and against (1) any and all claims, liabilities and obligations of every kind and description, contingent or otherwise, arising from or relative to (A) the operation or ownership of the Business or the Assets on and after the Closing Date and (B) a breach of any of Purchaser's representations and warranties hereunder, and (2) any and all actions, suits, proceedings, damages, assessments, judgments, costs and expenses (including reasonable attorneys' fees) incident to any of the foregoing.

(d) Summary of Obligations. The obligations and rights of the parties under this Paragraph 12 shall survive the Closing Date and shall be binding upon and inure to the benefit of their respective successors and assigns.

13. Additional Agreements of Seller.

(a) Conduct of Business Pending the Closing Date. Seller shall use its best efforts to preserve for Purchaser its present relationships with clients and others having business relationships with Seller that pertain to the Business. Seller will immediately notify Purchaser if there is the loss or expected loss or other disruption of any relationship between Seller and a vendor, customer or employee.

(b) No Material Contracts. Seller shall not enter into any contract or commitment pertaining to the Business, except contracts or commitments which are in the ordinary course of business and consistent with past practice and are not material to the Business (individually or in the aggregate).

(c) Maintenance of Insurance. Seller shall maintain all of the insurance related to the Business and the Assets in effect as of the date hereof and shall procure such additional insurance as shall be reasonably requested by Purchaser.

(d) Maintenance of Property. Seller shall use, operate, maintain and repair all assets of Seller which are defined herein as Assets in a normal business manner.

(e) No Negotiations. Seller shall not directly or indirectly (through a representative or otherwise) solicit or furnish any information to any prospective buyer, commence, or conduct presently ongoing, negotiations or discussions with any other party or enter into any agreement with any other party concerning the sale of the Business or the Assets or any part thereof, and Seller shall immediately advise Purchaser of the receipt of any such acquisition proposal.

(f) Disclosure. Seller shall have a continuing obligation to promptly notify Purchaser in writing with respect to any matter hereafter arising or discovered which, if existing or known at the date of this Agreement, would have been required to be set forth or described in the disclosure schedules, but no such disclosure shall cure any breach of any representation or warranty which is inaccurate. In the event that Seller discovers a breach and notifies Purchaser pursuant to this Paragraph 13(f), Seller shall have three (3) days to cure such breach.

(g) Open Matters. The client files and matters described on **Schedule 13(g)** shall be considered ongoing matters for which _____ was providing services at the time of his death. Such matters and the clients (and client records) for whom such matters were being performed shall be included in the terms of this Agreement. Subject to Purchaser's right to exclude any clients hereunder and the client's right to obtain other counsel, Purchaser agrees to cooperate with Seller and the professional staff of _____ in bringing such matters to a conclusion. Seller and Purchaser shall cooperate in notifying such clients that Seller has transferred his Business to Purchaser and shall advise such clients in the same manner as the notice to be delivered pursuant to Paragraph 21 below. For services rendered for such Open Matters, Purchaser shall charge an hourly rate of _____ and 00/100 Dollars ($_____.00) for attorney services and _____ and 00/100 Dollars ($____.00) for paralegal services. In the event that Seller has been previously paid by such clients, the amount of any services shall be offset against the Purchase Price set forth hereunder. In such an event Purchaser shall provide Seller with an itemization of the services provided, the time incurred on

such matters and the cost of such time. In the event such matter shall include additional services outside the scope of the client's agreement with the Seller, the Purchaser shall negotiate a separate fee arrangement with the client.

(h) Seller's Independent Contractor. Except in the case of death or disability, for a period of not less than _____ (___) months, _____, shall provide services to Purchaser in the same manner and to the same extent as provided to _____ prior to the date of his death, in order to assist Purchaser in the acquisition of assets hereunder and the transition of _____'s practice to Purchaser. Purchaser shall be responsible for the compensation of _____ during this ____ (__) month period with respect to such services.

14. Conditions Precedent to Purchaser's Obligations. The obligation of Purchaser to consummate the transactions contemplated hereunder is subject to the satisfaction at or prior to the Closing of the following (unless waived in writing by Seller):

(a) Representations, Warranties and Covenants. The representations, warranties and covenants of Seller contained in this Agreement shall be true and correct in all material respects at and as of the Closing Date as though made at and as of the Closing Date, except for changes contemplated by this Agreement.

(b) Performance. Seller shall have complied with all agreements, obligations, covenants and conditions required by this Agreement to be met, performed or complied with by it prior to or at the Closing.

(c) Absence of Litigation. No litigation shall have been commenced or threatened, and no investigation by any government entity shall have been commenced against Purchaser or Seller or any of the affiliates, officers or directors of any of them, with respect to the transactions contemplated hereby.

(d) Satisfactory Due Diligence Review. Purchaser shall have completed by the Closing Date a due diligence review satisfactory to Purchaser with respect to, among other matters, the business, operations, assets, contracts, legal compliance and future prospects of the Business, all of which shall be confidential and not disclosed to any third party by Purchaser.

15. Conditions Precedent to Seller's Obligations. The obligation of Seller to consummate the transactions contemplated hereunder are subject to satisfaction at or prior to the Closing of the following (unless waived in writing by Purchaser):

(a) Representations, Warranties and Covenants. The representations, warranties and covenants of Purchaser contained in this Agreement shall be true and correct in all material respects at and as of the Closing Date as though such representations, warranties and covenants were made at and as of such time.

(b) Performance. Purchaser shall in all material respects have complied with all agreements, obligations and conditions required by this Agreement to be met, performed or complied with by it prior to or at the Closing.

(c) Delivery of Purchase Price. Purchaser shall have delivered to Seller the Note.

(d) Litigation. No Litigation shall have been commenced or threatened, and no investigation by any Government Entity shall have been commenced, against Purchaser or Seller with respect to the transactions contemplated hereby; provided that the obligations of

Seller shall not be affected unless there is a reasonable likelihood determined by Purchaser that as a result of such action, suit, proceeding or investigation, Seller will be unable to transfer the Assets in accordance with the terms set forth herein.

16. Endorsement Reporting Coverage. Seller agrees to maintain, at its expense, professional liability insurance coverage or reporting endorsement coverage of insurance for the term commencing on the date of Closing and continuing thereafter for a period of time not less than the applicable statute of limitations for any legal services provided by Seller pursuant to Section 214(6) of the New York State Civil Practice Rules and Procedures, prior to or following closing.

17. Expenses. Whether or not the transaction contemplated herein is consummated, each party hereto shall bear all costs and expenses incurred by it in connection with this Agreement and the transactions contemplated hereby.

18. Notices. Any notice or other communication required or permitted hereunder shall be sufficiently given if labeled conspicuously in bold letters "PERSONAL AND CONFIDENTIAL", and mailed personally or sent by registered or certified mail, postage prepaid, or by facsimile transmission or telex immediately confirmed in writing sent by registered mail or certified mail, postage prepaid, addressed, in the case of the Seller to:

PERSONAL AND CONFIDENTIAL

Estate of _____, Esq.

c/o _____

_____

_____

_____

or in the case of the Purchaser to:

_____

_____

_____

Attn: _____

or to such other person or address as shall be furnished in writing by any party to the others prior to the giving of the applicable notice of communication, and such notice or communication shall be deemed to have been given as of the date so delivered or sent.

19. Employees. Purchaser shall not be required to employ any employees of Seller and Seller shall be responsible for the termination of any employees it does not desire to retain following Closing. To the extent Purchaser desires, it shall have the opportunity to interview any of Seller's employees or independent contractors, including _____, for possible employment by Purchaser upon such terms and conditions as Purchaser determines. Such interviews shall take place prior to Closing with the consent of Seller, which shall not be unreasonably withheld.

20. Right of Set-Off. In the event Purchaser suffers any loss for which Seller is obligated to indemnify Purchaser hereunder, and Seller for any reason fails or refuses to pay the same, Purchaser shall have as the means of recovery for any loss (in addition to any other remedies at law or in equity), the right to set-off against any sums due to Seller pursuant to this Agreement. Purchaser's right of set-off shall not be subject to any order of priority, and shall be exercisable in such amounts (not to exceed the amounts of any such loss) and in such manner as Purchaser in its reasonable discretion may determine.

21. Client Letter. Upon execution of this Agreement, Purchaser and Seller, in accordance with DR 2-111 shall provide written notice to Seller's clients, in form and substance of **Exhibit B**, attached hereto and made a part hereof, at Purchaser's expense, of Purchaser's acquisition of Seller's practice of law. Such written notice shall include information regarding:

(a) The client's right to retain other counsel or to take possession of the file;

(b) The fact that the client's consent to the transfer of the client's file or matter to the Purchaser will be presumed if the client does not take any action or otherwise object within ninety (90) days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(c) The fact that agreements between the Seller and the Seller's clients as to fees will be honored by the Purchaser;

(d) Proposed fee increases, if any; and

(e) The identity and background of the Purchaser and Purchaser's employees, including principal office address, bar admissions, number of years in practice in the state, whether Purchaser, or any employee of Purchaser, has ever been disciplined for professional misconduct or convicted of a crime, and whether Purchaser currently intends to re-sell the practice.

22. Entire Agreement. It is understood and agreed that all understandings and agreements heretofore made between the parties hereto are merged in this Agreement which alone fully and completely expresses the agreement between the parties hereto and that this Agreement has been entered after full investigation, neither party relying upon any statement or representation which is not herein contained. This Agreement may not be changed or terminated orally.

23. Governing Law. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of New York.

24. Binding Provisions. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, assigns and all other successors-in-interest.

25. Sales Tax. Purchaser shall pay any sales tax due and payable by reason of the consummation of the transaction herein contemplated. Payment for the taxes shall be made by Purchaser to Seller who shall remit such sales tax to the appropriate taxing authority. Purchaser shall indemnify Seller for any and all sales taxes paid by Seller by reason of consummating this transaction.

26. Headings. The paragraph and clause headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

27. Miscellaneous.

(a) Waiver of Conditions. Any party may, at his or its option, waive in writing any or all of the conditions herein contained to which his or its obligations hereunder are subject.

(b) Variation and Amendment. This Agreement may be varied or amended at any time by joint action of the Seller and Purchaser.

(c) Assignment. This Agreement may not be assigned by Seller or Purchaser without the prior written consent of the other party, which consent shall not be unreasonably withheld.

IN WITNESS WHEREOF, the parties hereto have subscribed their names and seals the date and year first above written.

PURCHASER:

_____

By:

_____, Vice President

SELLER:

ESTATE OF _____, ESQ.

By:

_____, Surviving Spouse and
Executor-Nominee

EXHIBIT A

PROMISSORY NOTE

$_____

_____,

New York

_____ __, 200__

FOR VALUE RECEIVED, _____, a New York professional corporation, its successors and assigns ("Maker"), hereby promises to pay to the order of _____, as surviving spouse of _____**, ESQ.** and Executrix-Nominee of the **ESTATE OF** _____**, ESQ.**, his heirs, representatives, successors and assigns ("Holder"), in immediately available funds, the sum of _____ and 00/100 Dollars ($_____), plus interest, payable in _____ (___) equal monthly installments commencing on the ____ (___) day of _____ 200__of _____ and 00/100 Dollars ($_____) each and a final payment on the _____ (____) day of _____ 200__ of _____ and 00/100 Dollars ($_____). Interest shall be computed on the outstanding principal balance at _____ percent (__%) per annum. Installments under this Note shall be made in accordance with the amortization schedule attached hereto as **Schedule 1**, and made a part hereof.

1. **Acceleration Upon Default.** At the option of the Holder, this Note shall become immediately due and payable upon the occurrence of any of the following events of default:

(a) The failure of Maker to make payment of the principal or interest due under this Note within ten (10) days after receipt by Maker of written notice from Holder that an installment is past due;

(b) The insolvency of Maker, the appointment of a receiver of its assets, or the institution of any involuntary proceeding under any bankruptcy or insolvency law relating to the relief of debtor for the readjustment or relief of any indebtedness of Maker, whether as a reorganization, composition, extension or otherwise, which involuntary proceeding is not terminated, dismissed or concluded in a manner not adverse to Maker within ninety (90) days of the commencement of such proceeding; or

(c) The filing by Maker of an application or an assignment for the benefit of creditors or for taking advantage of the same under any bankruptcy or insolvency law.

