Winding Down:
Considerations for Exiting the Practice of Law

SUCCESSION PLANNING GUIDEBOOK

Wisconsin Lawyers Mutual
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State Bar of Wisconsin Senior Lawyers Division


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FOREWARD

Ending a law practice is not easy. Your clients' matters don't end neatly on a selected date, and great care needs to be taken to make sure your duties to your clients continue to be met during and after your transition out of practice. WILMIC and the Senior Lawyers Division of the State Bar of Wisconsin developed this handbook to help you meet those duties whether you are closing your practice, selling your practice, or merging your practice with another law firm.

WILMIC's experience in 35 years of insuring lawyers' professional liability gives us unique insight into mistakes, real or perceived, that lead to malpractice claims. It has also given us the distinct pleasure of working with experts in many areas of the practice of law, including those familiar with the obligations and risks of transitioning out of the private practice of law. Some of those experts have contributed to this guide and more are listed in the guide as additional resources. We hope you find their advice as helpful as we do and that your transition goes smoothly.

Katja Kunzke
CEO of Wisconsin Lawyers Mutual Insurance Company and
Member of the Senior Lawyers Division Board of Directors
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CHAPTER ONE

Transitioning Your Law Practice — When Do You Know It's the Right Time?

By Atty. Dean Dietrich
State Bar of Wisconsin Senior Lawyers Division

INTRODUCTION

As many senior lawyers reach the pinnacle of their careers and think about their future outside the practice of law, the notion of transitioning from being a lawyer becomes a very challenging time. Many have said that the practice of law is one of the few businesses where someone does not have to retire and can continue on in some type of reduced or limited capacity. Others have said that they do not know how to do anything other than being a lawyer and they are fearful of losing their identity if they step away from the practice of law. Others have spent so much time helping others that they have not taken the time to prepare for life after being a lawyer and cannot afford to stop practicing law even though they deserve to stop or really should stop because of other conditions and considerations.

There is no single answer to how to transition away from the practice of law or whether one should transition away from the practice of law. Some lawyers have their whole identity centered around being a lawyer and cannot imagine doing anything else. Other lawyers know that it is time to transition away from the practice, but do not have other interests

and are afraid that they will either die from boredom or die from lack of mental stimulation. Other lawyers see their friends and acquaintances enjoying retirement and wonder if they are going to be as lucky in finding life after the practice of law.

When?

The most challenging step in thinking about transitioning away from the practice of law is deciding when to think about it, when to plan for it, and when to actually make the transition. Some lawyers plan for the day they are going to leave the practice of law and set a date several years before so they are working toward an end date. Other lawyers think about a "soft" transition where they will move away from the more stressful aspects of their law practice, but continue to engage in a limited practice and focus on helping others. Other lawyers are excited about the opportunity to use their legal experiences to help others in a pro bono capacity and fulfill some of their dreams of helping others. Deciding to consider a transition requires someone to take the time to plan and to be honest with one's self. Those who no longer enjoy the stress of the law practice can begin to see the need to plan for transitioning out of the legal business. Those who no longer get enjoyment from helping others or addressing challenging legal questions also see that the time is right to start planning for something new and different. It is a very personal decision, but it requires a lawyer to be honest with him/herself and really recognize how they feel about the practice of law and the stress and strain of that business. Deciding that you no longer like your clients may be the hardest thing to realize, but may be the best sign that it is time to transition away from the practice of law. Deciding that you can no longer stand the stress of clients demanding an immediate response to their question is another signal that it is time to look at transitioning.

Obviously, physical and mental challenges are an important consideration when thinking about transitioning away from the practice of law. Dealing with physical challenges are generally to obvious and help a lawyer decide that it is time to make a transition. Mental challenges are more

difficult – it is very hard to assess whether you are mentally challenged in some way that prevents you from engaging in the active practice of law. Checking with others and talking with others about your performance or perceived challenges to your ability to serve your clients is one way to make an assessment of your ability to continue practicing law. Again, the most important challenge is being honest with yourself and listening to others who can provide advice and counsel regarding your capabilities.

I often see lawyers setting a date when they are going to retire from the practice of law based upon arbitrary considerations like age or amount of time spent as a lawyer or when the retirement monies have reached a certain level. This may be helpful to the lawyer in initiating a planning process but it may also be a false plan because the lawyer fails to do any introspection to know whether or not it is time to transition away from the practice of law. Each lawyer must make their own decision based upon their own circumstances.

How?

How to transition away from the practice of law is the topic of many articles and advice columns that try to help a lawyer understand that it is okay to make a transition and stop feeling the need to help others. Unfortunately, what may work for one person may be a disaster for another person. Implementing a plan to transition away from the practice of law is certainly an individual consideration but it also assumes you have a plan or have thought about a plan.

I think the most important factor for lawyers is to provide a safe place for clients to continue to receive help and services. Lawyers spend their entire career helping others and working to address the needs of clients, so it only feels right to make sure that there is a plan in place to help clients continue to receive quality services as the lawyer transitions away from representation. This is not always an easy thing to do especially in solo and small firm practices. Finding successor counsel that can provide the same level of services is an important aspect of creating a transition plan for the lawyer. Visiting with clients about the transition plan and

the timing of the transition plan is also an important aspect of ensuring that your clients are being taken care of. It is better to communicate your plans instead of having your clients make assumptions regarding your continued practice or transitioning of your current representation.

Often, it is not easy to develop and implement a succession plan for representation of your clients. One alternative is to find and train a successor but that becomes very challenging depending upon your location and your type of practice. Another option is to explore opportunities with other attorneys in your area and look for a way to transition clients with perhaps joint representation of the client during the transition process or an agreement that the lawyer will continue representation while another lawyer shadows the lawyer to become familiar with the issues involved.

Tips

As I said, making a decision to transition your law practice and your time as a lawyer is a very individual decision. Here are some tips:

- **Talk to others.** It is important to talk out your thinking and thought process regarding transitioning and moving away from the practice of law. This may involve family members or close friends or maybe someone who is in the same situation that you are in. It is also important to listen to what others say and to digest that information, not make a rash decision.

- **Seriously think about it.** It is important to give serious consideration to what you want to do and when you want to do it. Being forced to transition out of your law practice because of mistakes made or financial issues is not a good way to prepare for and implement a transition. You need to give this serious thought. You also need to recognize that your thinking may change and finding the right decision and the right time is going to be based upon your individual situation and your individual feelings. But it is most important to think about it and be comfortable with any decisions that you make.

- **Think about others.** As you think about transitioning your law practice, you need to think about others and the impact that a decision may have on others. People that you work with and family members will be impacted the most. A high priority should be your clients and how your transition planning will affect your clients and their future. You have spent many years working with clients and building trust with clients so you need to include them in your planning process.

- **Recognize that considerations may change.** Life is full of change and you need to recognize that your considerations in thinking about transitioning away from the practice of law may change based upon many different factors. Health is often a very important factor that needs to be considered and can change at a moment's notice. Mental health and personal satisfaction are also factors that can change without you having control.

- **Focus on business considerations.** As you consider transitioning from the practice of law, it is important to identify business considerations and work through those considerations in your planning process. Income and financial status are two very important considerations. Maintaining some type of malpractice insurance (tail coverage) is another important consideration. How you handle your office situation and personnel is another important consideration. You need to set aside time and consult with others, as needed, to make sure you are looking at the business considerations of your transition planning.

- **Address your fears.** One of the most challenging aspects of transition planning is addressing your personal fears of the transition process. What are you going to do with your free time? What are you going to do to keep busy? How much do you want to participate in community activities? How much do you want to stay connected to the law? These are the types of questions that you need to consider as you plan your thinking around a change in your professional endeavors. Everyone I talk to, however, says that they are busier in retirement than they were

when they were actively practicing law, so I wonder whether there really needs to be a lot of planning about commitments ahead of time. The important aspect of this is that you have an idea in mind regarding your plans and commitments so that you do not over commit and place yourself back in a setting that you actually were trying to move away from, such as excess demands upon your time.

The aging of the population of lawyers throughout our country and the world is an obvious fact. As lawyers, we spend a great deal of time planning our strategies and focusing our attention on meeting the needs of our clients. To make a proper transition away from the practice of law, lawyers need to spend the time to think ahead and develop a plan (or maybe just guidelines) for transitioning away from the practice of law. It is most important that you make the transition under your control and not be forced to do something by others or by a particular bad situation. Everyone has a different view of how and when to make the transition, so it is a personal decision, but the best advice is think ahead and develop a plan that will meet your needs and the needs of others around you.

CHAPTER TWO

What Is My Law Practice Worth? Valuation of a Law Firm and a Law Practice

By James D. Cotterman

Lawyers leaving a law practice have an economic interest in monetizing their career-long investment in building a client portfolio and a referral network. They have invested time, knowledge and care into relationships created to solve clients' problems, advance clients' interests and navigate clients' legal and regulatory responsibilities. They have devoted much effort to establishing professional credentials and a visible presence for their particular experience and expertise. How each lawyer has accomplished this depends on his or her particular practice, market and style. But while the means may vary, the results are the same — access to clients who have legal needs. And this is the value the acquirers wish to capture.

With a changing marketplace for legal services, many of the old rules for valuing a law firm or law practice need to be reexamined. Due diligence must be more thorough and conducted with greater skepticism. The market of sellers (retiring lawyers from the Boomer generation) is growing rapidly. At the same time, the market of buyers (the successor lawyers) have become more experienced with the challenges of transfer-

ring practices. And those clients and referral networks (the assets being monetized) have become more unpredictable. Clients are more willing to seek alternatives to the traditional, longstanding relationship with a single trusted advisor for their legal and regulatory needs. Add rapidly changing advances in technology which change how the profession works and where it works; which affects the lawyer-client relationship and ultimately the value of that relationship. And finally, potential buyers and sellers should take note of the liberalization of standards in the UK and elsewhere that, for the first time, have allowed outside investment in law firms by non-lawyers. A similar change in the US would be a potential game changer for firm valuation.

Even without the liberalization of ownership standards, the valuation landscape has changed and generally not for the better from a seller's perspective. Buying professional practices is recognized as a much more difficult activity today than it was a decade ago. Pricing models, and reasonable hopes and expectations for pricing conversion and future pricing increases are vastly different today.

Traditionally the opportunity to sell a small firm or for a sole practitioner to join a larger firm as part of a transition and exit strategy was predicated upon the assumption that clients would stay with the new firm after a short (one to three year) transition period, that the new firm subsequently would be able to convert those clients to its higher pricing models and that the year over year rate increases historically achieved would be repeated in the future. All three of those assumptions must be examined far more critically today. Clients may not "go along" with the handoff and it's likely they will be much less willing to accept an upsell in pricing. And the rate increase patterns pre-recession are unlikely to return in the current environment. In fact, a market has developed for practitioners leaving larger, higher-priced firms to go to smaller less costly firms where they can reduce pricing to keep clients who have become quite cost conscious.

Current pricing models, along with the likelihood of client retention, successful pricing conversion and future pricing increases are all critical elements to consider in determining the value of a practice. Re-

cent changes have complicated valuation and altered the best means to achieve a positive outcome for all parties (seller, buyer and client).

Valuing a business concern is a specialty service, built on proper experience and knowledge, good tools and data. There are accrediting organizations who provide training and credentialing for those who wish to develop a valuation practice. Such organizations include the AICPA and NACVA. And there are networks, such as the ABA (no, not the American Bar Association, but American Business Appraisers) who have a network of professionals credentialed in various aspects of valuation.

When searching for someone to assist with monetizing the value of your law practice, recognize that the practice you have built is deeply specialized. It is a closely-held business where the valuation and transfer task is complicated by several factors. Within the category of closely-held businesses, it is a professional practice which further complicates the task. And finally it is in the field of law, where the task becomes most difficult of all. What is the fair value of a lifetime of work building a law practice? This writing discusses the issues and methods to answer that question.

What's Being Valued—What's Being Transferred?

This very simple question is often the one most overlooked. One cannot value a law practice without the answer of what's being transferred, although many people try.

The seller is providing the accumulated efforts of establishing trust-based relationships with clients, building relationships with contacts and referral sources, creating a market presence professionally and among desired clients, and developing the infrastructure to deliver legal services.

The buyer is looking for an ongoing stream of income that is represented primarily by the client base and referral sources of the seller. The buyer is hopeful that (s)he can assume the trust position with clients and market presence of the seller. In addition, there are hard (often called tangible) assets and intangibles such as an established business operation that make up the practice's infrastructure.

The clients are looking for consistent advice, steady counsel and

retention of their institutional knowledge; more directly, they are looking for solutions to problems or issues from someone who understands them and their needs and someone they trust.

In essence, what's being transferred can be separated into two components which will be valued separately. The two components are the business entity and the law practice.

Each is described briefly below.

The business: which consists of the operating intangibles and the hard assets less any outstanding debt or lease obligations that are a part of the business entity.

Such assets and obligations may include:

- Cash, deposits and prepaid expenses
- Land, building and improvements thereto (or more likely a long-term facility lease)
- Technology and communication infrastructure (probably a mix of owned, leased and outsourced services)
- Library and reference materials (in those few practices that have maintained the investment even though the knowledge is accessed electronically today — not a source of value unless it is some specialized circumstance)
- Furnishings and fixtures
- Accounts receivable (fees and client costs advanced)
- Unbilled fees and client costs advanced but not yet billed
- Accounts payable and accrued expenses not yet paid
- Loans and capital lease obligations (leasing rules are likely to change placing more operating leases on the balance sheet, but even if not, a careful examination of all operating leases is needed)
- Client funds held in trust both an asset and an offsetting liability confirmed to bank and client records
- Unrecorded liabilities or contingent liabilities arising from off the books agreements that may contain current and future

obligations and claims of current and/or past employees, clients and creditors that may or may not be insured.

The practice of law is not a capital intensive business. Large land holdings are not required. There is minimal investment in raw materials (unless you consider the cost of attending law school!). The inventory is modest, amounting to a few months of the lawyer's time value expended on client matters (except possibly in certain contingent fee practices). There is no need for expensive equipment (as in many medical practices). Yet what investments there are have grown more expensive and require more rapid replenishment—that typewriter for your secretary that lasted twenty years is now a notebook/tablet/smart phone combo for the lawyer and an all-in-one computer for the assistant—both (the equipment) needing replacement every couple of years. Today, communication bandwidth and security to support massive data transfer/storage, remote functionality and state-of-the-art video conferencing is a vastly different world than the multi-line telephone with voice mail and a dedicated fax line.

The business is valued at a point in time starting with the firm's cash basis balance sheet and adjusting from there. These adjustments are normally done in several intermediate steps; such as cash to accrual, then unrecorded and contingent items, then current value/obsolescence, then items excluded from the transaction (if any) and finally items required by the agreement at closing such as minimum guaranteed working capital or net worth.

The practice: the source of the immediate stream of revenues, as well as the network of contacts and referrals that assist in generating the future stream of revenues. Access is the first step and their trust is the ultimate requirement. This is where there is significant value, or not. And it is the area where there is the most difficulty determining what value there is and how much of it can be transferred from seller to buyer. This last question of the transfer requires seller, buyer and client to make happen. This is a further reason why law practices have less value than comparably sized businesses in different settings.

A further complication arises if one looks to other professions where there is data on purchases and sales. Such transactions, often expressed as a multiple of earnings (compensation of individual partners) or revenues, may be based on different valuation parameters. For example, the balance sheet may be valued separately or subsumed within the multiples being quoted. Further, the balance sheet may or may not include accrual adjustments (the most notable likely unbilled time and accounts receivable). The earnings generally are reflective of partner compensation, but cash or fully loaded total compensation? CPAs generally use cash compensation; lawyers generally use total compensation. These are nuances that must be understood before applying market data to a specific situation. Unfortunately, there are no databases of comparable transactions for law firms. The only available guidance are the surveys that look at the buy-out and retirement of partners, which represent an okay, but not ideal proxy for valuation. One must separate the buy-out of an ownership interest from any retirement benefit funded by the firm. In most instances, these are co-mingled and not readily separable.

Special Problem of Law Practice

If, in essence, the most valuable asset conveyed in the transfer of a law practice is the ongoing and future access to contacts, referral sources and clients, along with the trust they have in the seller, then essentially what is conveyed is the professional goodwill of the lawyer. The courts remain divided on this issue. And the complexity is seen in the various cases where goodwill has and has not been recognized. Clearly, in some fact situations, there may be an ongoing concern that is independent of the seller. It is also clear that fact situations exist where this is not the case.

Historically, the profession and the courts held that as a matter of public interest and policy, clients are not property and could not be sold, and that clients are ultimately free to select and change their legal representative at any time.

In matrimonial matters, both equitable distribution and community property jurisdictions have been inconsistent in their treatment

of goodwill and value of practice, but this is the general area in which goodwill has traditionally been found; often embodied in the value of the professional license.

ABA Guidelines

Before 1990, the ABA's position was that it was unethical to sell a law practice. And that was the position adopted by the state bar associations. In 1990, the ABA adopted Rule 1.17.

Sale of Law Practice. See the Model Rules of Professional Conduct and the annotations found in Annotated Model Rules of Professional Conduct, published by the ABA's Center for Professional Responsibility. The Rule provides for the purchase of a law practice, or an area of a law practice, by one or more lawyers or firms if certain conditions are met.

The rule further provides for the recognition of goodwill in such transactions. The primary conditions to be met are that the lawyer sell the entire practice or area of practice, the seller ceases practicing law at least in the substantive area of the practice(s) sold, the seller notifies each client in writing of the proposed sale and buyer does not raise fees by reason of the sale. Lawyers should also check their State's Rules, as they may vary from the ABA's guidelines.

The ethical considerations present problems and risks for both the seller and the buyer and center on protecting clients' rights, property and confidences. Ethical considerations cover a broad gamut of issues including: client communication, lawyer of record, client confidences, client files/property, client funds, conflicts of interest, competency, misrepresentation by the seller of purchaser's qualifications, errors of selling lawyer discovered by the buyer and other issues.

Financial aspects covered in the rules that are important in the negotiation of the transfer are the right to have a covenant not to compete and the requirement that the seller must sell an entire practice or an entire practice area, thus preventing the cherry-picking of the best work/clients to the detriment of other clients.

Valuing Partner/Shareholder Interests (The Internal Transfer)

The spectrum of law firm valuation and withdrawal entitlement theory can be characterized by two polar positions. The first considers the firm as a means to generate income (i.e. compensation), with modest, if any, value beyond the cash basis capital account. This is the dominant view currently in the profession and has resulted in the vast majority of firms valuing only the cash basis balance sheet for internal withdrawal rights. The second considers the firm as an investment, much like most other commercial endeavors.

There is readily acknowledged value in the establishment of a business enterprise. Starting a business involves creating business contacts, banking relationships, vendor relationships, designing and outfitting space, finding and training staff, creating forms and procedures and generating cash flow. These items comprise institutional goodwill. Any individual who has started a business understands the value of an ongoing entity. It is for this reason that many firms will still provide something to founders beyond the cash basis capital account upon retirement. At times, the cost of buying out the founders is spread across two or three generations in order to facilitate the transfer.

When this is done for founders and in those firms that still provide some form of unfunded buy-out, the typical methodology is to establish the adjusted net cash-basis book value of the firm, plus a multiple of some average of past earnings. At a minimum, this multiple will recognize the proportional value of unbilled time and accounts receivable that are not shown on the balance sheet. In some circumstances, and with higher multiples, some recognition of the goodwill or going concern value of the business will be factored into the buyout.