2. **Prepayment.** Maker shall have the right to prepay all or any portion of the principal balance due under this Note at anytime without premium or penalty. Except as set forth above, Holder shall not have any the right to require prepayment of the principal balance due under this Note.

3. **Waiver.** No delay or omission on the part of Holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this Note. A waiver of any right or remedy on one occasion shall not be construed as a waiver of any right or remedy on any future occasion.

4. **Attorneys' Fees.** The Holder shall be entitled to collect all costs and reasonable attorneys' fees incurred by Holder in enforcing his rights under this Note.

5. **Notice.** All notices, demands and requests given or required to be given by any party hereto to the other party shall be made in writing and shall be deemed to have been properly given, made or served only if sent by registered or certified mail, postage prepaid, addressed to the other party his or its last known address, or such other address as the parties shall give prior notice.

6. **Negotiability.** This Note is fully negotiable and may be assigned, transferred or set over by Holder or Maker.

7. **Reference.** Any reference herein to the Holder shall be deemed to include and apply to any subsequent holder of this Note. Any reference herein to the Maker shall be deemed to include and apply to every person now or hereafter liable upon this Note.

8. **Jurisdiction.** This Note shall be deemed to have been made under and shall be governed by the laws of the State of New York in all respects, including matters of construction, validity and performance and none of its terms or provisions may be waived, altered, modified or amended except as Holder may consent thereto in writing duly signed for and on his behalf.

9. **Right of Setoff.** Maker shall be entitled to the right of setoff against any or part of any installment due Holder hereunder for any sums owing or hereafter becoming payable to Maker from or by Holder for any reason whatsoever in accordance with the Asset Purchase Agreement by and between Maker and Holder dated January __, 200__.

MAKER

By:_____

_____, Vice President

Attach as Schedule 1 amortization schedule

EXHIBIT B

CLIENT LETTER

EXHIBIT "B"

CLIENT LETTER advising that Selling Attorney's practice has been transferred to Buyer and satisfying other requirements of DR 2-111

Re: [Name of Case]

Dear [Name]:

As you aware from my previous correspondence to you, I have arranged to transfer ownership of my practice to [*Name of Buyer*]. That transaction [was completed] [will be completed] on [date of conveyance]. His office address and his phone, fax and e-mail addresses are [state addresses separately].

In accordance with the provisions of our Code of Professional Responsibility, please be assured that both I and [Name of Buyer] have carefully maintained whatever confidences and secrets you have imparted to me and that he and I shall continue to do so as long as he continues to represent you, and permanently thereafter should you decide at any time to select another attorney to represent you in this matter.

Please also be assured that those terms of fee payment that you and I agreed upon at the time of my original retention, or that may thereafter have been agreed upon between us, shall continue to be honored by the [Buyer] and cannot be increased by reason of the transfer of your file unless specifically otherwise permitted within the terms of our retainer agreement with you or as otherwise specifically agreed to between you and [the Buyer].

I am certain that [the Buyer] will continue to serve you professionally and well and that your file will continue to be in good hands. Please feel free to communicate with him/her just as you have with me. Thank you for allowing me to be of service to you.

Very truly yours,

[If the client, having previously been notified of the selling attorney's intent to transfer the client's file or matter to the Buyer, has not responded to the Seller's request to provide his or her consent, or lack of it, within the ninety day period prescribed in DR 2-111(C)(2), this letter should include the following:

> Although I previously notified you of my intent to transfer your file to [the Buyer] and asked that you provide me with your written consent or disapproval, I have not received your written response. Accordingly, pursuant to the provisions of Disciplinary Rule 2-111(C)(2) of New York's Code of Professional Responsibility, I presume that you consent to the transfer.]

I have read this letter and agree in all respects to be bound by its terms.

_____

[Buyer]

SCHEDULE 2(a)

ASSETS

The following Assets shall be included in the sale from Seller to Purchaser:

1. Seller's goodwill
2. Seller's Active Files (see attached list)
    a. Corporate
    b. General Partnerships
    c. Limited Liability Companies
    d. Limited Partnerships
    e. Real Estate Matters
    f. Estate Administration Files
    g. Will Files
3. Seller's Special Holdings (see attached list)
    a. Client's original wills retained by seller for safekeeping
    b. Client's Corporate Minute Books and Limited Liability Company Minute Books retained by seller for seller for safe keeping
    c. Miscellaneous Records

SCHEDULE 3(b)

ALLOCATION OF PURCHASE PRICE

Client Records,
Intangibles and Goodwill

$_____

SCHEDULE 7

IOLA ACCOUNT DETAIL

Attach Bank Account Information (accounts, locations, signators, balances, list of clients and allocation of funds among designated clients).

SCHEDULE 13(g)

OPEN MATTERS

See attached.

Set forth all client matters which are considered open and ongoing by Selling Attorney

APPENDIX V-1

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

[optional language in brackets]

The undersigned for and on behalf of itself, its affiliates, subsidiaries and agents, including without limitation,_____, [an attorney engaged in the practice of law in the state of New York] [a New York professional corporation engaged in the practice of law], (the "Disclosing Party") has developed certain confidential and proprietary information in both written form and oral form ("Confidential Information"), which has been and is being disclosed to the undersigned for the sole purpose of entering into discussions regarding possible future business and professional relationships.

In consideration of the Disclosing Party's disclosure of the Confidential Information to the undersigned, its officers and directors and all affiliates (hereinafter "Recipient") the undersigned agrees as follows:

1. **Disclosure of Confidential Information**.

(a) The Recipient hereby acknowledges that all documents and information owned or developed by the Disclosing Party or pertaining to the Disclosing Party which has or will come into Recipient's possession or knowledge, unless Recipient provides the Disclosing Party with independent verification to the contrary within fifteen (15) days of the original receipt of such information, is Confidential Information and therefore:

(i) is proprietary to the Disclosing Party having been designed, developed and accumulated at great expense over lengthy periods of time; and

(ii) is secret, confidential and unique, and constitutes the exclusive property of the Disclosing Party.

(b) Excluded from the Confidential Information is any submission or disclosure:

(i) that can be demonstrated by documentation to have been public information or generally available to the public prior to Recipient's receipt of such Confidential Information from the Disclosing Party;

(ii) that can be demonstrated by documentation to have been in Recipient's possession prior to receipt thereof from the Disclosing Party; and

(iii) that becomes part of the public information or generally available to the public such as by publication or otherwise, other then as a result of a disclosure by Recipient in breach of this Agreement.

2. **Use of Confidential Information.**

(a) Recipient shall not use any of the Confidential Information for any purpose other than for the exclusive purpose set forth above. Recipient agrees that the Confidential Information will not be used in any way detrimental to the Disclosing Party and that such information will be kept confidential by Recipient and its agents; provided, however, that (i) any of such information may be disclosed to such representatives of Recipient who need to know such information for the specific purposes set forth above (it being understood that Recipient's directors, officers, employees, affiliated entities, accountants, legal counsel and

representatives shall be informed by Recipient of the confidential nature of such information and shall agree to treat such information confidentially in accordance with the terms set forth herein) and (ii) except as otherwise provided in this Agreement (including Paragraph "3" below), no disclosure of such information may be made by Recipient or its representatives to any other person or entity without the prior written consent of the Disclosing Party.

[(b) Any of Recipient's employees, officers, directors, agents and/or representatives granted access to any Confidential Information provided by the Disclosing Party will each be required to agree to the provisions of, and shall sign a copy of, this Agreement.]

3. **Required Disclosure**. In the event Recipient should be requested or required (by oral questions, interrogations, requests for information or documents, subpoena, civil investigative demand or similar process or as otherwise required by law ("demands")) to disclose Confidential Information supplied to it in the course of Recipient's dealing with the Disclosing Party, the Recipient will provide the Disclosing Party with prompt notice of such requests so that the Disclosing Party may, at its own cost and expense, seek an appropriate protective order; in the event no such protective order is timely obtained, Recipient is permitted to comply with such demands.

4. **Indemnification and Injunctive Relief**. Recipient agrees to indemnify the Disclosing Party against all losses, damages, claims or expenses incurred or suffered by the Disclosing Party as a result of Recipient's breach of this Agreement. Recipient acknowledges that the Confidential Information it will obtain is unique and of a confidential and proprietary nature and that a breach of the terms of this Agreement will be wrongful and may cause irreparable injury to the Disclosing Party. Therefore, in addition to all remedies of law or equity, the Disclosing Party shall be entitled, as a matter of right, to injunctive relief enjoining and restraining Recipient and each and every other person or entity concerned thereby from continuing to act (or failing to act) in violation of the terms hereof. Recipient shall be liable for any and all damages (whether direct, indirect, consequential or otherwise) resulting from any breach of this Agreement.

5. **Return of Information**. Immediately upon the request of the Disclosing Party, all documentation and records of any nature and kind delivered to Recipient, its directors, officers, employees, accountants, legal counsel, representatives and affiliates shall be promptly returned and all copies of all such documentation, records, etc., made by any person or entity shall be promptly destroyed.

6. **Publicity**. Without the prior written consent of the Disclosing Party, the Recipient will not disclose to any person (a) that the Recipient has entered into discussions regarding possible future business and professional relationships with the Disclosing Party, (b) that the Recipient has received Confidential Information from the Disclosing Party, or (c) any of the terms, conditions or other facts with respect to any such possible transaction, including the status thereof.

7. **Acknowledgments of Recipient**. Recipient acknowledges that the Disclosing Party is not making any representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information or any other information concerning the Disclosing Party provided or prepared by or for the Disclosing Party and neither the Disclosing Party nor any of its officers, directors, employees, stockholders, owners, affiliates or agents, will have any liability to the Recipient resulting from the Recipient's use of the Confidential Information.

8. **Termination**. This Agreement shall expire six (6) months from the date hereof ("Term"). Upon expiration of the Term of this Agreement:

(a) all Confidential Information previously received by Recipient, and not previously returned, shall be promptly returned to the Disclosing Party in accordance with Paragraph "5" above; and

(b) all of the terms and conditions of this Agreement pertaining to the disclosure of Confidential Information shall remain in full force and effect in accordance with this Agreement.

9. **Waiver**. It is further understood and agreed that no failure or delay by the Disclosing Party in exercising any right, power or privilege hereunder will operate as a waiver thereof, not will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

10. **Governing Law**. This Agreement shall be interpreted and governed under the laws of the State of New York and each party hereby irrevocably and unconditionally consents to the exclusive jurisdiction of the courts of the State of New York for any action, suit or proceeding arising out of or relating to this Agreement and the transactions contemplated hereby.

11. **Notices**. All notices or documents required pursuant to this Agreement shall be effective if forwarded by certified or registered mail, return receipt requested addressed to the principal office of the party to such parties last know mailing address.

12. **Entire Agreement/Modification**. This Agreement represents the entire agreement between the parties hereto with respect to its subject matter and specifically supersedes any oral or written agreements heretofore entered into by the parties respecting the same. This Agreement may not be altered or modified without the express written consent of the parties.

IN WITNESS WHEREOF, the undersigned have executed this Confidentiality and Non-Disclosure Agreement the ____ day of _____, 2005.

RECIPIENT:

(signing individually and on behalf of any entity)

By:

Name:

Title:

DISCLOSING PARTY:

_____

APPENDIX W

INTERRUPTION OF A PRACTICE DUE TO A LAWYER'S ALCOHOLISM OR OTHER DRUG ADDICTION

The professional continuity of a law practice, whether it be the practice of a sole practitioner or a law partnership, can be interrupted by an attorney's alcoholism or drug addiction and/or subsequent treatment for the same. Anecdotal evidence suggests that perhaps as high as eighteen percent of lawyers may find themselves faced with personal issues of alcoholism or drug abuse sometime during their careers and that more than fifty percent of serious cases of attorney misconduct have alcoholism or drug addiction at their root.