The buyers, in this instance, have an advantage in that they know the seller, the clients, the infrastructure required to serve those clients and the practice methodologies being acquired. The clients should know and have relationships with some of the acquiring partners (at least if succession was planned properly, which unfortunately is not done as frequently or effectively as one might expect), resulting in a more likely

successful transition. This is essentially the exclusive means by which law firms handled the retirement of partners, before the tax law changes in the early 1980s permitted qualified pension programs for partnerships.

The Earnings Multiple (The Traditional Look-Back Method)

The earnings multiples for service businesses are lower than for manufacturing concerns. In professional service firms, the multiples are lower yet and law firms generally even lower than other professional service firms. Manufacturing concerns typically have ongoing franchises and productive machinery to sustain them. Sustaining the profitability of a law firm, however, greatly depends upon whether the firm is able to retain and develop its base of clients and the lawyers responsible for attracting them.

Value in a law practice is largely personal to the lawyer and that individual's ability to attract and retain clients. The lawyer has knowledge, experience, skill, judgment, and reputation—all elements of **professional goodwill**. As long as clients primarily hire lawyers, as opposed to firms, this will remain a guiding principle in valuing law practices.

This is not to say that some firms have not created a "brand identity" that is separate and distinct to the institution. And in larger practices, the servicing team (including other partners and other practice specialties) influence the client's selection decisions. It is just that those firms are rare and larger practices are not the subject of this writing.

Complicating this task is the fact that even when client relationships are transferred, it is ultimately the new lawyer's personal ability and relationship with the client that determines whether the client will stay or leave. Therefore the transfer of a practice is a complex blend of seller, buyer and client interaction. It is for these reasons that multiples are so low.

Buy-outs beyond the return of cash basis capital in a law firm can be valued and paid in many different ways. Some plan designs are simple, while others are very complex. This variety makes comparisons of buy-outs among firms difficult. However, a present value analysis allows the various plans to be reduced to a common, comparable stated amount.

Once that amount is calculated, a comparison can be made between that amount and partner earnings at withdrawal. The result is a standard multiple of compensation (earnings) that is common in the legal profession for a buy-out.

Once the standard multiple is determined, it is adjusted up or down to reflect the facts and circumstances of that firm, that practice and that market. Here are the common factors to consider when adjusting the multiple:

- Market demographics and location,
- Stability and quality of the client base,
- Source of clients and referral sources,
- Nature of relationships (institutional or transactional),
- Ability of remaining lawyers to perpetuate the business,
- Name recognition and reputations (firm and lawyers) in the community served,
- Type of practice and pricing/billing/payment norms,
- Concentration of revenues,
- Profitability of practice relative to comparatives,
- Size of firm,
- Stability of partner group,
- Profits reinvested into the firm to fund growth,
- Level of risk undertaken, and
- Quality of infrastructure.

The process of establishing an adjusted multiple is both subjective and judgmental. There is more art than science in the assessment and valuation of positive and negative factors of a specific situation.

Generally, earnings multiples fall within a range of 0.50 to 3.33. (Appendix One). That means the value of the practice is in a range from a half-year of normalized annual earnings to three and one-third times normalized annual earnings. A second multiple often referred to is a multiple of revenues. Generally ranging from .25 to 1.00 in value, such multiples are considered less appropriate because they ignore risk and

return—two critical elements of value. Appendix Two has a conversion chart for comparing revenue multiples to adjusted earnings multiples at various profit margins.

The following table depicts how one might assign factors and points for a hypothetical small law firm to arrive at a reasonable multiple. First you establish a base multiplier principally by size of firm,

Valuation Factor	Multiplier Points Low Range	Multiplier Points High Range
Base multiplier:	1.00	1.50
Positive factors:		
Core client group is stable and obtained through direct contact	.15	.25
Seller is young enough to effect an orderly succession	.20	.30
Practice has been consistently profitable	.50	.75
Senior partner (and then firm) are known as the "go to" firm for these services	.75	1.00
Negative factors:		
Remaining partners too reliant on senior partner for rainmaking and leadership	-.30	-.45
Firm is tied to a bad regional economy	-.15	-.25
Valuation multiplier:	2.15	3.10

practice specialty and location. Then, you assess and value positive and negative factors that should adjust the base multipliers. Based on this hypothetical example, the adjusted multiplier should be 2.15 to 3.10 times earnings.

In this instance, the seller (retiring partner) would receive two payments for a buy-out. The first payment would be for the cash basis capital account, adjusted upward for any additional sums owed to the partner and downward for any debt the partner owed to the partnership. This amount will most likely be paid over a short one to three-year period and is most often the same amount of time granted new partners buying-in to the practice. The second payment would be the earnings multiple. The definition of earnings can vary, but most common is an average of three to five years of total compensation. There are variations on this theme. For example, you might use the average of the highest three of final five years, or of the last five years, dropping the highest and lowest and averaging the middle three. Total compensation includes all taxable income (wages, fringe benefits, employer paid pension and employer paid payroll taxes for those practicing in a professional corporation setting). This payment would most often be amortized over a three to seven-year period of time. For example, if the high multiple were used over seven years then the partner would receive 44% of their average total compensation for each of the next seven years. In addition, most firms would condition such payments on the actual retirement of the partner from the practice of law.

Sellers (retiring partners) should not forget to have the firm acquire a tail errors and omissions insurance policy, in addition to the payments for capital and retirement. And, if the partner has retired before age 65 or has a spouse under age 65, some provision for health insurance continuation should be provided. Often, this would be done with the premiums paid by the retired partner. But, it may complicate the mechanics of the transaction in order to comply with the insurance carrier's contract.

Special note for estate and contingent fee practices or firms with a material amount of estate or contingent fee work. These practices require

extra care and special analysis, as there is future potential value that must be considered arising from past services.

The Profit Sharing / Earn-Out Model (A Potential Solution)

The traditional method of looking back at earnings and applying a multiple over some payout period has also been dubbed the "unfunded buyout." Much of the legal profession has altered its view of these programs — labeling them unworkable in their most historic form and a dangerous tax on the current earnings of mobile partners with portable books of business. Some firms have retained such plans, many with features to improve their economics. A few feel their culture and reputation are sufficient to maintain the economic expectations of successors and retirees with the arrangements in place.

Irrespective of one's view for, neutral or against such programs, there is room for improvement, with two modest changes. The purpose of such programs is to recognize the value of a transferred client base and referral network. The first modification is to make the program self-funding by linking the payout to the very clients and referral sources being transferred. The second modification is to value the payout as a declining percentage of the net contribution of those clients and referral networks to the profitability of the firm.

Accordingly, the earn-out, much as with the external transfer described below, integrates itself with the future economics of the firm. Clients who stay and provide more work and more profitable work benefit both the retiree and the successors. Those clients who leave, thereby providing less work or less profitable work, diminish the amounts paid to the retirees in direct proportion to the diminished profits experienced by the firm. This outcome has a real market connection and benefits those partners who integrate into the firm with an institutional view.

Partners who do not have a client following or have clients that the firm does not want or cannot maintain will not benefit from such a model. Partners who practice in isolated silos and do little to develop a

successor, preferring to leverage every ounce of profit during their own career, will have consumed all value at retirement.

Valuing The External Transfer

When the buyer is not associated with the seller's firm, the transfer is handled a bit differently. The buyer and seller will often know of each other, but the buyer may not fully understand the seller's practice.

The first step is to learn about the seller. This is standard business due diligence. Interview lawyers, judges, bankers, accountants and other contacts who can tell you something about the individual. Discuss the practice, the clients, pricing and billing policies.

The buyer should look to the seller to assist in the transfer of the client relationships and referral contacts. It is for this reason that so many of these deals extend over one to five years and sometimes longer. A common procedure to facilitate such a deal is to have the acquiring lawyer(s) and the selling lawyer operate as a joint "firm" for a period of time.

Value the Business

The method to value another lawyer's business is very similar to the internal transfer method of valuing the capital of a partner. Essentially, the business is valued on the net book value cash basis balance sheet. Reasonable due diligence should be conducted as one would for any business transaction. Rarely will a firm have assets that require separate fair market adjustments. This usually occurs with real estate, antiques, artwork and the like. However, often those assets are the personal property of the seller and will not be part of the transaction. If such assets are part of the transaction, then separate appraisals may be necessarily undertaken by those valuation experts with expertise and experience with each class of asset.

Items to consider:

- Review copies of filed federal income tax returns for the past three to five years.
- Protect yourself against the quality of the work-in-progress and accounts receivable and the level of debt and accounts payable. Although you may not be buying these assets and liabilities, you could inherit the problems that are hidden within.
- Review title to all assets and a detail of assets included in the transaction.
- Review all debt agreements, equipment and office leases, maintenance contracts and subscription agreements. Look for capital leases improperly classified as operating leases. New accounting rules regarding leasing are on the way and will need to be factored into any review.
- Review all business and payroll tax returns that are required to be filed for the last three to five years.
- Review the malpractice insurance policy and applications. Verify claims history with the carrier. Determine the availability of "tail" and "prior acts" coverage.
- Review all other liability, fire and theft policies and applications.
- Interview the staff and review salaries, bonuses and benefits. Review performance evaluations, if any.
- Interview the office manager and conduct a procedures and practices audit to look for general compliance with applicable rules and regulations.
- Test for prepaid expenses, accounts payable, accrued expenses and deferred income taxes.
- Examine the trust account asset and liability, including the detail ledgers supporting the balances, confirm the balance with the bank. Require representation that the balances are accurate and confirm with clients after closing. Is the trust account properly established?
- Review annual client fee lists for several years and compare

the fee detail lists to fees reported on the tax returns. Do a conflicts check.
- Review practice management procedures (file opening procedures, tickler systems, conflict check systems and the like).
- Review open matters and any pending deadlines.

Value the Practice

Review the factors provided above that affect the value of earnings multiples for internal transfers. These same factors are critical for arriving at an appropriate understanding of the practice value (appropriate multiple) for an external transfer.

Valuing a practice can involve a number of methodologies. Looking at internal transfers as well as past transactions for that firm is one good way to begin to develop a valuation.