In 1977 the New York State Bar Association formed the Committee on Lawyer Alcoholism and Drug Addiction in an effort to address this serious problem head on. Since that time, eleven local bar association committees have been formed to assist statewide efforts in the identification and treatment of members of the bar so afflicted. Most of the bar associations which have formal programs also provide resources and referrals for problems related to mental illness, particularly depression. A list of the bar associations having such committees, as well as contact phone numbers for each, can be found at the end of this exhibit.

In 2001, the New York State Court of Appeals created the Lawyers Assistance Trust. The Trust provides statewide leadership and financial assistance to programs for treatment and prevention of alcohol and substance dependency in the legal community. Its goals include encouragement of the development of new Lawyers Assistance programs to educate lawyers, judges and their staffs about alcoholism and substance abuse and their effect on the legal profession, support of existing programs and sponsorship of research in the field. The Trust is funded through attorney registration fees.

In 1992, the New York State Legislature passed section 499 of the Judiciary Law which provides that the confidential relations and communication between a member or authorized agent of a Lawyer Assistance Committee sponsored by a State or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents, shall be deemed to be privileged under the same basis as those provided by law between an attorney and client, and that such privilege may be waived only by the person, firm or corporation which has furnished information to the committee. In addition, the law provides that any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of a Lawyer Assistance Committee shall be immune from civil liability that might otherwise result by reason of such conduct.

Related to the provisions of Judiciary Law section 499 is DR 1-103(A) of the New York Lawyers Code of Professional Responsibility which provides that: "A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another's lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Thus, the statute and the Code provide members and agents of Lawyers Assistance Committees with highly valuable tools in assisting persons who contact the Committees either on their own or on behalf of another person. Any referring person knows that unless he or she agrees, the matters discussed with Committee representatives may not be disclosed to anyone who is not a committee member or one of its agents and are strictly confidential.

Concern about alcoholism or other drug addiction within a law firm creates a tension between the responsibility to protect clients' rights, the firm's reputation and a lawyer's wellness on the one hand and the fear of violating a colleague's rights under the Americans Under Disabilities Act, standards relating to confidentiality and fear of destruction of personal relationships on the other.

An excellent article by Paula A. Barran, Esq., a lawyer in the Oregon law firm of Barran Leibman LLP, follows this exhibit and clearly sets forth: (1) the importance of defining the relationship of a lawyer within the firm, (2) the principal employment and disability laws involved, (3) a summary of signs of substance abuse and related impairment, (4) methods of obtaining and protecting medical information, (5) suggestions for covering the ongoing work of an impaired attorney and what to tell clients, (6) suggestions regarding payment for the cost of treatment, and (7) a proposed "last chance" agreement to be considered by the impaired attorney and members of his/her firm. Ms. Barran also addresses important issues relating to re-entry of the attorney after treatment and dealing with resentment and mistrust among colleagues within the firm as a result of the lawyer's impairment.

It is the sincere hope of the NYSBA Committee on Professional Continuity that the article by Ms. Barran will provide insight and guidance to co-workers and friends of an impaired lawyer in their efforts to assist in the rehabilitation of the lawyer while protecting the rights of the lawyer's clients.

Bar Association Resources

Lawyers Assistance Trust
Barbara F. Smith, Executive Director
518-285-4545

New York State Bar Association
Lawyer Assistance Program
800-255-0569

The Association of the Bar of the City of New York
Eileen Travis, Director of the Lawyer Assistance Program
212-302-5787

Brooklyn (Kings County) Bar Association
Lawyers Helping Lawyers Committee
Sally Krauss, Contact Person
718-643-3700

Bar Association of Erie County
Lawyers Helping Lawyers Committee
Kathie S. Bifaro, Contact Person
716-852-8687

Monroe County Bar Association
Lawyers Concerned for Lawyers Committee
John Crowe, Contact Person
585-234-1950

Nassau County Bar Association
Lawyer Assistance Program Committee
Carol Hoffman, Esq., Contact Person
516-746-8000

New York County Lawyer's Association
Committee on Substance Abuse
Andy Bratton, Contact Person
212-401-0748

Oneida County Bar Association
Lawyer Assistance Committee
Tim Foley, Contact Person
315-733-7549

Onondaga County Bar Association
Lawyer to Lawyer Committee
Ken Ackerman, Contact Person
315-233-8203
Noreen Shea, Contact Person
315-476-3101

Queens County Bar Association
Committee on Alcohol and Substance Abuse
David Dorfman, Contact Person
917-256-0355

Schenectady County Bar Association
Lawyer Assistance Program Committee
Vincent Reilly, Contact Person
518-388-4350

Suffolk County Bar Association
Committee on Alcohol and Substance Abuse
Richard Reid, Contact Person
631-697-2499

Westchester County Bar Association
Committee on Alcohol and Substance Abuse
John Keegan, Jr., Contact Person
914-949-7227

Impaired Attorneys: The Firm As Employer

Paula A. Barran

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INTRODUCTION

Dealing with the disease is hard enough, but law firms confronting professional impairment have additional problems. Practice within a firm is carried out in the context of loosely structured professional relationships with ill-defined hierarchies, and except in their early years of practice, lawyers work with little or no supervision. There are few objective measures of work product; "good" is subjective. Firms are structured with a lot of thought to the professional and economic parts of life – defining what kind of practice (full service boutique, something else), size (small, medium, supersized), and how to pay the partners. But little thought is given to establishing disciplinary procedures. There may not even be someone in charge with authority to discipline.

Toss in the idea of collegiality, which is one of those important rules of the road that help organizations endure. But collegiality, so important when you're having a fight about money, is a barrier to the kind of confrontation that impairment may require. It isn't my job, my role, or even my right to challenge my colleague about the problem. Professional lives are stressful enough. It is not difficult to find excuses for inappropriate conduct or lawyer negligence. There but for fortune . . . And if I do, am I possibly pushing the firm into the murky area of professional liability for malpractice. It isn't surprising that lawyers circle their wagons.

All of these behaviors can be downright enabling.

The consequences of ignoring impairment include malpractice, loss of client confidence, and even the departures of qualified staff and colleagues. These can be dire. But there are equally dire consequences to blundering into a problem, ignoring laws and violating confidences and privacy. There are some rules.

DEFINING THE RELATIONSHIP

You cannot make proper decisions about how to confront and manage impairment until you understand the nature of the relationship between the lawyer and the organization (which, for want of a better term, is probably "the firm"). If the relationship is employer-employee, there will be extensive regulation to worry about. If the relationship is that of independent contractor, there will be little regulation. If the relationship is that of partner to the firm, or partner to other partners, the principal concerns will be fiduciary duty and the partnership agreement. All that means a necessary first task is to define the relationship, because the nature of the relationship sets the rules.

Defining the relationship used to be easy. There were employees, and there were partners. In an unusual case there might be a sole proprietor or an independent contractor. Today there are new organizational forms, and lawyers generally make their selection of firm structure for tax advantages. Whether or not the form might require partners to become employees is rarely an important consideration, except where mandatory retirement rules are big issues (and then, employer-employee form is a real problem). Whether the organizational form requires something more than pro forma shareholder meetings is also rarely a consideration. A law firm now can be a general partnership, a limited partnership, a limited liability partnership, a limited liability corporation, and the people who work in the firm can be general partners, limited partners, shareholders, employees, employers, and can have a bewildering combination of attributes that defies pigeonholing.

On April 22, 2003, the U.S. Supreme Court issued its decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 123 S.Ct. 1673 (2003). The opinion outlines the mode of analyzing a lawyer's relationship to the firm to decide an important question or two. Employer or employee? Owner or worker? Partner? Knowing the status of the lawyer is critical for application of a host of federal and state labor and employ-

ment laws, so *Clackamas Gastroenterology* provides important advice. At issue in the case was whether the medical clinic, which was set up as a professional corporation, was covered by the federal Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. That law is inapplicable to very small businesses; it does not cover an employer unless the employer's work force includes 15 or more employees over certain defined times.

The question arose because this clinic had four employee physicians who were actively engaged in the medical practice as shareholders and directors. Because the clinic was set up as a professional corporation, the physicians were formally shareholders who had employment contracts with the clinic and so were nominally employees. That very status made an easy and attractive argument for the terminated employee who wished to sue under federal law. She contended that the physicians could not have it both ways, that they could not establish a corporate status to reap tax advantages and limit civil liability, and yet at the same time claim the physician shareholders were partners for purposes of employment law. If the court counted the shareholders as employees, the clinic met the threshold for application of federal law.

The Supreme Court recognized that "we are dealing with a new type of business entity that has no exact precedent in the common law" with state statutes permitting incorporation for the purpose of practicing a profession. In the past the learned professions were not permitted to organize as corporate entities. Since professional corporations are "relatively young participants in the market" with features that vary from state to state, there had been little, if any, true guidance on just how to define and evaluate the relationship of professionals to the organization. That is what the court set out to do in *Clackamas Gastroenterology*, noting that the resolution of any legal issue depends upon understanding whether the professional is an employee or an owner. That analysis, in turn, requires a thorough understanding of the details of how the professional interacts with the organization. Here are the necessary questions:

- Can the organization hire or fire the individual or set rules and regulations for the individual's work?
- Does the organization supervise the individual's work, and to what extent?
- Does the individual report to someone higher in the organization?
- To what extent is the individual able to influence the activities of the organization? Act like a boss? An owner?
- What is the nature of the parties' agreement as to status?
- Does the individual share in the profits, losses and liabilities of the organization?

An employer is the person or group of persons who owns and manages the enterprise, can hire and fire, can assign tasks and supervise performance and decide how the profits and losses of the business are to be distributed. The fact that such a person has a title (even shareholder or employee) does not determine whether that person is an employee or a proprietor. The Court emphasized that no one factor is controlling, that even the existence of a document called "employment agreement" does not lead inexorably to the conclusion that a party is an employee, and that the answer to the question of status "depends on all of the incidents of the relationship with no one factor being decisive." The test is all about the substance of the relationship, not what it looks like on its surface.

That means that if the lawyer in a professional corporation has a status functionally equivalent to partnership, the form of the organization does not control. In such a case, partnership law applies. If the lawyer has a status within the firm that permits him or her to influence decision-making and keep a share in profits, losses and liabilities, those factors point to something akin to a partner and partnership law applies. If, in contrast, the lawyer can be terminated or disciplined, works under set rules and regulations, reports to and is supervised by the firm, employment law probably applies because those factors point to employee status.

PARTNERSHIP

If the relationship is not employer-employee but a partnership relationship, the statutory protections do not apply but activities will be governed by the murkier provisions of the common law, including the fiduciary duties extended within partnerships, as well as common law privacy protections.

Theories arising out of the breach of fiduciary duty can be asserted if a partner is disciplined or expelled. Because most of the reported case law turns on the laws of individual states and the provisions of the partnership agreement, they are somewhat limited in precedential value. See, for example, *Cadwalader, Wickersham & Taft v. Beasley*, 728 So.2d 253 (1998) (applying New York partnership law that partners have no common law or statutory right to expel or dismiss another partner, but may provide in the partnership agreement for expulsion under prescribed conditions "which must be strictly applied"); *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (1998) (applying Texas law, holding that the relationship between partners is fiduciary in character and imposes an obligation of loyalty and utmost good faith, fairness and honesty, but concluding "a partnership exists solely because the partners choose to place personal confidence and trust in one another"); and see, *Heller v. Pillsbury, Madison & Sutro*, 50 Cal.App.4th 1367 (1996) (finding no breach of fiduciary duty in expulsion by executive committee of partner who behaved inappropriately where partnership agreement authorized executive committee to do so).

PRINCIPAL EMPLOYMENT LAWS

Assuming the impaired lawyer holds employee status (as compared to partnership status or something else), two sets of statutes are most important in that they regulate and define the manner in which the organization can confront and address the impaired lawyer.

The federal Americans With Disabilities Act, 42 U.S.C. § 12101 et seq., prohibits discrimination on the basis of disability, which is broadly defined to include a mental or physical condition which substantially limits a major life activity, the existence of a record of a disability, or the perception of a disability. The law also sets certain confidentiality standards and requires accommodation of protected disabilities, but also provides some level of freedom in addressing drug-related dependency. Alcohol-related dependencies fall into a different category altogether, something that firms must always remember in addressing issues under this law.

In addition to the federal law, virtually every state has a separate state statute providing similar, although not necessarily identical, protections. The potential for supplemental state regulation was recognized under federal law. 42 U.S.C. § 12201 provides: "Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." In other words, federal and state law both apply and an employee is entitled to the benefit of the law which offers the greatest protection.

The second group of statutes that are important in addressing impairment of employees are those laws providing protected leave for serious health conditions. The federal law is the Family Medical Leave Act, 29 U.S.C. §§ 2601 et seq. This statute requires employers (those who employ 50 or more employees) to grant 12 weeks leave during any 12-month period for a variety of conditions, including the employee's own "serious health condition." This is another of those federal laws that establishes a level of protection as a floor, but permits greater protection in individual states. 29 U.S.C. § 2651 provides: "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."

As is the case with disability protections, a number of states have passed their own laws establishing various periods of protected leave for a variety of conditions, and often applying the requirements to smaller employers. Once again, the leave laws must be evaluated on both a federal and state basis to determine what protection, if any, the employee is entitled to. The leave laws can be important for two reasons. First, they guarantee a protected leave from work for a set period of time. Second, they provide for some level of reinstatement or reemployment. The most protective of the laws require an employee to be returned after leave to the same position of employment with the same benefits, the same responsibilities, the same duties, and perhaps even the same client base.

DISABILITY PROTECTIONS

Title I of the ADA governs employment, regulates the conduct of employers, and places some limits on what employers can do in the employment, management, and terms and conditions of employment for employees who have disabilities. Because the definition of disability is so broad (any physical or mental condition which substantially limits a major life activity), substance abuse impairments meet, at least, the statutory definition. The potential protection of drug-related misconduct was a controversial issue during the debates over ADA; as a consequence, the statute provides only limited protections for drug-related activity.

The statute prohibits employers from making certain disability-related inquiries until there has been a conditional offer of employment. If you ask an applicant how much he or she drinks, you may be asking a medical question because the answer may be diagnostic. Ask whether the applicant has ever been treated for drug addiction and you may end up in ADA-land.[4]

Once a conditional offer of employment has been made, you are free to make those inquiries, and to make them as broadly as you like (provided they are made for every employee being considered for the same class of jobs). Once the employee is hired, however, the window of opportunity slams shut.

After employment has started, only limited disability-related inquiries may be made and they must be "consistent with business necessity." The restriction on disability-related inquiries during employment (where they are limited to inquiries consistent with business necessity) also limits the ability of employers to inquire into potential substance abuse problems. Before asking, you will always need to test yourself: is this an inquiry that is "consistent with business necessity"? Is it an inquiry that can be justified because the answer matters to the firm?

Because drug abuse (as compared to alcohol abuse) typically implicates illegal activity, the statute draws a marked distinction between abuse of drugs and abuse of alcohol.

4. The EEOC has a helpful guidance on permissible pre-employmnt inquiries at www.eeoc.gov.

"Drugs" are defined as controlled substances, with reference to the Federal Controlled Substances Act. The "illegal use of drugs" is unprotected; if use of drugs would be illegal under the Controlled Substances Act, it remains unprotected under the Americans with Disabilities Act. An exception exists under the law for drugs which are used under the supervision of a healthcare professional or as otherwise authorized by federal law.

There is an uneasy treatment of marijuana, which is authorized under the laws of some states for certain medical conditions, but remains illegal under federal law. Employers are generally free to follow the mandates of federal law, most state laws relating to the medical use of marijuana are limited in what they permit and generally excuse users from state criminal laws. Some employers want to ban it entirely. Other employers want to permit marijuana for recognized therapeutic purposes. Those are permissible legal choices up to a point; most firms don't particularly want to be seen as flaunting federal law, so an uncomfortable "don't ask don't tell" attitude might be the result.

An employee who is "currently engaging in the illegal use of drugs" has no protection under federal law, as long as the employer acts on the basis of the illegal drug use. At issue, however, is whether the employee's drug use is "current." There is some circularity in the legal definition of "current" drug use. Current drug use is drug use that is current. It is a fact-based inquiry. An individual's drug use is "current" if the facts suggest that ongoing drug use may continue to be a problem, even though the employee is not actively using, and even though the employee may not have drugs in his/her system at the time of the employer's disciplinary decision.

The structure of the statute is intended to encourage rehabilitation. Employees who have used or are using illegal drugs can regain the protection of the statute through rehabilitation. The successful completion of a supervised rehabilitation program, together with ceasing the illegal use of drugs restores the protection of the law. Employees can achieve rehabilitation in other ways, including participating in a supervised rehabilitation program (as compared to completing the program) so long as the illegal use of drugs stops. The law also recognizes "being otherwise" rehabilitated. That can include, for example, participation in a 12-step program or voluntary activities, so long as the illegal use of drugs ceases and so long as there have been sufficient rehabilitative activities to make it reasonable to conclude that the illegal drug use has stopped.

Under the ADA, employers have a statutory right to control employee drug use including prohibiting the illegal use of drugs in the workplace, requiring employees to remain in compliance with other statutes such as the Drug Free Workplace Act, holding employees to the same qualification standards as non-users, complying with administrative requirements which may mandate drug testing in certain occupations, and requiring employees to submit to drug tests.

Some state statutes place limits on employer rights to conduct drug testing. Federal law is generally silent (except for those situations in which testing is mandatory — drivers, pipeline workers, train operators, coast guard, defense contractors).

Employers also have the right to prohibit alcohol use at the workplace, to require employees not to be under the influence of alcohol in connection with their work, to require employees to meet job and behavior standards regardless of alcoholism or alcohol-related conditions and to require compliance with federal standards such as Department of Transportation testing regulations.

The disparity in treatment between alcohol and illegal drugs creates employment-related issues. Although an employer can, in most circumstances, prohibit the illegal use of drugs even if off work (as long as there is some job-related connection), the same is not true with the use of alcohol.

Employers may require employees to submit to drug testing. It is not a medical examination according to federal law, and therefore can be administered without "cause" or suspicion of drug-related impairment. Alcohol tests are different and employers do not have the same right to test for alcohol. Any alcohol-related testing must be preceded by cause or suspicion of alcohol-related impairment. In the language of drug and alcohol testing, drug tests can be administered on a random basis under federal law; alcohol tests cannot be administered on a random basis.

SIGNS OF SUBSTANCE RELATED IMPAIRMENT

Substance abuse leads to behavior problems, performance problems, or both. However, all employers need to proceed cautiously because a performance problem or a behavioral problem is not necessarily linked to a drug-related dependency or alcohol problem. Other concerns, some of them protected disabilities, could also be the cause. For example, a performance problem could be caused by personal problems at home, concerns about serious health conditions of family members, mental impairments, clinical depression, stress, fatigue, burnout, or overwork, and a host of conditions or circumstances. Many of these are protected by various state and federal laws and it is far too easy for an employer to blunder in a situation and mishandle it by making assumptions about the cause of the problem.

A cautious approach would include some, perhaps all, of the following steps:

- Establish and maintain institutional standards so that behavioral and performance problems are identified at an early opportunity.

- Identify specific performance or behavioral problems such as erratic work hours, substandard performance, observations of intoxication or impairment, unacceptable or unprofessional behavior.

- Confront the lawyer with factual information and observations, and provide an opportunity for explanation or a request for assistance.

- If appropriate, request an evaluation by a healthcare professional to determine whether there is a medical problem and, if so, what course of treatment is recommended.

- Impose appropriate requirements, including a "last chance" or "return to work" agreement.

OBTAINING AND PROTECTING MEDICAL INFORMATION

Any time a firm requires a lawyer, employee or otherwise, to participate in a medical evaluation, any communication between the firm and the healthcare professional should be preceded by a specific written authorization. The law on the content of such an authorization varies from state to state, but typically an authorization should include the description of information which is to be used or disclosed, authorization to the healthcare professional, identification of the person to whom disclosure may be made, a description of the purpose for which disclosure is authorized, some expiration date, and obviously the lawyer/patient's signature and date of authorization. It bears emphasis that any communication with a healthcare provider should remain strictly within the boundaries of the authorization. Repeat after me: I will not talk to doctors without a written authorization.

Regardless of whether the individual lawyer is an employee covered by the ADA or has a different status, any medical information should be retained in strictest confidence. The ADA requires medical records to be stored in separate locked cabinets and separated from personnel records, and limits the persons who may have access to those records. Even if that law does not apply, however, most states recognize a right of privacy to confidential medical information. That means, at a minimum, that the persons within the firm who are aware of the medical information or medical records must restrict dissemination absent the consent of the lawyer.

COVERING THE WORK

Client needs don't stop when a lawyer's practice is interrupted for treatment, and somebody needs to take care of those needs if there are to be any clients to come back to. Managing re-entry to the practice starts with planning to cover client needs during treatment. You may be doing this in crisis mode, but some time to plan will pay dividends.

- **What's pending?** Have somebody go through all pending matters and sort out the work so that you can identify immediate needs, near-term problems, and those matters that can wait. How you accomplish this will depend on what sort of system the lawyer uses. Check calendars, look through files, check documents on computers, and talk to clerical staff. Maybe the lawyer can prepare a list to start with, and if you're really lucky you may be able to get a briefing memo on major matters. And don't forget the invaluable assistance of the secretary or assistant who has been keeping the practice running. While you're at it, you might have some great ideas about reorganizing your own calendaring system; that can probably wait a few days, but don't lose track of the thought.

- **Who's going to do it?** Once you have a list, get matters reassigned as quickly as possible. Obvious deadline work is the place to start, but don't forget that large complicated matters need some advance warning too. It might be practical to get everything passed out in one awful meeting. Then everybody in the firm can feel terrible for an afternoon before they get down to work. While you're pondering reassignments, consider whether you may be able to reassign work in a way that will protect the practice for the lawyer. That maybe particularly important in organizations with a high degree of internal competition.

- **Should I get extensions?** Getting extensions sounds like it might solve some of the interim problems, but delaying the work may be a bad move. A month's worth of mail stacked up, clients clamoring for attention, and major messes to clean up aren't good for anybody. See if you can get the most critical work covered in the lawyer's absence.

- **What do I tell the clients?** In general, clients do not belong to that class of people who have a need or a right to know the nature of the problem. They do, however, have a right to know that their lawyer is not going to be around for a while and not going to be handling a particular matter, and they might have strong feelings about reassignment. Before you say anything to clients, see what the lawyer wants you to say. You might be able to agree on wording that communicates the need for the absence, without damaging the lawyer's client relationships in the bargain. If you can't reach some agreement, you still have to tell the clients something. Consider explaining that the lawyer is on leave or on medical leave. It is very good form to ask a client whether a particular reassignment is acceptable.

CONFIDENTIALITY

The staff may know a lot more than you want, but you still need to think about what you are going to announce internally. There isn't an easy answer for all categories, but there are some guidelines that can help work through the gray area between confidentiality and notice.

Philosophically, honesty is great. But substance abuse treatment is a confidential matter. Information about treatment should be shared only with consent or on a need to know basis. If there is an employment relationship, it may be the type of medical information protected by the law. Outside of an employment relationship, there may be civil privacy protections prohibiting the disclosure of private facts.