Organizational documents may set forth a methodology that the owners have agreed to with respect to valuation. Remember that buy-ins are as instructive as buy-outs in determining how the owners feel about value. Look to see how that compares to any prior transactions at the firm. Unfortunately, these internal reviews may involve documents and transactions that are not recent. And such deals could have had objectives other than fair market value driving the ultimate agreements reached.

A second methodology used is known as the multiple of earnings approach. This method is founded on the principle that value is predicated on what an informed and rational investor would pay for the company's future earnings. Profits must be "normalized," that is, adjusted for those items that would reflect the company's operating characteristics going forward after a sale.

- Use five years of financial statements to see the sustained level of and direction of performance.
- Eliminate non-recurring revenues and expenses as well as items that are not indicative of economic performance for each year.

- Consider the appropriate mix of past years of revenue to use as going forward revenues.
- Review historical gross and net profit margins to see how direct costs and selling, general and administrative (SG&A) expenses relate to revenues to determine what direct costs and SG&A expenses to subtract from the going forward revenues.
- Calculate for each year an adjustment to normalize earnings by adding back benefits, "perks" and compensation to reported net income and subtracting a reasonable compensation package. Determine what adjustment is appropriate for the going forward analysis.
- Calculate the multiple using a methodology similar to what has been described above.
- Multiply the normalized earnings by the multiple.

While a common methodology, the multiple of earnings approach requires skill in determining the economic income, future growth and the appropriate multiple. This method will often include most of the balance sheet as those assets and liabilities are necessary to the production of the income. Excessive net assets require an addition to the final value.

A third methodology is capitalized cash flows. This method is predicated on the present value of future cash flows (as opposed to earnings). This means that earnings are adjusted for non-cash expenses, such as depreciation and amortization and nonexpense cash flows, such as repayment of debt. The capitalization rate is the return a prudent investor would require, after adjusting for risk, over a five-year period. We have used a balanced market index investment portfolio, adjusted for risk, for this methodology.

- Use five years of financial statements to see a sustained level of and direction of performance.
- Eliminate non-recurring revenues and expenses, as well as items that are not indicative of economic performance for each year.

- Add back depreciation and amortization and subtract out repayment of debt to determine cash flows for each year.
- Calculate for each year an adjustment to normalize earnings by adding back benefits, "perks" and compensation to reported net income and subtracting a reasonable compensation package.
- Determine net cash flows for each year. Then calculate average and weighted average (determine what weights are appropriate to reflect the direction of performance) net cash flows for the five years.
- Determine the capitalization rate.
- Calculate the practice value using the capitalization rate computed above.

The same concerns exist for capitalized cash flows as for the multiple of earnings method.

A fourth methodology is capitalized excess earnings. This method essentially is calculated as follows:

- Determine the firm's net tangible assets on an accrual basis.
- Reconstruct net income by adding back benefits, "perks" and compensation to reported net income and subtracting a reasonable compensation package.
- Calculate reconstructed net income for three to five years and average.
- Multiply net tangible assets from above by a reasonable return rate.
- Subtract the reasonable return from average reconstructed net income (the result is excess net income).
- Capitalize the excess net income to arrive at goodwill.

This is a widely used valuation method, but requires considerable skill and judgment to do well. And in a professional practice, the concept of excess earnings is a very difficult concept to work with. See the author's

article, Unreasonable Compensation for P.C. Shareholders, which is available free of charge from the author's website www.altmanweil.com.

Structuring the Deal

You have probably used all of the above methods and now have a series of value ranges. See if you have any that are significantly different from the rest. If you do, then go back and try to understand why that occurred. Generally, you will see a pattern of value that you can feel comfortable using.

You have used a mixture of historical information and adjustments to project the future economic performance of the practice. But what if you are wrong? What if the clients do not stay with the practice? Consider a structure that pays prospectively. If you are buying a future stream of income, then pay based on the future income. It's riskier to the seller, which may mean a higher multiple for the valuation. But at least it is self-funding. Since the seller is needed to assist in the transfer, this could be structured as an earn-out. The best result is that you pay even more because the combination of the seller's efforts and yours result in even more business during the transition years.

A good practice is to provide for post-closing price adjustments. Sellers generally do not like them and buyers like them to protect against downside risk. In professional service firms, adjustments based on client transfer are a bit more tricky. Good provisions contain the following elements:

- Adjust for material discrepancies only,
- Provide for bi-directional adjustments, so that up and down adjustments are possible,
- Limit adjustments to a reasonable post-closing time period.

The Seller's Perspective

The seller of a law practice is primarily interested in assuring that his/her clients will be provided with quality legal services, that payment is

received, and that personal liability is protected.

There is risk to the seller if the buying lawyer is not competent to handle certain areas of the practice being acquired. Clients may not continue their relationship with the new lawyer. Payments may not be made.

Therefore, a selling lawyer must undertake due diligence that includes:

- Verification of purchasing lawyer's expertise and credentials.
- Verification of purchasing lawyer's reputation, including a check of malpractice claims with the purchasing lawyer's insurance carrier.
- Assessment of purchasing lawyer's philosophical approach to clients and practice — will there likely be an effective relationship between seller's clients/referrals and the purchasing lawyer.
- Determination of availability of "tail" insurance coverage.

A word on credentialing for both buyers and sellers. Credentialing is a process whereby you confirm with the issuing organization the existence and good standing of a bond, certification, degree, or license. It is preferable to obtain certified copies of the documents for your records. Some will say this is overly burdensome and overly intrusive. And problems with valid credentials are rare. But when credentialing problems occur they can be quite troublesome.

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APPENDIX ONE

Earnings Multiplier for Law Firms

Type of Firm	Low Multiple	Likely Range	High Multiple
Law Firms	0.50	1.00 – 2.50	3.33

Revenue Multiplier - Adjusted Profit Margin
Adjusted Earnings Equivalents
Adjusted Profit Margin

Revenue Multiplier	25%	30%	35%	40%	45%	50%	55%	60%
0.20	0.800	0.667	0.571	0.500	0.444	0.400	0.364	0.333
0.25	1.000	0.833	0.714	0.625	0.556	0.500	0.455	0.417
0.40	1.600	1.333	1.143	1.000	0.889	0.800	0.727	0.667
0.50	2.000	1.667	1.429	1.250	1.111	1.000	0.909	0.833
0.60	2.400	2.000	1.714	1.500	1.333	1.200	1.091	1.000
0.75	3.000	2.500	2.143	1.875	1.667	1.500	1.364	1.250
0.80	3.200	2.667	2.286	2.000	1.778	1.600	1.455	1.333
1.00	4.000	3.333	2.857	2.500	2.222	2.000	1.818	1.667
1.25	5.000	4.167	3.571	3.125	2.778	2.500	2.273	2.083
1.50	6.000	5.000	4.286	3.750	3.333	3.000	2.727	2.5

CHAPTER THREE

Case Studies From Lawyers Who Went Through the Process

By Mary Maher

CASE STUDY ONE: Merging Practices

Seeking out a merger opportunity is a common way to ensure succession. Hector and Linda de la Mora began years ago to explore the idea of a merger as an organized way to serve clients while they gradually reduced their practice time in anticipation of retirement.

An Organized Transition

Linda de la Mora and her husband Hector established their firm in 1984. Their areas of concentration are municipal, employment and education law in Hector's case, and estate planning and real estate in Linda's. They operated two offices, employed two to three associate attorneys at any given time and two legal assistants. The firm relied on part-time support for billing and accounting.

Succession planning was on their minds for a number of years, says Linda de la Mora. Their first idea was to mentor a promising associate to

take over. "Despite having some very talented attorneys working for us over the years, we realized finding someone who was essentially a clone of ourselves was an elusive goal," she explains.

The partners had no interest in shutting down. "Besides letting down the dedicated legal assistants and attorney working for us, it would be unfair to the municipal and private clients that have depended on our firm for decades."

Exploring a Merger

Starting in 2013, the de la Moras began to explore combining their small practice with another firm. They made a list of likely candidates and analyzed each for how well it fit with their practice areas and if the culture of the firm was compatible with the de la Mora's approach to practicing law.

"After almost 30 years of practicing together and developing relationships with many long-time clients, this was very important to us" says Linda de la Mora. "The merger had to reflect our values as well as meet business and operational needs."

The search started with other small firms in the Waukesha and Milwaukee counties area and, eventually, with two larger firms. When they knew attorneys in a firm, it smoothed the way to discussions of a merger.

Preliminary meetings with several firms were instructive but did not proceed beyond initial discussions. Hector's municipal practice was unique so finding a law firm that understood the value of that was important, de la Mora says.

"Hector called a senior attorney we knew at von Briesen & Roper in 2014 and learned of their interest in expanding into our territory and building up their government law section," she explains. "When we asked if they'd consider a merger, the answer came back 'oh, I think so!' Just what we wanted to hear."

Both sides came away from the first meeting enthusiastic about a merger. The de la Moras felt comfortable with the culture of von Briesen and its practices.

"We'd found the fit we were hoping for and moved ahead with due

diligence and the careful steps necessary to a merger," says Linda de la Mora

Step-By-Careful-Step

Taking those careful steps, the two firms ran the de la Mora's list of clients and affiliated parties through von Briesen's conflicts check system to detect any problems that would prevent the merger. None appeared.

The de la Moras also had to address their firm's malpractice insurance coverage. "Wisconsin Lawyers Mutual had been our carrier since its inception so we purchased **tail coverage** from them to cover claims for any prior work," Linda de la Mora says. Work after the merger, including with the clients who moved with the de la Moras, is covered by von Briesen's malpractice policy.

Linda de la Mora notes that incoming lawyers who followed them in merging their existing practices with the larger firm now have **prior acts** covered by von Briesen's malpractice insurance carrier.

Smooth Process

The de la Moras joined the von Briesen firm in July 2015 after working out all the logistics of the transition, which included making sure the move was a fit for the support staff they brought along.