The first place to look for a resolution is the lawyer. Ask for input. You may be able to work out an acceptable internal statement, and you'll never know unless you ask. It may be, however, that the lawyer does not want to start treatment with a fanfare. If you can't agree on a statement, you may still need to notify personnel. If that happens to you, separate people into categories. You will have some who have a clear right to know (partners, for example). You will have others who have little or no right to know. And you will have others somewhere in between (the receptionist, the librarian, the mail room). Tailor your announcements accordingly, but remember to caution them not to gossip or contribute to the rumor mill. That is particularly important with the group that may be getting some detailed information. You don't want them spreading it around after you took such pains to tailor your own announcements. You might want to avoid notifying people in writing, unless you are using a prepared statement. Memos have a way of missing the shredder and finding the light of day someplace you didn't want them to be.

A caution is probably in order here. Lawyers entering treatment often do so having skated the surface of malpractice. As you assign out work, you may want to suggest the file be reviewed for errors or problems. That suggestion might require a bit of explanation. That category of person probably falls neatly into the "need to know" category, so don't worry too much about explaining what the problem is, as long as you follow up with the threat that they will get warts all over their bodies if they breach confidentiality. It usually works (the threats, not the warts). The final caution, to the extent that any notification is made, consider whether you want to make it orally rather than in writing. Confidential memoranda often are not, and may find their way into the hands of people who will spread the news.

WHO PAYS FOR ALL THIS?

The cost of treatment is normally the lawyer's responsibility, regardless of status. That does not mean that you are prohibited from contributing, paying the bill, or loaning money for treatment. Keep a few guidelines in mind as you consider expense issues, however.

- If you are going to pay this time, consider whether you are setting a precedent that you might feel compelled to follow with others. Would you have to? Perhaps, particularly if you are dealing with employees. If you pay a male's treatment costs, you should think twice before deciding not to pay a female's treatment costs. If you pay this year, how will you explain next year's decision not to pay?

- It is permissible to contribute to the cost of treatment in different ways depending on status. For example, you could choose to have the firm pay for a partner but not an employee.

- It is probably more common to loan money for treatment, and set up some repayment plan. If you elect to do so, you should consider having the lawyer sign a repayment agreement and a promissory note. Most states have laws about payroll deductions, so check your state before you draft an unenforceable payroll deduction agreement.

CAN WE VISIT OR SEND CARDS AND LETTERS?

Sure, unless the lawyer does not want to hear from you. Or unless you don't have authorization to share any information. Don't assume that well-intentioned contacts will be appreciated.

IS OUTPLACEMENT BETTER THAN REENTRY?

Don't automatically assume that reentry to the same practice is the best thing to do. It may not be. There may be situations in which the relationship is so fractured that treatment should be followed by outplacement into another job or career. That may be particularly appropriate if there is no work to return to.

Keep this in mind, however, when you are dealing with the lawyer who is an employee. If the organization is large enough to fall under the federal Family and Medical Leave Act, substance abuse treatment is medical care for a serious health condition, and employers are required to hold the job open. Your state may have equivalent state laws.

Partnership and shareholder agreements may also determine whether outplacement is a choice that can be imposed on the lawyer. If outplacement seems like a better idea, you might do well to involve the treatment counselors. You may unwittingly interfere with the treatment program by making a sudden unexpected change like telling the lawyer there may be no job to return to.

LAST CHANCE AGREEMENTS

In business, employers generally require employees returning from treatment to execute a "last chance agreement" or "return to work agreement." These agreements can be a constructive part of recovery. They provide job-related motivation and outline job-related responsibilities which relate to treatment and recovery. Although they vary from workplace to workplace, most include the following elements:

- Verification that the employee is participating in a treatment program (be careful not to require too much information);
- A commitment to remain drug and alcohol[5] free;
- An acknowledgement that the lawyer is committed to adhere to requisite standards of behavior;
- Drug or alcohol testing if appropriate (be careful to avoid random alcohol testing for employees);
- A commitment to participate fully in recommended aftercare, 12-step meetings, or other therapy recommended by treatment counselors;
- An acknowledgement that a violation of the agreement, or its incorporated standards, will result in immediate termination; and
- Authorization to talk to treatment counselors to obtain information about compliance with treatment requirements, aftercare conditions, and to get advice about the return to work, all limited to a need to know basis and carefully drafted to protect medical privacy.

5. Before requiring a commitment to remain alcohol free, check with developing interpretations of the Americans with Disabilities Act. While current use of illegal drugs is not protected under the law, alcoholism is as long as it does not have a negative effect on the business operations. That may lead to a tension between the need to abstain from alcohol for purposes of treatment and recovery, and the employer's insufficient interest in monitoring off-the-job drinking habits. We don't yet know where the line lies.

"Last chance" or "return to work" agreements are appropriate for the lawyer too; however the type of agreement might vary with the lawyer's status. Partners and shareholders who have ownership interests may work under agreements that spell out rights and responsibilities that leave little room for a mandatory extra agreement such as a last chance agreement. That may leave the firm with little leverage beyond a motion to expel the lawyer or break up the firm. But don't overlook the value of negotiation too. You may be able to work out a perfectly satisfactory return to work agreement which protects organizational interests and, in exchange, offers practice-related assistance upon return.

THE WELCOME HOME

It is a good idea to designate a single person or a small group to be the lawyer's designated contacts during treatment. That will ensure a more consistent flow of information about progress, prognosis, return dates and similar details. It will also help avoid a minor catastrophe upon return: the lawyer walks in, wholly unexpected, to find someone working at his/her desk, secretary reassigned, no clients, no work, and no friends. That doesn't have to happen; the contact person can be responsible to see it doesn't.

Organizations must give some thought to the lawyer's return to the office:

- Check out the physical space and make sure you return it to pre-treatment condition (but ditch the bottles!).[6]

- Some kind of welcoming activity is appropriate, but take personalities and desires into account. Maybe a brief acknowledgement at a breakfast meeting is in order, maybe a card, or some other recognition. Treatment counselors are often very good sources to tap if you're concerned about what's appropriate.

- At least a week before the lawyer's scheduled return, two work related things should be happening. First, the lawyers who were assigned the pending matters should prepare brief status reports on what was done in the lawyer's absence. Second, the appropriate person (practice chair, managing partner, and supervisor) must give some thought to the work the lawyer will be doing upon return. Employees need assignments; partners or shareholders may need guidance. A visit with treatment counselors may help out here provided you have consent.

- Don't neglect the other lawyers in the practice. Some of them will have a right and a need to have some information about the return. You will also need to manage their expectations about the return. Maybe the lawyer will return gung-ho, ready to dive into an intense three month project. More likely he/she will return to a wounded practice and some resentful colleagues.

BASIC LAWYER SKILLS

There may be a lot of surprises upon the lawyer's return. Alcohol or drug use can mask many other problems, and may have contributed to a false impression of the lawyer's skills. The lawyer may have forgotten — or never learned — good skills. That may include work skills — effective research, analysis, advocacy, effective oral and written presentation skills — and it may include "office" skills — billing practices, client relationships, office relationships. Be on the lookout for this problem. It can be corrected, but not if you don't know about it.

6. Actually, if the organization's culture respects the privacy of desks and offices, don't go searching for bottles or drug paraphernalia. Let the lawyer or a sponsor take that project on.

WHAT HAPPENED TO THE PRACTICE?

You can bet the rent on this: you are welcoming back a lawyer with a sick practice. If you want reentry to work, you have to work on the practice. Every sick practice is sick in its own way, and there are no universal solutions.

- The returning lawyer is probably not able to do much alone. More likely he/she will be at a loss to know what happened to the practice, let alone how to fix it.
- Controlled assignments or responsibilities for six to twelve months may be needed, first to provide some work, then later to fill in gaps as the practice rebuilds.
- Most lawyers returning from treatment will benefit from practice building advice and some wise counsel — from a department head, knowledgeable peer, or even an outside consultant.
- Don't underestimate the value of jump starting. Early successes are very important motivators.
- Have a short-term and near-term practice development plan; give some thought to it before the lawyer returns, and make it a key point of discussion the first few days back on the job.
- Monitor progress against the plan, particularly during the first six months.

All this takes commitment, which raises another concern. Sick practices don't get that way overnight. More likely, others have carried their impaired colleague just a little too long.

RESENTMENT, MISTRUST AND THE OTHER UNHOLY EMOTIONS

Most lawyers do not analyze their own practices; but they often can't stop themselves from analyzing the practice of their colleague who has just returned from treatment. It isn't difficult to understand why the dominant emotion is resentment. One of their own has failed them. They may be cleaning up, mending shattered client relationships, worrying about staff complaints and rebuilding a tarnished firm reputation. They may be the ones giving up vacations and weekends to get the work done in the lawyer's absence. They may even be paying for treatment, in one way or another. They may be struggling with their own practices, but not getting the same care and attention the returning Prodigal Son is getting. They may be looking for a reason to believe the lawyer should go someplace else to make a fresh start.

Reentry to the same firm is not always the best choice, although it may sometimes be required because of a controlling statute. If you are looking for the greatest good for the greatest number of people, an honorable goal, you will understand that the interests of the group are at least as important as those of the returning lawyer (and there are usually more of them). Give this some time. The tension may fade, but it is unlikely you'll be able to predict whether it will. But don't count on time alone to make this work. The lawyer in an average organization knows very little about the complexities of drug and alcohol abuse. If you sense tension, it might be helpful to provide some education to the lawyers in the organization so they can understand more about addiction, and maybe learn something about repairing relationships themselves.

Regaining credibility is a critical task for the impaired lawyer. Remember that a part of credibility is what others see. If the senior or "important" lawyers in the firm wash their hands of the returning lawyer, everybody else will too. On the other hand, a little public attention from the right people can make the difference.

SAMPLE: TREATMENT AND RETURN TO WORK AGREEMENT

By signing this agreement I accept and agree to the following terms and conditions which will govern my continued employment with and my return to work with [firm].

I. TREATMENT

1. I acknowledge that my work performance and/or behavior have resulted in the need for intervention and have provided a basis for the termination of my employment (or: define nature of relationship) with the firm. As a consequence, and in order to avoid the termination of my employment (expulsion from the firm), I voluntarily accept the terms of this agreement.
2. I agree to submit to an immediate evaluation by a health care professional of the firm's selection.
3. I will follow all treatment recommendations of that professional including without limitation entry into a residential treatment program.
4. I understand that I am responsible for all costs associated with the treatment program to the extent they are not covered by insurance.
5. I will authorize regular progress reports to be made to the firm during treatment (tailor to specific consent).

II. RETURN TO WORK

1. Upon completion of the recommended treatment program I understand that the firm will return me to employment.
2. Upon my return, I will review all aftercare requirements and recommendations with my supervisor (on a need to know basis).
3. I understand and acknowledge that my return to work will be conditioned upon my strict compliance with the following:
   (a) Strict compliance with the treatment recommendations made by the treatment professionals with whom I have been working. Upon completion of my treatment program, a summary of those recommendations will be prepared and attached as Exhibit A to this agreement, and I will re-execute it at that time (tailor consistent with medical authorization);
   (b) Complete abstention from all mood-altering substances except in strict accordance with the written authorization of a licensed physician who has been advised in advance of my treatment for substance abuse and who has reviewed any such prescription in advance with my substance abuse counselors (tailor to address off-duty alcohol use);
   (c) Regular attendance at required or recommended 12-step programs.
4. For a period of two years from the date of my return to work, I agree to submit to testing to detect the presence or use of drugs (or alcohol if appropriate), on any basis including random or unannounced, and at the times and on the terms that are communicated to me by [insert authorized person or entity]. I understand that at the conclusion of the two year period the company, in its sole discretion, may

extend the period during which I will submit to drug testing for an additional year. (Use caution in defining alcohol testing to avoid ADA problems)

5. I understand and acknowledge that I continue to be bound by and must adhere to all standards of professionalism, behavior and performance that are required of attorneys with the firm as they may exist from time to time, including but not limited to those set out in the firm's policy and procedure manual.

6. This agreement does not guarantee my employment or compensation for any period of time, nor does it in any way alter my status [as an at will employee]. I understand and acknowledge that strict adherence to these terms and conditions are a requirement of my continued employment with the firm and that any violation of the terms of this agreement (including its incorporated standards) will result in my immediate termination.

By my signature below I confirm that I have reviewed and considered these terms and accept them voluntarily as a constructive part of my recovery. I also acknowledge that these terms are being provided to me as an alternate to the termination of my employment. I understand that I may withdraw my consent at any time during the term of this agreement, but acknowledge that withdrawing my consent is a voluntary termination of my employment (consent to my expulsion from the firm).

Signature # 1 (at the time of intervention):

Signature # 2 (upon return to work, and incorporating aftercare recommendations)

APPENDIX X

CHECKLIST FOR LAWYERS' BUSINESS DISASTER PLANNING AND RECOVERY

Imagine yourself as a lawyer whose offices have just been closed as a result of a "disaster," whether it is a fire, flood, windstorm, terrorist attack or the product of some other natural or man-made event. Building management has notified you that, in all likelihood, you will not be permitted to re-enter the building for at least a week. And, they admit it might be longer. To heighten the sense of urgency, assume you or your firm have no disaster recovery plan to which you can refer and thus no step-by-step approach to handling the situation. This is not an event anyone expected, but, as demonstrated at the World Trade Center, it is a risk faced by every lawyer, regardless of practice setting or locale.

After you kick yourself for not having a disaster plan, what is your first move? The best answers are likely to fall into one of three categories. These are: How do we contact, reassure and communicate with our employees? How do we notify and communicate with our clients? What must be done to put the firm "back in business"?[7]

In order to protect your practice against the ill effects of a catastrophic event, you or your firm should have a business continuity plan in place. It is important that the plan is available in all events and not just literally left in a drawer in your office; for instance, once a plan is put in place, consider sending it to your firm's attorneys at their homes for their retention there and/or making it available to relevant persons over the Internet, perhaps through a firm Website. Implementation of such a plan following the occurrence of a catastrophic event impacting your practice can help put you on a path to disaster recovery. The following outlines a methodology for developing a business continuity plan for catastrophic events and related considerations.

A. Impact Analysis

1. Perform an impact study of catastrophic events in order to identify functions and services the firm considers critical (i.e., for which continuity is required at all times)
    a. Include specific disaster scenarios causing different levels of disruption
    b. Examine alternative methods for conducting the firm's business, depending on the degree of disruption
    c. Examine methods for uninterrupted provision of services identified as critical
    d. Examine recovery time frames for all functions and services
    e. Examine methods of dealing with individual/personal disasters (e.g., sudden death or disability of a partner)

7. Randolph J. Burkart, *Disaster Recovery: After the Damage is Done*, N.Y.L.J., Mar. 9, 1993, p. 4. © NLP IP Company 1993.

B. Plan Preparation

1. Identify the location of at least the following:
    a. List of all clients and client matters
    b. Contact lists (e.g., rolodexes, computerized address books, etc.); in the case of all contacts which would need to be made, be sure to have specific names, addresses and telephone numbers
    c. Client files
        i. Physical
        ii. Electronic
    d. Calendar and docket for all client matters
    e. Billing records
    f. Financial records
        i. Firm operating records
        ii. Client funds
2. Write a business continuity plan (the "Plan") in case of a catastrophic event; overall, identify who in your firm will be responsible for each task set forth in the Plan
    a. Contact employees
        i. The first concern after any disaster should be to locate and ensure the safety of the firm's employees. It is equally important to let employees contact their families and to confirm that they are safe. This will be an easier process if telephone lists or directories with home numbers are routinely distributed (and mailed to all personnel). Facts which should be communicated to the employees during the initial call include:
            (A) The firm has established voice mail capability for all employees. This need assumes that the firm has a voice-mail system and that it is inoperable. The approach will involve the use of a voice mail service bureau. If at all possible, communicate the needed voice mail log-on instructions to the employee during the first call. Service bureau-based voice mail is an easy and relatively inexpensive way to keep everyone posted on the status of the firm and in contact with each other. It will, if the disaster necessitates a long-term office closing, also become a useful tool for attorneys to stay in touch with their clients.
            (B) For larger firms, using a conferencing service provider, arrange conference calls among all practice and administrative groups. This can only be done if telephone and fax numbers exist outside the office. If this does not exist, it must be created "on the fly" as attorneys make contact.[8]

8. Randolph J. Burkart, *Disaster Recovery: After the Damage is Done*, N.Y.L.J., Mar. 9, 1993, p. 4.© NLP IP Company 1993.

b. Contact clients

i. Once you have contacted all employees and ensured their safety, the next step is to contact your clients to assure them that the firm is in a position to continue to represent them and to notify them of any interim or new contact information.

ii. To assist in this process, consider the following:

(A) Establish a small command center immediately. Equip the site with at least five or six telephones, two fax machines, four to five personal computers (preferably with modems) and up to ten local telephone lines. This center will become home to your disaster team and, during the first several days, the focal point of all employees and clients. Do not worry about having calls to the firm's main number or DID lines transferred to the command center initially. For smaller firms or solo practitioners, make arrangements to use your home, a local hotel or motel or another lawyer's office (perhaps by making advance reciprocal arrangements with that lawyer).

(B) As client contact is made, the command center should be notified, and the client's name, contact and fax number centrally recorded. You do not want to alarm clients by repeatedly contacting them to assure them that your firm is "okay." Repeated and haphazard contact will send a different message; one that says all is not well and that you have no plan.

(C) As clients are identified, they should be contacted first by telephone and, then, via a brief fax message or letter. Since you or your firm may be contacting hundreds or even thousands of clients, you should not attempt to do this via your fax machines in the command center. You should look to your long distance vendor or fax vendor, who should be able to provide you with a method to "broadcast" the fax simultaneously to all addresses. The fax message should be brief, advising that the attorney responsible for the matter will contact the soon. The fax should list the command center's telephone and fax numbers. However, calls to the command center should be brief and should occur only until a temporary office is established.[9]

c. Contact courts

i. If you have cases pending, you will need to contact the courts to determine if their facilities were affected by the disaster and, if so, what plan of action they have devised. The courts are also a good source for obtaining records that have been lost or destroyed.

ii. Have "at the ready" a master application form to go to the administrative judge(s) requesting case adjournment(s) and designate a responsible attorney (e.g., head of litigation or deputy) to act on it when necessary.

d. Contact others

i. Contact banks for replacement checks and bank records

9. Randolph J. Burkart, *Disaster Recovery: After the Damage is Done*, N.Y.L.J., Mar. 9, 1993, p. 4.© NLP IP Company 1993.

ii. Contact payroll service

e. Office space/furnishings

i. Identify/communicate alternative work locations

It may be only a tent or other temporary shelter, but you need a temporary office during the time that your office is being repaired. You will want it to be as close to your office as possible. Whatever situation you arrange, assure that there is some private area in which you can converse with clients. Post a sign where your office was, directing interested parties to your temporary quarters.

If your local newspaper is up and running, consider placing an ad announcing that you have moved to a temporary location. Provide your address and your phone number and the working hours that you are available. Encourage clients to contact you to be sure you have all cases listed and that you have new locations for clients with pending matters.

Consider all that you will need to start a practice, for that is what you will be doing again. Make a list of supplies and call for them when you can. You will also need some common forms, especially a new case creation or intake sheet to record those new clients you will counsel as a result of some problem that arose from the disaster. In addition, the new case sheet may be valuable when starting to recreate a file from no available data. A copy of all of those sheets ought to be kept separate for later establishment of the necessary office databases and systems.[10]

Some firms have identified others similar to them—"twins," if you will—and made arrangements with their twin(s) for the firms to accommodate each other in case of a catastrophic event. Consider identifying a "twin" for your firm and establishing mutually cooperative contingency plans. Your firm's "twin" might not even be another law firm (e.g., consider accounting firms, brokerage firms, etc.). This is obviously intended as a possible temporary solution. Be very aware of the need to address conflict of interest and confidentiality issues in this context.

ii. Other suggestions

(A) Call local realtor to find office space

(B) Share space with others temporarily (lawyers, accountants, hotels)

(C) Obtain (rent, borrow or purchase) furnishings (desks, chairs, lamps, filing cabinets, bookshelves, etc.)

(D) Contact vendors concerning temporary location

(E) Contact Post Office and other delivery services to stop delivery to damaged location and re-route to temporary location

f. Telephone and Internet service

i. Arrange to have telephone calls forwarded to new number or arrange for telephone answering service with prepared message until new system in place

ii. Arrange temporary service with local telephone company at temporary location

10. Robert D. Reis, *After the Hurricane, The ALPS Risk Management Report*, Vol. 3, No. 12 (Dec. 1995).

iii. Phones, fax, modem, Internet use

g. Equipment

i. Contact equipment vendors regarding existing leases/contracts and your/their performance obligations under the terms of lease or contract

ii. Types of equipment needed:

(A) Computer

(B) Printer

(C) Fax machine

(D) Copier

(E) Dictation equipment

(F) Typewriters

(G) Computer network

iii. Identify portable computers/home computers and other equipment owned by the firm that might be pulled back from home use during recovery period

h. Office supplies

i. Contact supply vendor to obtain necessary supplies

ii. Contact printer to print stationery, business cards, etc.

iii. Contact forms vendors (billing forms, other forms)

i. Library

i. Evaluate possibility/cost of repairing books (vacuum/freeze dry method)

ii. Identify subscriptions/volumes to be replaced immediately

iii. Arrange with other firms/universities to use library facilities

iv. Establish link with providers, such as Lexis, Loislaw, or Westlaw at your new office location

v. Publish a resource list for attorneys about where to go for library services

j. Documents and records

i. Client documents and records (opposing counsel/clients/Secretary of State's Office may be able to assist with copies and reconstruction of events, dates, deadlines, etc.)

(A) Leases

(B) Wills

(C) Agreements

(D) Settlements

(E) Corporate records

(F) Docket and calendar records

(G) Pleading files and court papers

(H) Client billing information

(I) Current address of client's counsel and contacts

(J) Billable time and receivables information

(K) Correspondence

ii. Firm documents and records

(A) Leases/subleases (landlord, leasing companies may have copies)

(B) Agreements (other parties may have copies)

(C) Client list of names, addresses, phone numbers

(D) Client files and billing records (opposing counsel/clients may be able to provide copies)

(E) Accounts receivable information

(F) Work-in-process information

(G) Financial records (CPA may be able to provide copies)

(H) Insurance policies, broker information (insurance company has policy)

(I) Inventory of physical assets

(J) Payroll and employee records (payroll service, employees may be able to provide information to reconstruct)

iii. Solo practitioners and small firm attorneys should give serious consideration to off-site backup of computer files, to the extent you have not already done so. You may also wish to start a process of scanning or electronic imaging of key documents in your files, back copies of which should also be stored off-site.

k. Malpractice insurance issues

i. After a disaster, a law firm may be exposed to malpractice claims resulting from the difficult and time-consuming nature of recovering lost or destroyed records. Below are some of the issues that may arise.

(A) The most frequent source of claims is likely to be failure to take action within a specified time period. Usually, this is seen in the failure to file an action within the statutory period. Possibilities include lawyers sued for failure to file pleadings within the permissible time, failure to comply with orders for filing of any response or other document within a specified time and a host of other errors or omissions that all result from a failure to keep and adhere to a good calendar.

(B) Lack of confidentiality may arise as records that were blown about are recovered.

(C) Some clients may allege that their rights or positions were not prosecuted with sufficient zeal as available records and evidence were lost.