"It was a smooth process, helped some by the fact they knew enough about us," Linda de la Mora notes. "We informed them of our personnel policies and other details of our operation so their management team could determine the best way to incorporate our people. The fact our cultures were so complimentary helped."

Von Briesen sent a letter, jointly crafted and signed by Linda and Hector, to all the de la Moras' clients explaining the facts of the merger. The clients learned they could make the move with the de la Moras and become clients of the larger firm. Most did make the move, which was gratifying, Linda de la Mora says.

They also retained trusted staff members who became employees of

von Briesen and kept their phone number—a valuable asset for a firm so long in business. What did not make the move was their extensive library of law books, of no value in an age of digital research.

New equipment replaced old when the de la Moras' former offices became expanded von Briesen offices. The de la Moras worked through the client transition process with the conflicts team and quickly learned the electronic onboard system for new client engagements.

"Our biggest challenge was handling our voluminous inventory of open and closed files," Linda de la Mora recalls. "We retain in storage all of our closed files while our open files became von Briesen files, entered into the firm's system."

Research Paid Off

Five years on, the de la Moras are practicing in the expanded von Briesen offices in Waukesha, energized by working with many accomplished attorneys in a culture that suits them and their clients. As shareholders, compensation is based on the work the de la Moras bring into the firm and the work they do.

Having a strong management team at von Briesen and excellent support staff frees them from the details of running a law business while they concentrate on client engagement. Clients and staff members similarly appreciate the switch.

Talking with other attorneys exploring whether a merger is right for them as retirement nears, Linda de la Mora always advises them that research pays off. "Every practice is unique, long-standing practices especially so. Finding a good fit requires lots of reaching out but it's worth it in the end."

That was the case for the de la Moras. "Hector and I are pleased with the transformation, it was the right move for us."

CASE STUDY TWO: Selling a Practice

Establishing the 'value' of a law practice is key in the decision to sell

when a lawyer is ready to retire. Attorney Tom Schumacher discusses selling a practice as part of a succession plan and explores variations on that theme for lawyers working solo or in small firms.

A Rare Approach to Succession

Tom Schumacher, a partner in the firm of Bakke Norman SC, New Richmond, Wisconsin, notes that in reality, the sale of a law practice rarely occurs. Lawyers winding down their practices generally look for a merger opportunity or join another firm, bringing their book of business with them.

Whatever the end goal, having a plan is key, says Schumacher. His own practice focuses on business law and he represents many closely held businesses in many fields. He sees that often the last thing to get done is a plan for succession.

"Entrepreneurs, including solo lawyers, tend to work IN their businesses and not ON their business," he notes. "Agreements for partners who leave, retire or die take a back seat to day-to-day concerns."

Balancing the Business Side of Law

Sustaining a solo practice is a challenge, Schumacher says. The solo lawyer needs to know about and handle everything. A lawyer working in litigation, for example, is managing court deadlines, client contact, filings and paperwork. The administrative and business side of a law practice—infrastructure, financials, billings—are easy to underestimate when starting out.

There is a lot to balance while still doing a good job for clients, he notes. "Even people not ready to retire find it better to be part of a group and many, if they can find the right group, or firm, consider doing it."

Reduce Practice Commitment

Bakke Norman has experience with a handful of solo lawyers joining the firm as they prepare to reduce their practice commitment—and the

burdens of being solo—over three or four years in anticipation of exiting the profession. Schumacher explains that it gave them the ability to make sure long-term clients could continue working with trusted counsel. "It answers the main concern about taking care of their clients, doing a good job of transferring a relationship built over many years."

In this scenario, Schumacher says there is a benefit to firms that solo lawyers join as they prepare to retire. The larger firm has access to new clients and increased revenue, and both sides benefit from different viewpoints and new ideas.

In a variation on this scenario, Schumacher tells of a solo lawyer who joined Bakke Norman some years ago. He wanted to try making it on the Senior Golf Tour. So with the understanding that he might NOT return to practice, the lawyer concentrated on competitive golf for about three years and then came back to practice a few more years before retiring. Attaching himself to a firm in anticipation of taking a break gave him the leverage to live his dream.

What Price a Practice?

Have you worked ON the business or just IN it? That is the question Schumacher raises again in talking about how to place a value on any business in the hopes of a sale. Location, experienced support staff who might stay with the practice, owned real estate or a lease agreement. All have quantifiable value, he says. But the most important is goodwill. "Lawyers selling a practice must find a way to account for it."

Many professionals working solo tend to underestimate what their practice is worth, Schumacher says. They can overlook the fact there is value in having a good reputation in the community and with clients.

Solo lawyers also often operate with a minimal business set up that can lead to imprecise record keeping and infrequent financial statements. Bringing all that up-to-date is critical—*for doing business and for selling a business!*

If there is a succession plan and valid financial information, there is a better chance for a transition built on the value of the practice to go smoothly, says Schumacher. And, in the case of an unexpected health

event or other emergency when timing is critical, a thoroughly thought-out succession plan is invaluable.

Who are the buyers?

Until 2007, the rules of Professional Responsibility did not permit the sale of a solo law practice in Wisconsin. But even with the rule change, selling a solo practice is not easy, Schumacher explains, because people think there is not much money in it.

How can the seller overcome this misperception? And who are the buyers? The usual options are other lawyers in the community who know the lawyer selling the practice and someone known by clients of the practice for sale.

Another approach is finding someone willing to relocate to the community and take the practice over. Schumacher says that is not always easy to do in small towns and rural areas. One solution is to become a mentor.

Mentoring a Buyer

Schumacher says most law firms in Wisconsin have five lawyers or less. One option for a solo lawyer making a plan for succession is to develop a successor, or recruit a lawyer interested in taking over the practice in the near future. Maybe someone with an appreciation for small-town life since that is where many solo and small practices do business.

Professionals fresh out of law school are worth considering. Student debt today might deter new lawyers from a small town practice, steer them instead toward jobs in government or an in-house practice. But as law firms find creative ways to help new associates manage that debt, it opens up possibilities on all sides.

Bringing someone in to buy or succeed an older lawyer in an existing practice, however, takes time. "They need to establish a connection to the community—for themselves and for their spouse or partner," says Schumacher. "And time to see they *can* enjoy stability and thrive in a solo or small practice."

Schumacher recalls how his mentor, Gary Bakke, inspired him to succeed. "Day one out of law school and throughout my career, he helped me learn what I needed and gain perspective on different practice areas. It's served me well for decades."

Find a Connection, Use Technology

Whether a succession plan involves recruiting a lawyer newly out of law school or one with several years of practice experience, looking for people who have a connection to the area, an interest in the firm's practice areas and who shares some of the same values is important. "Are they willing to put in the work," Schumacher translates.

If a young lawyer cannot afford to buy in, Schumacher suggests considering a lease agreement. The two parties agree on a purchase timeframe. They establish a plan for the seller to receive a gradually declining percentage from the firm's income over a set number of years until the purchase is complete. It is a selling option many businesses use to transfer ownership.

Schumacher says his firm is using technology as another way to introduce new hires to the firm. Law clerks work remotely from other locations for a period of time before making the move to northwestern Wisconsin. "Young people think nothing of doing everything on line so this is an extension of that."

Helping them become integrated into the firm's culture remains important. But working remotely is a way to build a relationship before a lawyer and potential buyer makes the move to a community.

For a solo lawyer looking ahead to retiring from their practice, Schumacher says that if they can see the value in what they've built, they can find the right fit, the right someone to take over.

CASE STUDY THREE: Closing a Practice

There are many reasons for closing a solo or small law practice and plenty of trip wires to navigate no matter what situation induces a lawyer to

take that step. Steve Sorenson, now of von Briesen & Roper, is a veteran "closer" having done it multiple times. His experience and insights provide useful information on the topic.

Plan For the Future Now

Attorney Steven Sorenson was principal and owner of Sorenson Law in Ripon for the better part of 40 years. During that time, he shuttered his solo practice several times before finally closing permanently to accept an offer from von Briesen to join its newly opened Oshkosh office.

Plan for the future well in advance of that future is Sorenson's overriding advice for closing a law practice. It is advice he followed uniquely each time.

"The first was when I ran for president of the State Bar, which gave me a year to anticipate what may come," he says. "I knew that during the year I served as president, I would shut down my practice, expecting to go elsewhere after my term was up."

Sorenson worked beforehand with a lawyer he brought in as a partner plus several associates. Together, they would take over and protect the practice. When Sorenson's term ended and the other opportunity did not materialize, he returned to town and found the partner and associates had left, taking with them many clients. "I had to rebuild the practice almost from scratch."

Ten years later, his practice going strong again, Sorenson was considering an open judgeship when then-Governor Scott McCallum asked him to serve as chair of the Wisconsin Employment Relations Commission.

"I went from having six-months lead time to transfer out of my practice to doing it instantly," Sorenson recalls. He worked out a plan to close down swiftly with as much care as possible until the State Senate confirmed his appointment. This involved working two or three days in Madison every week and one day traveling the state on Commission business. "Other days and weekends, I spent back home working in my practice, finding places for my clients to go, pretty sure I wouldn't come back," explains Sorenson. "After my time on the Commission ended, I

thought I'd take my mediation practice in another direction."

Instead, when McCallum lost re-election, Sorenson lost his post and, without much notice, was headed back to Ripon.

The final closing came when Sorenson received the offer from von Briesen. By then his small firm had seven employees—including three associates. Sorenson found new jobs for everyone before he left for *his* new opportunity. Along with one associate, Sorenson took all his existing clients to the larger firm. He completed the process in less than three months, a benefit perhaps of having been there, done that.

Duty to Profession and to Clients

Among Sorenson's lessons learned from closing his practice under various scenarios is the fact that attorneys on the whole are anxious about the good of their clients, a fact amplified in small towns where everyone knows everyone.

A lawyer's duty to the profession when closing a practice is to find representation for clients. Sorenson calls it a responsibility he took seriously each time he closed or substantially changed his involvement in Sorenson Law.