(D) New clients may be in dire straits and become unreasonable if their concerns cannot be addressed and resolved promptly. Unrealistic expectations often turn into claims against a lawyer when no one else can solve the problem nor has sufficient assets to address the issues.[11]

ii. If the disaster is widespread, the courts and government are likely to be sympathetic to the plight of those affected. For instance, as a result of the World Trade Center disaster, Governor Pataki signed several executive orders designed to suspend and delay the statutes of limitations for certain actions. Chief Judge Judith Kaye also issued a statement to the members of the New York State Bar stating that the courts would be understanding and honor requests for adjournments where appropriate. Attorneys should apprise themselves of any such actions on the part of the government.

iii. In any event, you should contact the courts and opposing counsel, notify them of your situation and new contact information, and request copies of documents for pending cases and time extensions where necessary. In addition, contact your malpractice/"E&O" insurer to inform them of the disaster and obtain information and advice about how to avoid malpractice in event of missed deadlines and other potential errors or omissions resulting from the disaster.

11. Robert D. Reis, *After the Hurricane, The ALPS Risk Management Report*, Vol. 3, No. 12 (Dec. 1995).

APPENDIX Y

RELEVANT EXCERPTS FROM THE CPLR AND JUDICIARY LAW

CPLR § 321. Attorney withdrawal

(b) Change or withdrawal of attorney

1. Unless the party is a person specified in section 1201, an attorney of record may be changed, by filing with the clerk, a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

2. An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

(c) Death, removal or disability of attorney. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

CPLR § 4503. Attorney-client privilege

(a) 1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting there from, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

CPLR § 5514. Extension of time to take appeal or to move for permission to appeal

(b) Disability of attorney. If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

(c) Other extensions of time; substitutions or omissions. No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, section 1022, or section 5520.

Judiciary Law § 499. Lawyer assistance committees

1. Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privilege may be waived only by the person, firm or corporation which has furnished information to the committee.

2. Immunity from liability. Any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of, any of the committees referred to in subdivision one of this section shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of any proceeding, the good faith of any such person, firm or corporation shall be presumed.

22 NYCRR § 1200.19 [DR 4-101]. Preservation of Confidences and Secrets of a Client

(a) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under section 1200.19(c) of this Part, a lawyer shall not knowingly:

(1) Reveal a confidence or secret of a client.

(2) Use a confidence or secret of a client to the disadvantage of the client.

(3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(c) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of a client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

(5) Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

(d) A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client,

except that a lawyer may reveal the information allowed by subdivision (c) of this section through an employee.

22 NYCRR § 1200.15 [DR 2-110]. Withdrawal from Employment

(a) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) Even when withdrawal is otherwise permitted or required under section 1200.15(a)(1), (b) or (c) of this Part, a lawyer shall not withdraw from employment until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(b) Mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(3) The lawyer's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(4) The lawyer is discharged by his or her client.

(c) Permissive withdrawal. Except as stated in section 1200.15(a) of this Part, a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(2) The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.

(4) The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.

(5) The lawyer's client knowingly and freely assents to termination of the employment.

APPENDIX Z

DISCIPLINARY RULES, ETHICAL CONSIDERATIONS AND ETHICS OPINIONS RELATING TO LAW PRACTICE CONTINUITY

New York State Disciplinary Rules

DR 1-102 [22 NYCRR § 1200.3] Misconduct.

DR 1-103 [22 NYCRR § 1200.4] Disclosure of information to authorities.

DR 1-104 [22 NYCRR § 1200.5] Responsibilities of a partner or supervisory lawyer and subordinate lawyers.

DR 2-102 [22 NYCRR § 1200.7] Professional notices, letterheads, and signs.

DR 2-103 [22 NYCRR § 1200.8] Solicitation and recommendation of professional employment.

DR 2-106 [22 NYCRR § 1200.11] Fee for legal services.

DR 2-107 [22 NYCRR § 1200.12] Division of fees among lawyers.

DR 2-108 [22 NYCRR § 1200.13] Agreements restricting the practice of a lawyer.

DR 2-110 [22 NYCRR § 1200.15] Withdrawal from employment.

DR 2-111 [22 NYCRR § 1200.15-a] Sale of law practice.

DR 3-101 [22 NYCRR § 1200.16] Aiding unauthorized practice of law.

DR 3-102 [22 NYCRR § 1200.17] Dividing legal fees with a non-lawyer.

DR 4-101 [22 NYCRR § 1200.19] Preservation of confidences and secrets of a client.

DR 5-101 [22 NYCRR § 1200.20] Conflict of interest; lawyer's own interests.

DR 5-104 [22 NYCRR § 1200.23] Transactions between lawyer and client.

DR 5-105 [22 NYCRR § 1200.24] Conflict of interest; simultaneous representation

DR 5-107 [22 NYCRR § 1200.26] Avoiding influence by others than the client.

DR 5-108 [22 NYCRR § 1200.27] Conflict of interest; former client.

DR 6-101 [22 NYCRR § 1200.30] Failing to act competently.

DR 7-101 [22 NYCRR § 1200.32] Representing a client zealously.

DR 9-102 [22 NYCRR § 1200.46] Preserving identity of funds and property of others; fiduciary responsibility; commingling and misappropriation of client funds or property; maintenance of bank accounts; record keeping; examination of records.

New York State Bar Association Committee on Professional Ethics

Opinion #48	Fee settlement by deceased lawyer's estate.
Opinion #178	Withdrawal from employment.
Opinion #275	Duty of lawyer to disclose failure to act.
Opinion #281	Payment to retired partner or estate of deceased partner.
Opinion #295	Duty of lawyer to client for professional liability.
Opinion #341	Notice to clients whose wills lawyer holds when he retires.
Opinion #396	Duty to respond to client communications.
Opinion #460	Preservation of closed files.
Opinion #480	Duty to report violation of Disciplinary Rule; former client.
Opinion #521	Wills; contact with executor, beneficiaries.
Opinion #531	Duty to report violation of Disciplinary Rule; communication to member of rehabilitative committee.
Opinion #545	Employment, withdrawal from, due to client's unlawful conduct.
Opinion #622	Firm name; deceased partner; successor firm.
Opinion #623	Closed files; disposition procedures; dissolution of law firm.
Opinion #635	Conflict of interest; adverse interests of lawyer.
Opinion #674	Conflict of interest; multiple representation of corporation and corporate officer.
Opinion #680	Record retention by electronic means digest: lawyers may retain some records in the form of computer images, but certain records must be retained in original form.
Opinion #699	Sale of practice by newly elected judge.
Opinion #707	Sale of portion of law practice.
Opinion #715	Conflict of interest; sub-contractor to multiple law firms.
Opinion #724	Wills; obligations of law firm in regard to wills in its custody.
Opinion #734	Attorney's obligation to report to a client a significant error or omission that may give rise to a possible malpractice claim.

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Opinion #1993-1	Assignment by retired attorney of accounts receivable to another attorney.
Opinion #1999-04	Law firm mergers.
Opinion #1999-05	Lawyer's obligations regarding disposition of original wills held for safekeeping where the testator cannot be located and the lawyer is retiring or the firm is dissolving.

New York County Lawyers' Association Committee on Professional Ethics

Opinion #709	Partners and legal representatives of deceased attorney; duty to notify clients; lawyer as fiduciary in will.
Opinion #725	Retention of closed client files/papers.
Opinion #728	Publicity; Partner withdrawal from firm partnership.

Nassau County Bar Association Ethics Opinions

Opinion #81-10	Recommended procedure for attorneys, for the management of files on closed matters.
Opinion #49/88	Payment of referral fees to estate of deceased employer and to attorney who referred cases to that attorney before his death.
Opinion #89-23	Maintenance by "guardian" attorney of deceased attorney's files on closed matters.
Opinion #89-43	Custodian attorney's release of files to client of deceased attorney.
Opinion #90-14	Sharing fee with attorney who has resigned.
Opinion #91-35	Disclosure of amount charged to clients and other information about clients.
Opinion #92-27	Maintenance by "guardian" attorney of deceased attorney's files on closed matters.

American Bar Association Standing Committee on Ethics and Professional Responsibility

Opinion #327	A law firm may, in accordance with a pre-existing retirement plan, pay to a retired partner, or for a fixed period to the estate of a deceased partner, an amount measured by earnings accrued after the retirement or death of the partner.
Opinion #92-369	Disposition of deceased sole practitioner's client files and property.

Ethical Considerations

EC 2-34	Sale of law practice – protection of clients.
EC 2-35	Sale of law practice – notice to clients.
EC 2-36	Sale of law practice – client confidences.

NEW YORK STATE DISCIPLINARY RULES

DR 1-102 [22 NYCRR § 1200.3] Misconduct.

A. A lawyer or law firm shall not:

1. Violate a Disciplinary Rule.
2. Circumvent a Disciplinary Rule through actions of another.
3. Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer.
4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
5. Engage in conduct that is prejudicial to the administration of justice.
6. Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.
7. Engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

DR 1-103 [22 NYCRR § 1200.4] Disclosure of Information to Authorities.

A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 [1200.3] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

DR 1-104 [22 NYCRR § 1200.5] Responsibilities of a Partner or Supervisory Lawyer and Subordinate Lawyers.

A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or

2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

E. A lawyer shall comply with these Disciplinary Rules notwithstanding that the lawyer acted at the direction of another person.

F. A subordinate lawyer does not violate these Disciplinary Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

DR 2-102 [22 NYCRR § 1200.7] Professional Notices, Letterheads, and Signs.

C. A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners.

DR 2-103 [22 NYCRR §1200.8] Solicitation and Recommendation of Professional Employment.

A. A lawyer shall not solicit professional employment from a prospective client:

1. By in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client or current client;

2. By written or recorded communication if:

a. The communication or contact violates DR 2-101 [1200.6] (A);

b. The prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

c. The solicitation involves coercion, duress or harassment;

d. The lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient make it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney; or

e. The lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

B. A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

1. A lawyer or law firm may refer clients to a non-legal professional or non-legal professional service firm pursuant to a contractual relationship with such non-legal professional or non-legal professional service firm to provide legal and other professional services on a systematic

and continuing basis as permitted by DR 1-107, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; or

2. A lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

C. No written solicitation shall be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail.

D. A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

1. A legal aid office or public defender office:
   a. Operated or sponsored by a duly accredited law school;
   b. Operated or sponsored by a bona fide, non-profit community organization;
   c. Operated or sponsored by a governmental agency; or
   d. Operated, sponsored, or approved by a bar association;
2. A military legal assistance office;
3. A lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule;
4. Any bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
   a. Neither the lawyer, not the lawyer's partner, nor associate, nor any other affiliated lawyer nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
   b. Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
   c. The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
   d. The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief.
   e. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations.

f. Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

E. A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks services does so as a result of conduct prohibited under this Disciplinary Rule.

F. Advertising not proscribed under DR 2-101 [1200.6] shall not be deemed in violation of any provision of this Disciplinary Rule.

DR 2-106 [22 NYCRR § 1200.11] Fee for Legal Services.

A. A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee.

C. A lawyer shall not enter into an arrangement for, charge or collect:

1. A contingent fee for representing a defendant in a criminal case.

2. Any fee in a domestic relations matter:

b. Unless a written retainer agreement is signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement. A lawyer shall not include in the written retainer agreement a nonrefundable fee clause; or

E. In domestic relations matters, a lawyer shall resolve fee disputes by arbitration at the election of the client.

F. In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

DR 2-107 [22 NYCRR § 1200.12] Division of Fees among Lawyers.

A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:

1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

2. The division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.

3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

B. This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108 [22 NYCRR § 1200.13] Agreements Restricting the Practice of a Lawyer.

A. A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

B. In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.

DR 2-110 [22 NYCRR § 1200.15] Withdrawal from Employment.

A. In general.

1. If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

2. Even when withdrawal is otherwise permitted or required under DR 2-110 [1200.15] (A)(1), (B) or (C), a lawyer shall not withdraw from employment until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.

3. A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

B. Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

1. The lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

2. The lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule.

3. The lawyer's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

4. The lawyer is discharged by his or her client.

C. Permissive withdrawal.

Except as stated in DR 2-110 [1200.15] (A), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

1. The client:

a. Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

b. Persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

c. Insists that the lawyer pursue a course of conduct which is illegal or prohibited under the Disciplinary Rules.

d. By other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.

e. Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

f. Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

g. Has used the lawyer's services to perpetrate a crime or fraud.