"Closing down as a solo and going into a large firm is the preferred scenario," says Sorenson. "But even if you don't continue in the law, if you do it right, you assign clients according to where they fit, making sure their needs are met."

Sorenson says having a plan in place for a deliberate closing, like most of his, or an unexpected closing due to circumstances like a sudden health event is in the best interest of clients.

Planning for the unexpected is especially important. Solo lawyers should identify in advance other attorneys in town who can take over in a crisis. "Attorneys who know you and your clients, who care about the practice of law," Sorenson advises.

"If there's magic, someone in your community will step in who has the feel of the rural or small-town practice," he continues. "Ideally, the State Bar identifies eight-to-ten of those lawyers around the state who can

step in when there is an emergency."

Sorenson further recommends lawyers keep their law license—for a time at least—after closing their practice so they can second-chair someone if necessary or assist someone with legal advice. "Solo and small firm lawyering doesn't stop one night, overnight," he notes.

Get Healthy, Stay Healthy

Health is a big issue with Sorenson. He says many lawyers live on the edge when they are practicing, fueled by the adrenaline rush of their work for clients. Any good plan for transitioning out of life as a lawyer includes getting healthy *before* the transition.

"People sometimes fall ill after quitting because the health problems held at bay all those years of working without a break rear up," Sorenson says. "Getting healthy—physically and mentally—while still practicing should be part of any succession plan. Make time for exercise and workouts, and for downtime. Pay attention to what you eat."

Besides, he notes, following a regime of preventive healthcare while a lawyer is still in practice keeps cost of health insurance down.

Decide How You See Yourself

Closing a small-town solo law practice and joining a big firm, as Sorenson did, appeals to many lawyers with a long career in the profession. They can take their knowledge and expertise on given practice areas to a larger venue. What does not change, he says, is the idea that practicing law is about people, the clients.

There is no secret formula for closing a practice, Sorenson emphasizes. Each situation is individual. He recommends, however, that lawyers contact someone like him or other attorneys to discuss the process of creating a succession plan that applies to their practice.

"It can be a hard topic to broach but I find if you frame it like a narrative outlining exactly how you'd like it to unfold, it makes sense," Sorenson suggests. "If people work at it with good intentions, there are

some beautiful solutions that pay off in the end."

Sorenson emphasizes that lawyers focus their process on what is good for the practice of law. When they do that, the outcome benefits clients but also the lawyer.

Disperse Stored Files

Stored files are another reason for having a plan in place. Many lawyers fail to think about this aspect of shutting down a practice. It is crucial since few lawyers routinely purge files when still in practice. Sorenson says keeping old files risk courting trouble in future or, for the family of an attorney who dies, become a nightmare. He outlines three typical approaches he has seen lawyers follow.

1. **Do it yourself.** Lawyers planning to close a practice correspond directly via letter or email message with clients, asking them to retrieve their files. Sorenson tells of an attorney he knew who held a festive "going-out-of-business party" in front of his office under a tent, inviting clients to stop for refreshments and leave with their old files. Attorneys who were picking up clients also came to pick up their files. Important to have written receipts to record each handover transaction. "Something like this can be very cathartic when closing," Sorenson says.
2. **Hire extra help to do the job.** This can be a service or a handful of people working part-time who would do this *confidential* work in the law office, focusing solely on dispersing the stored files to clients or other attorneys.
3. **Bury head in sand.** Otherwise known as procrastination, practiced by lawyers who tell themselves they will handle it on their own. *Someday*.

What if a client asks their lawyer to hang on to files? Sorenson cautions this is unethical if an attorney gives up their license but never a good

idea. If you cannot persuade a client to take his or her files, make arrangements with another firm to hold the files. Make it clear to the client that they relinquish confidentiality as a result.

NOTE: An attorney closing a practice but retaining client files must inform the insurer providing them with tail coverage.

Also, see sections on "Closed Files: Retain and Communicate Policy" by Aviva Kaiser on page 76 and Ethics Opinion EF-17-01 on page 115.

Erase All Trace

Cancel telephone numbers. Shut down email and social media accounts. Wipe websites. Sorenson says, "You can't maintain any of that after giving up your license so make every effort to eliminate references to your role as a practicing lawyer."

CASE STUDY FOUR:
Making Operational Changes that Anticipate Retirements

Successful succession planning in any small business with multiple stakeholders requires collaboration and a shared sense of what is fair to all parties. For one small firm, serious discussions about what to do when one of the lawyers wanted to work fewer hours in anticipation of retirement led to the crafting of an operating agreement that continues to serve the firm well.

In All Fairness

David Krekeler and George (Gard) Strother of Krekeler Strother, S.C., in Madison began exploring strategies for handling this scenario in

2013 when Strother turned 64. Their working relationship is one of long-standing. Krekeler started the firm in 1982. Strother joined in 1995.

"David gets the credit for initiating our discussions on an agreement," Strother says. "I was amenable to exploring an orderly way I could cut back and yet have some control over how much I worked and how much I made each year."

The two lawyers work in discrete practice areas—Strother concentrating on employment-related cases and Krekeler on bankruptcy and creditor/debtor issues. Having distinct but related practice areas in the firm mean they do sometimes refer clients internally. But each having a separate focus works well with the terms of their agreement.

Base Compensation

The agreement they reached and signed—along with two other associates covered at the time by provisions in the document—begins with details related to stock ownership, and titles and responsibilities. It then outlines and defines base compensation for the parties to the agreement.

In Strother's case, compensation for work in his areas of practice is based on productive hours billed at $100 per hour. The agreement also allows him to grant client discounts not exceeding 10 percent of the amount billed without affecting his compensation.

For handling certain of the firm's administrative tasks, Strother receives $50 per hour. Work on malpractice insurance applications, personnel issues and employee evaluations are on the list of things he manages regularly.

"These are areas of the business that Gard does better than I would so it's worked out well for the firm," says Krekeler, noting that it reflects their efforts to make the agreement fit the needs of Krekeler Strother.

Additional provisions related to compensation lay out a formula for contingent-fee work Strother originates and work he does on other contingent-fee files for the firm.

The advantage of working under the agreement, Krekeler observes,

is that while being part of the firm—although on a different footing—Strother has all the staff support and operational back up he needs to practice.

Bonuses

Krekeler explains that the agreement honors the firm's tradition of giving out decent bonuses at the end of the year. The percentage for the other full-time associates is based on stock ownership, a straightforward approach. For Strother's more-flexible arrangement, they devised a formula that distributes his bonus according to hours worked.

They came up with their own percentages for that formula, Krekeler adds, after finding nothing out there to use as a guide.

The agreement calculates Strother's percentage of annual profits on a sliding scale based on billed and collected hours. For example, if total billings equal 500 hours in a year, his bonus equals 6 percent of profits and 800 hours equals 11 percent. The formula tops out at 20 percent for 1,000 hours billed.

The approach meets the goal of fairness, Krekeler and Strother agree, giving everyone a clear sense of what they can expect when there are profits to share at the end of the year.

Deferred Compensation

Several pages of the agreement cover items like benefits, marketing allowance, vacation time, timing of distributions, share surrender and a range of operational issues that relate more or less equally to all the lawyers.

Under "deferred compensation," the agreement references the dollar amount Strother will receive based on his age at the time he surrenders his shares in Krekeler Strother, or retires. "We think of it as a reward for Gard's contributions to the firm over these many years," says Krekeler.

The agreement specifies that the amount payable "shall not increase after age 65." An attachment to the agreement lists that amount as $33,000. The agreement further states that the firm will pay within six

months of surrender or over another time period agreed on at the time.

"We are of one mind, David and I, that lawyers working together in a firm have the responsibility to compensate leaving lawyers according to a plan that's fair to both sides," says Strother, who continues to work flexible hours into his 70s.

Practical Approach

Krekeler and Strother describe the agreement coming together easily when they decided it was time. "It helps that we're both practical guys," Strother says. "Neither of us is inclined to quibble."

Signed in December 2013 and put into action over the next few months, the firm has worked under the agreement—largely unaltered—since then.

Krekeler notes that creating and enacting the Stock Purchase and Operating Agreement (its official title) back then was important to his peace of mind. "I wanted to avoid the risk of harboring resentment as another member of the firm, even with good reason, started working less, contributing less, with no change in standing.

"Having this document in place is healthy for me."

For Strother, there is a sense of relief knowing he can come into the office a few days a week without feeling guilty about playing golf or going fishing on other week days. "I'm doing my part when I'm there and feeling relaxed when I'm not."

Retaining Identity

Another benefit of the agreement Krekeler Strother developed is how its mechanisms help lawyers nearing retirement adjust gradually to life after lawyering. Neither lawyer could imagine quitting "cold turkey," giving up their professional identity overnight.

"Sometimes I feel like I'm too much into my lawyer role to give this up," says Strother. "This agreement lets me control how I do that, however, which is important to me emotionally and in other ways."

Krekeler praises his colleague as an excellent lawyer but also someone who is managing this stage of his life admirably, balancing work and outside interests well. He sees his law partner as eager to give more time to his non-work activities.

"My own approach is different and I'm not ready to retire but I'm doing my best to find my focus away from work," Krekeler notes.

Strategy That Works

Exploring a strategy for making one lawyer's transition to retirement fair on all sides led Krekeler Strother to what turned out to be a comprehensive, effective agreement. Their experience demonstrates how such a succession-planning tool can work for other small law firms and the clients they serve.

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CHAPTER FOUR

Checklists

IMPORTANT NOTICE *This material does not represent legal advice and is provided for informational purposes only. It does not establish or create a standard of care for attorneys in Wisconsin, nor is it a complete and comprehensive list of the steps necessary for your specific circumstances. Readers should conduct their own appropriate legal research. For guidance on the Rules of Professional Conduct, contact Aviva Kaiser or Tim Pierce at the State Bar of Wisconsin.*

Checklist for Lawyers Planning to Retire

1. If you are a sole practitioner or head of a small firm with a number of associates working for you, decide whether you wish to sell all or part of your law practice, including goodwill.

2. If you wish to sell your practice, see the Checklist for Selling Your Practice, on page 60.

3. Decide when you would like to retire and create a timeline for your plan.

4. Review all active client files.
   a. Do you intend to finish all open matters, and will you be able to do so prior to retirement?
   b. Do your files contain original documents, photographs, tapes, discs or other property provided to you by clients?

Return these items to clients and make copies for your records. Property belonging to the client, including original client documents, cannot be destroyed.

c. Do you have original wills? If you keep original wills, check the ethics rules before disposing of the wills.

5. Notify current clients of your impending retirement. Advise clients to obtain a new attorney if they will need further legal services after your retirement date. Clients may be referred to other practitioners or contact the State Bar of Wisconsin Lawyer Referral Service, at 800-728-7788 or LRISresponse@wisbar.org.

6. For cases with pending court dates, depositions, or hearings:
   a. Discuss with clients how to proceed. When appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmation of these extensions, continuances, and resets to opposing counsel and your client. Ideally, these matters should be concluded prior to your retirement date.
   b. Obtain client permission to submit a motion and order to withdraw as attorney of record.
   c. If the client is obtaining a new attorney, be certain a Substitution of Attorney motion is filed with the court.
   d. Pick an appropriate date to confirm whether all cases either have a motion and order allowing your withdrawal as attorney of record, or have a Substitution of Attorney filed with the court.

7. Make copies of files for clients who need further legal services after your retirement. Retain your original files. All clients should either pick up their files and sign a receipt acknowledging they received the files, or sign an authorization for you to release the files to their new attorneys.

8. Wrap up the business and financial affairs of your practice. Prepare final billing statements showing any outstanding fees due and/or money in trust. Get instructions from clients concerning any funds in their trust accounts. These funds should be either returned to the clients or forwarded to their new attorneys. All accounts should be fully reconciled before they are closed.

See ***SCR 20:1.15 Safekeeping Property; Trust Accounts and Fiduciary Accounts.***

9. Generally, it is recommended that closed files be kept for 7-10 years or longer, depending on the area of practice. Obtain all clients' permission to destroy the files after a certain period of time. If property and documents belonging to the client have been returned, files may be stored electronically. If you are storing client files or data in the cloud, make arrangements to maintain your cloud-based storage for 10 years or longer.

See Chapter Nine – Retention and Destruction of Closed Client Files.

10. Tell all clients where their closed files will be stored and whom they should contact to retrieve them. If closed files will be stored by another attorney, get the clients' permission to allow the attorney to store the files for you and provide your clients with the attorney's name, address, and telephone number.

11. Contact Wisconsin Lawyers Mutual Insurance Company or whomever your malpractice insurance carrier is for information about "tail" or Extended Reporting Coverage (ERC).

12. Contact the State Bar of Wisconsin at (800) 728-7788 to change your membership status.

13. If you are a sole practitioner, maintain your telephone number

for 30-60 days after your office is closed. Record an appropriate outgoing message announcing your retirement and office closure. Remind clients whom they can contact to obtain their files. If you choose to disconnect your number, consider asking the telephone company for a new phone number to be given out when your disconnected phone number is called. This eliminates the problem created when clients call your old number, get a recording stating that your telephone is disconnected, and do not know where else to turn for information.

14. Malpractice Insurance Considerations
See Tail Coverage Section in Chapter Five.

Checklist for Closing Your Practice

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 timeframes important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this.

3. For cases with pending court dates, depositions, or hearings, discuss with the clients how to proceed. When appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and your client.

4. For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.

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

6. Pick an appropriate date to check whether all cases either have a motion and order allowing your withdrawal as attorney of record or have a Substitution of Attorney filed with the court.

7. Make copies of files for clients with open matters. Retain your original files. All clients should either pick up the copy of their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys. If a client is picking up the file, return original documents to the client and keep copies in your file.

8. Remind clients of your file retention and destruction policy. Tell them where you will be storing your client file records and who they can contact should they need an additional copy of their file. If your fee agreement or engagement letter did not notify your client about your file retention and destruction policy, you should obtain all clients' permission to destroy the files after approximately 10 years.

9. If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number.

See Chapter Nine – Retention and Destruction of Closed Client Files.

10. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your disconnected phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information. In the alternative, arrange for your telephone number to have a

recorded announcement about your closed office for 30 to 60 days after you close your office.

11. Malpractice Insurance Considerations
See Tail Coverage Section in Chapter Five.

Checklist for Selling Your Practice

1. Screen the buying lawyer for skills, experience, and competence. Ask for a resume, personal and professional references, and the names of staff and other lawyers with whom the buying lawyer has worked. You may want to observe the buying lawyer's court or administrative appearances.

2. Verify the buying lawyer's bar admission.

3. Research the buying lawyer's reputation. Talk to people with whom the buying lawyer has had contact as co-counsel, as an adversary, through participation in bar groups, in the community, or elsewhere. Speak to personal and professional references provided to you by the buying lawyer.

4. Research the buying lawyer's discipline history.

5. Ask the buying lawyer for a list of his or her legal malpractice claims history.

6. Discuss the following issues with the buying lawyer:
   a. Why does the buying lawyer want to purchase your law practice?
   b. What is the buying lawyer's experience?
   c. What are the buying lawyer's professional goals?
   d. What is the buying lawyer's philosophy toward clients and the practice of law?

e. What kind of office systems has the buying lawyer used? What technology is he/she familiar with?
f. Does the buying lawyer have an existing client base and office systems that need to be incorporated into the selling lawyer's practice as part of the transition?
g. Is the buying lawyer involved in any state or local bar sections or committees? Other activities in the community?

7. Understand Your Obligations under the Wisconsin Supreme Court Rules of Professional Conduct Chapter 20. Consult with Aviva Kaiser or Tim Pierce at the State Bar of Wisconsin for guidance.

See ***Wisconsin SCR 20:1.17 Sale of Law Practice.***
See Chapters Two and Three of this publication for more information.

8. Potential buying lawyers should screen for possible conflicts of interest involving the selling lawyer's clients.

9. Provide written notice of the proposed sale to each of your current clients whose legal work is subject to the transfer.

Include the following information:
a. That a sale is proposed;
b. The identity of the buying lawyer or law firm, including office address and brief description of the size and nature of the buying lawyer's or law firm's practice;
c. That the client may object to the transfer of its legal work, may take possession of any client files and property, and may retain counsel other than the lawyer or law firm;
d. That the client's legal work will be transferred to the buying lawyer or law firm, who will then take over the presentation and act on the client's behalf;
e. Whether the selling lawyer will withdraw from the representation.

See ***Wisconsin SCR 20:1.18 Duties to Prospective Client.***

10. Send the notices by certified mail, return receipt requested, to the clients' last known addresses.

11. If certified mail is not effective to give a client notice, the selling lawyer must take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required.

12. The notice may describe the buying lawyer's or law firm's qualifications, including the selling lawyer's opinion of the buying lawyer's or law firm's suitability and competency to assume representation of the client, but only if the selling lawyer has made a reasonable effort to arrive at an informed opinion.

13. Selling lawyers should prepare a current client list to use in monitoring the progress of transferring clients. If any client objects to the transfer of its legal work, a note can be made on the current client list. This same list can be used to track the preparation and submission of substitutions of counsel for clients whose work is transferred without objection.

14. The selling lawyer may wish to include terms in the sales agreement that permit the selling lawyer to continue working on the legal matters of any clients who object to the transfer of their work.

15. Preparing for and Selling Your Law Practice
    a. Consider hiring a business attorney and a business valuation expert who can assist you in the valuation of your business.

See Chapter Two – Valuation of a Law Firm and a Law Practice.

    b. Consider such factors as: terms of payment; geography; nature

of the practice; history of client retention by the selling firm; size of practice; and whether the client base will remain with the buying attorney for a designated period of time.

c. Determine sales price and terms.
d. Prepare a sales timeline.

16. Malpractice Insurance Considerations
See Firms Selling, Buying or Merging Section in Chapter Five.

Checklist for Buying a Law Practice

1. Discuss the following issues with the selling lawyer:
   a. Why is the lawyer selling his or her practice?
   b. Inquire into the profitability of the practice — is there a consistent income stream or peaks and valleys? What type of fee arrangements does the selling lawyer have with clients? Flat fees? Hourly fees? Contingent? Hybrid fee arrangement?
   c. Do the selling lawyer's clients have discrete (one and done) legal matters or do they require ongoing legal services?
   d. Does the selling lawyer track how clients are referred to his or her office? Can the selling lawyer provide referral statistics that reveal referral sources? What percentage of new business comes from the selling lawyer's past or present client base?
   e. Will the selling lawyer commit to stay for 6 to 12 months to help transition or mentor the buying lawyer?
   f. What is the selling lawyer's assessment of his or her staff, if any? What skills do staff possess? How knowledgeable are they? Are they likely to remain through and after the transition?
   g. What is the selling lawyer's malpractice and discipline record?
   h. Is the selling lawyer involved in any state or local bar sections or committees? Other activities in the community?

i. What systems does the selling lawyer use for opening files, case management, calendaring, conflict checking, trust accounting, and closing files?
j. What does the selling lawyer recommend for integrating clients, staff, technology, office systems, and operational management when the firm transitions to the buying lawyer?
k. Will the sale of the practice include the selling lawyer's closed files? If so, where and how are the closed files stored? (Paper files in bankers boxes or scanned PDFs on the selling lawyer's computer system?) How many years' worth or total boxes of closed files does the selling lawyer have?
l. Does the selling lawyer retain original wills?
m. Can the selling lawyer provide a list of personal and professional references, including legal staff and lawyers?

2. Independently research the selling lawyer:
   a. Check his or her discipline history.
   b. Review disciplinary files of the selling lawyer.
   c. Ask the selling lawyer to provide his or her legal malpractice claims history.
   d. Talk to people who have interacted or worked with the selling lawyer, including co-counsel, opposing counsel, committee or bar group volunteers, or community members.
   e. Speak to personal and professional references provided by the selling lawyer. Observe the selling lawyer in court or administrative venues, if possible.