2. The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.

3. The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

4. The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.

5. The lawyer's client knowingly and freely assents to termination of the employment.

6. The lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

DR 2-111 [22 NYCRR § 1200.15-a] Sale of Law Practice.

A. A lawyer retiring from a private practice of law, a law firm one or more members of which are retiring from the private practice of law with the firm, or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including good will, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of this Code. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

B. Confidences and secrets.

1. With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as a confidence or secret under DR 4-101 [1200.19].

2. Notwithstanding DR 4-101 [1200.19], the seller may provide the prospective buyer with information as to individual clients:

a. concerning the identity of the client, except as provided in DR 2-111 [1200.15-a] (B)(6);

b. concerning the status and general nature of the matter;

c. available in public court files; and

d. concerning the financial terms of the attorney-client relationship and the payment status of the client's account.

3. Prior to making any disclosure of confidences or secrets that may be permitted under DR 2-111 [1200.15-a] (B)(2) the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidences or secrets, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to DR 2-111 [1200.15-a] (B)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless seller shall have obtained the consent of the client in accordance with DR 4-101 [1200.19] (C)(1).

4. Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

5. Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

6. If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes a confidence or secret in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

C. Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

1. The client's right to retain other counsel or to take possession of the file;

2. The fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

3. The fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

4. Proposed fee increases, if any, permitted under DR 2-111 [1200.15-a] (E); and

5. The identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in the state, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to re-sell the practice.

D. When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

E. The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

DR 3-101 [22 NYCRR § 1200.16] Aiding Unauthorized Practice of Law.

A. A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

B. A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR 3-102 [22 NYCRR § 1200.17] Dividing Legal Fees with a Non-lawyer.

A. A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

1. An agreement by a lawyer with his or her firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

2. A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

3. A lawyer or law firm may compensate a non-lawyer employee, or include a non-lawyer employee in a retirement plan, based in whole or in part on a profit-sharing arrangement.

DR 4-101 [22 NYCRR § 1200.19] Preservation of Confidences and Secrets of a Client.

A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B. Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.
2. Use a confidence or secret of a client to the disadvantage of the client.
3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

C. A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
3. The intention of a client to commit a crime and the information necessary to prevent the crime.
4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

D. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 [1200.19] (C) through an employee.

DR 5-101 [22 NYCRR § 1200.20] Conflicts of Interest – Lawyer's Own Interests.

A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

DR 5-104 [22 NYCRR § 1200.23] Transactions Between Lawyer and Client.

A. A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

1. The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
2. The lawyer advises the client to seek the advice of independent counsel in the transaction; and
3. The client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.

B. Prior to conclusion of all aspects of the matter giving rise to employment, a lawyer shall not negotiate or enter into any arrangement or understanding:

1. With a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the employment or proposed employment.
2. With any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of employment by a client or prospective client.

DR 5-105 [22 NYCRR § 1200.24] Conflict of Interest; Simultaneous Representation.

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

C. In the situations covered by DR 5-105 [1200.24] (A and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

D. While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101 [1200.20] (A), DR 5-105 [1200.24] (C), DR 5-108 [1200.27] (A) or (B), or DR 9-101 [1200.45] (B) except as otherwise provided therein.

E. A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105 [1200.24] (D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-101 [1200.24] (D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105 [1200.24] (D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105 [1200.24] (D).

DR 5-107 [22 NYCRR § 1200.26] Avoiding Influence by Others than the Client.

A. Except with the consent of the client after full disclosure a lawyer shall not:

1. Accept compensation for legal services from one other than the client.

2. Accept from one other than the client anything of value related to his or her representation of or employment by the client.

B. Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client under DR 4-101 [1200.19] (B).

DR 5-108 [22 NYCRR § 1200.27] Conflict of Interest; Former Client.

A. Except as provided in DR 9-101 [1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19] (C) or when the confidence or secret has become generally known.

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and

2. About whom the lawyer had acquired information protected by DR 4-101 [1200.19] (B) that is material to the matter.

C. Notwithstanding the provisions of DR 5-105 [1200.24] (D), when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm only if the law firm or any lawyer remaining in the firm has information protected by DR 4-101 [1200.19] (B) that is material to the matter, unless the affected client consents after full disclosure.

DR 6-101 [22 NYCRR § 1200.30] Failing to Act Competently.

A. A lawyer shall not:

1. Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.

2. Handle a legal matter without preparation adequate in the circumstances.

3. Neglect a legal matter entrusted to the lawyer.

DR 7-101 [22 NYCRR § 1200.32] Representing a Client Zealously.

A. A lawyer shall not intentionally:

1. Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by subdivision (b) of this section. A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

DR 9-102 [22 NYCRR § 1200.46] Preserving identity of funds and property of others; fiduciary responsibility; commingling and misappropriation of client funds or property; maintenance of bank accounts; record keeping; examination of records.

A. Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

B. Separate Accounts.

1. A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law, shall maintain such funds in a banking institution within the State of New York which agrees to provide dishonored check reports in accordance with the provisions of Part 1300 of the joint rules of the Appellate Divisions. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which he or she is a member, or in the name of the lawyer or firm of lawyers by whom he or she is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts which the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity, into which special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside the State of New York if such banking institution complies with such Part 1300, and the lawyer has obtained the prior written approval of the person to whom such funds belong which specifies the name and address of the office or branch of the banking institution where such funds are to be maintained.

2. A lawyer or the lawyer's firm shall identify the special bank account or accounts required by section 1200.46 (b)(1) of this Part as an "Attorney Special Account," or "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or lawyer's firm.

3. Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

4. Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

C. Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

1. Promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest.

2. Identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
3. Maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them.
4. Promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.

D. Required Bookkeeping Records.

A lawyer shall maintain for seven years after the events which they record:

1. The records of all deposits in and withdrawals from the accounts specified in section 1200.46(b) of this Part and of any other bank account which concerns or affects the lawyer's practice of law. These records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement.
2. A record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.
3. Copies of all retainer and compensation agreements with clients.
4. Copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf.
5. Copies of all bills rendered to clients.
6. Copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed.
7. Copies of all retainer and closing statements filed with the Office of Court Administration.
8. All checkbooks and check stubs, bank statements, pre-numbered canceled checks and duplicate deposit slips.
9. Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.
10. For purposes of section 1200.46(d) of this Part, a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

E. Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only an attorney admitted to practice law in New York State shall be an authorized signatory of a special account.

F. Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

G. Designation of Successor Signatories.

1. Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

2. An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this rule.

3. The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

H. Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in section 1200.46 (d) of this Part.

I. Availability of Bookkeeping Records; Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Disciplinary Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto and any such records shall be produced in response to a notice or subpoena *duces tecum* issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this subdivision shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the lawyer-client privilege.

J. Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Disciplinary Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

ETHICAL CONSIDERATIONS

Sale of Law Practice

EC 2-34 Lawyers and law firms, particularly sole practitioners, should have the ability to sell law practices, including good will, provided certain conditions, designed primarily to protect clients, are satisfied. Where a lawyer is deceased, disabled, or missing, the sale may be effected by the lawyer's personal representative. Although the sale of a law practice should ideally result in the entire practice being transferred to a single buyer, there is no single-buyer requirement.

EC 2-35 Notice to clients of the sale of the practice should be timely provided, preferably as soon as possible after an agreement has been reached by the seller and the buyer, and in any event no later than as soon as practicable after the day of closing. The sale of litigated matters does not relieve the seller of his or her obligations under DR 2-110 regarding withdrawal. To the extent that conflicts of interest preclude the buyer from undertaking the representation of any particular clients of the seller, the seller shall, to the extent reasonably practicable, assist such clients in securing successor counsel. If the client declines to engage successor counsel, and if the seller cannot properly withdraw from the representation under DR 2-110, the seller shall retain responsibility for the representation.

EC 2-36 Information concerning client confidences and secrets should not be disclosed to prospective buyers except to the extent permitted by DR 2-111. To the extent disclosures are made, extreme care should be taken to ensure that client confidences and secrets are protected by all lawyers who become privy to such information in the course of examining the seller's practice for possible purchase. Sellers should consider requiring prospective buyers to execute written confidentiality agreements prior to affording them access to any information concerning client matters.

APPENDIX AA

TEN THINGS NOT TO DO WHEN YOU RETIRE

By David Kee

I. DON'T RUSH

Relax. Don't try to immediately fill every moment. It's good, even essential, to have varied interests and hobbies, but there is no rule, or even a guideline, that says you initially have to fill each moment of every day. Learn to meditate. Try yoga. Take long walks alone or with someone you love. If you don't love anyone, consider getting a dog.

II. DON'T FRET

Relax even more. Take a sabbatical. If you're like most of us you've never had one. Take a month (Type A) or six months or more (Type B) and do or don't do as you please (See V). You can fill in (if you must) more "productive" activities later. You may simply enjoy having more time to talk with folks without looking at the clock. You are more than what you did for a living.

III. DON'T GO BACK INTO THE WORKPLACE IF YOU ARE NOT TOTALLY PREPARED FOR THE CHANGES YOU WILL FIND

Unless you have a paid consulting or part-time position (read: if you were not afraid to let go totally) at your previous place of employment, your views are no more than that – your views. When you take your arm out of the water, there is no hole left behind. No one is indispensable, and that's as it should be.

IV. DON'T TRY TO IMPRESS PEOPLE WITH HOW IMPORTANT, COMPETENT, ETC., ETC., YOU WERE IN YOUR PAST LIFE

You will be liked or disliked, accepted or rejected, happy or unhappy, based on who you are now.

V. DON'T OVERLOOK THE HOME FRONT

Call it home dynamics, or psychology of the home front. Call it anything you wish – but if you are living with a significant other, you are about to attach new meaning to the term "significance." Neither of you is as psychologically prepared for the change as you thought you were. Discuss the changes, as much as they can be envisioned, before retirement, and after, and discuss them often. After a few adjustments on everyone's part, life can be even more beautiful.

VI. THINKING OF MOVING? DON'T BUY!! RENT, RENT, RENT!!

Studies have shown that only four percent of retirees actually make a permanent move. Putting down roots is important, but so are new experiences (See VII). Find a new place you like? Rent for at least a year before you buy. When you crunch the numbers, it makes great financial sense, especially if you are financing the new purchase from savings or other investments, or taking out a mortgage.

VII. YOU DON'T HAVE TO BE GEOGRAPHICALLY RESTRICTED

You can travel. Maine offers a huge variety of places and experiences. Colleges across the country rent out rooms. Inexpensive travel abroad is possible. Sponge off friends, but don't give out your address.

VII. DON'T THINK FUTURE GENERATIONS WON'T WANT TO KNOW ABOUT YOU, WHAT YOU THOUGHT AND FELT, FIGURED OUT AND RE-FIGURED OUT

Would you like to read interesting aspects of the life of your great grandparents? Future generations of your family will feel the same about you. You may not be considered the world's greatest autobiographer but you are a direct link to the past and future. Write about it.

IX. DON'T BE AFRAID

Change can be frightening but not changing is even more so. Try new things that might interest you and know that it's okay to fall on your face. Who's judging? Who cares? Create something new – this may be as close as we ever get to God – even if it's a pottery salad bowl that looks like a frying pan. It never existed before you created it. Time can get away from us, so structure time to create.

The use of the imagination should come first – at least for some part of every day of your life. – Brenda Ueland

X. DON'T OVERLOOK A JOURNEY INWARD

Don't be afraid of anything. It will all work out (whatever "it" may be for you). Get to know yourself and be yourself. Your value is not limited to what you did for a living.

Finally, when asked "What do you do in retirement?" you can honestly respond, "I enjoy life".

David Kee is a Past President of the Maine State Bar Association and retired in 1998 after practicing law with Fellows, Kee & Tymoczko in Bucksport, Maine, for more than 30 years. He is currently the Director of the Maine Assistance Program for Lawyers and Judges.