3. The buying lawyer may wish to conduct court and business registry searches in other states where the selling lawyer is admitted.

4. The buying lawyer may also be able to assess the condition of the selling lawyer's files by evaluating the selling lawyer's office systems or lack thereof (see next item).

5. Ask the selling lawyer or the selling lawyer's staff to walk you through the selling lawyer's office systems and technology. Assess the effectiveness of the following:
    a. File management — opening, maintaining, organizing, closing, and storing files — Calendaring and docketing — entering and tracking dates and deadlines —Task management — tracking client projects.
    b. Conflict systems — performing, clearing, and documenting conflict checks —Trust accounting — recordkeeping, tracking funds, disbursing funds, reconciling accounts.
    c. Billing and collection — keeping time records, invoicing clients, aging of accounts receivable, collection issues (if any).
    d. Technology — assessing hardware and software. For hardware, evaluate age, general condition, availability of support/repair contracts, and ownership. If any equipment is leased, review lease terms and cost. For software, identify age, version, license/ownership status. If any cloud computing programs are used, determine the monthly/yearly subscription fees and if ownership can be transferred to another user.

6. Assess the condition of the business and the financial aspects of the practice.

7. Screen for possible conflicts of interest with the clients of the selling lawyer.

8. Consider hiring a business attorney and a business valuation expert.

9. Malpractice Insurance Considerations
See Firms Selling, Buying or Merging Section in Chapter Five.

Checklist for Partnership or Merging Law Practices

1. Consider formation options.

2. Recite all necessary formation details. Include the names and addresses of the partners, the name of the partnership, the purpose, and intent of the partnership, the term of the partnership, where the principal office of the partnership will be located, the entity's fiscal year, and whether books will be kept on a cash or accrual basis.

3. Describe in detail the capital of the partnership, including any loans to the partnership. Itemize cash and assets contributed by the original partners on separate schedules attached to the partnership agreement. Include a goodwill clause if desired. Consider terms addressing capital contributions by subsequent partners.

4. Describe how profits, losses, income, and expenses of the partnership will be allocated.

5. Describe any special conditions where income and expenses of the partnership may be accrued but not yet due, such as a lease.

6. Describe the procedure for partnership draws and the consequences of a debit balance in a given partner's drawing account.

7. Specify how management duties will be allocated among the partners, including participation in committees.

8. List any restrictions on partnership authority, such as engaging in another occupation, incurring partnership debt, charging an expense to the partnership, associating with another law firm,

establishing an Of Counsel affiliation, or assigning an interest in the partnership without consent of the other partner(s).

9. Describe the partnership decision-making and voting processes, including notice of meetings, proxy voting, adding, or removing partners, and whether issues will be determined by majority or supermajority vote.

10. Detail where funds of the partnership will be held and how withdrawals will be made.

11. Describe how and where partnership books will be maintained, who shall have access, and when books will be closed and balanced.

12. Provide for reimbursement and indemnification of the partnership for uninsured losses caused by a partner's negligence or wrongdoing.

13. Address the availability and terms of benefits, including vacation, leave, sabbatical, and retirement.

14. Specify the procedures for adding new partners.

15. Require each partner to complete a business succession plan no later than three years prior to retirement.

16. Consider pre-planning for buy-out of the partnership interest. Will there be an independent business appraisal? Will there be "Key Person" life insurance policies to fund the buy-out expense and cover overhead expense?

17. Include provisions addressing incapacity of a partner, death, and suspension of right to practice.

18. Specify the terms for withdrawing from partnership. Include details on the timing and manner of notice, duties of a withdrawing partner, liquidation of a withdrawing partner's interest, how disputes will be resolved, and whether prevailing parties will be entitled to attorney's fees.

19. Specify how clients will be notified when a partner withdraws. Best practices call for a joint letter sent by the departing partner and the firm on firm letterhead.

CAVEAT: Choice of representation is always the client's decision. Therefore, one cannot hold clients to be property of the firm and prevent the clients from electing to leave with a partner.

20. Specify the terms for dissolving and winding up the partnership. Include the specific steps that must be taken before dissolution, the number of votes required, how assets and liabilities are to be handled, who has the primary responsibility to perform the administrative tasks of dissolution, and how clients are to be notified.

21. Consider optional clauses addressing:
    a. Acts to make the agreement effective
    b. Severability and totality
    c. Governing law
    d. Adherence to ethical practices
    e. Professional liability coverage
    f. Continued use of the names of retired or deceased partners
    g. Acts required to change the name of the partnership or firm

22. Include an effective date and signature lines for all partners.

23. Make a list of likely candidates and analyze each for how well they fit with the practice areas of each firm and if the cultures of the firms are compatible.

24. Have the two firms run a list of clients and affiliated parties through a conflicts check system to detect any problems that would prevent the merger.

25. Assess the management team and support staff of each firm – determine who is staying with the newly formed firm.

26. Address file retention for each firm, including closed and open files.

27. Address technology and systems issues for both firms – which system will be retained? What technology will be retained and what will be eliminated?

28. Malpractice Insurance Considerations – Address each firm's malpractice insurance coverage.

See Firms Selling, Buying or Merging Section in Chapter Five.

CHAPTER FIVE

Malpractice Insurance Considerations

Generally, professional legal liability policies are 'claims-made and reported' policies. The very definition of this type of policy is that some form of coverage must be in place when a client comes forward and makes a claim and is reported to the lawyer's malpractice insurance carrier.

It's worth looking at the distinction between a Claims-Made policy and an Occurrence policy. An Occurrence Policy covers a loss that occurs while a policy is in force. Auto policies and homeowner policies are occurrence policies. A Claims-Made policy covers a claim or potential claim when someone comes forward to make a claim or report a problem which should be reported to the insurance carrier.

Each insurance policy is written differently. It's important to understand what your policy covers. It's important to know the terms and conditions which can impact coverage. A number of the issues discussed here may show up in the definitions portion of the policy.

In the context of a law practice, when a claims-made and reported policy is purchased, the lawyers named as insureds under that policy will

have coverage for claims that arise and are first reported to the insurance company during the year the policy is in force.

Coverage is sometimes limited going back in time by what is known as a Retroactive Date. The Retroactive Date can apply to an entire policy or to the individual lawyers listed on the policy. This date will limit coverage to any act, error or omission that occurred on or after that date.

Coverage can also evaporate if a lawyer or firm fail to realize they need to continue to insure their past work when considering retirement, change in employment, dissolution of the firm or simply changing insurance carriers. Whenever one of these takes place the lawyers need to realize that some type of coverage must remain in place to cover the past work they have done. If they simply allow their current policy to expire and walk away from their past practice, then the coverage they have paid for previously expires as well.

Coverage can be continued in two ways:

- Through Tail Coverage
- Through Prior Acts Coverage

Tail Coverage

When a lawyer changes employment, either by getting a new job or through retirement, they generally would have the opportunity to continue insuring their past work through what is commonly referred to as "Tail Coverage." Tail Coverage is technically known as an Extended Reporting Period Endorsement. The lawyer can purchase this endorsement or it may be complimentary based on the policy in question. The endorsement opens up a window of time into the future within which someone can come forward and make a claim. Generally, different lengths of time are available and may have some limitations depending on the underlying policy. It is important for lawyers to understand that if they buy tail coverage, the endorsement will only cover work done prior to the date the tail endorsement becomes effective. The endorsement does not create a new policy, it simply extends the policy it is attached to, so the same

limits, terms and conditions and policy language will apply to any claim made through the endorsement.

Prior Acts Coverage

Another way to insure past work when a lawyer changes employment or obtains coverage from a new insurance carrier, is to ask the new insurer to consider insuring all of the past work. Prior acts coverage will extend coverage backwards in time to cover work that has been done previously. Some carriers will consider providing coverage for those prior acts. Whether prior acts coverage is considered may vary from carrier to carrier.

As a practical matter, any time a lawyer changes employment, moves from one job to another, they should see what coverage options exist.

Relying on the previous firm's policy is a potential, but has some potential risks associated with it. If the firm changes carriers or breaks up or merges with another firm, then coverage changes and any past protection the individual lawyer had before they left the firm can be eliminated.

Lawyers should check with both the firm they're leaving and the one they're joining. Every firm is different and may have a unique approach to purchasing tail coverage for retiring lawyers or those simply moving onto another job. Some firms do purchase tail coverage for the lawyer who is leaving. Many do not. The departing lawyer should ask questions and understand the firm's policy, whether it's a firm they're leaving or a firm they're joining.

A firm's partnership agreement can be drafted to address this issue so that everyone is on the same page with regard to what will happen in the event a lawyer leaves.

The issue of insuring past work exists for, both an individual lawyer or a firm. If a firm is looking to change carriers or merge with another firm, they need to be cognizant of the potential of losing coverage for the work they have done previously. They need to look into the above questions just as an individual lawyer would.

Firms Selling, Buying or Merging

If a firm is looking at changing its makeup, through selling, buying or merging, they have several potential choices. The key issue is to make sure all the past work done by these firms is still being protected by insurance. It's just a matter of how to address it.

The two firms could both potentially buy tail coverage from their respective carriers, to address the issue of continuing to insure their past work. Then the two merging firms could buy one new policy listing all members of the newly merged firm. The new policy would likely carry a much smaller premium because they would almost certainly have retroactive dates attached to them limiting coverage going back in time. However, each firm would have spent money to purchase tail coverage, so whether it makes economic sense is something for each to review.

Another option would be for one of the firms to simply add the lawyers from the merging firm onto their current policy. Economically, this may make some sense because only one of the firms would then have to purchase tail coverage. Be careful to make sure all lawyers have the appropriate coverage going back in time so all past work is insured.

For merging firms, some consideration should be given to the previous coverage each firm has carried. If the liability limits previously covering both firms are the same, then there would be little concern about having the same level of coverage going forward. However, if one firm's coverage is higher, then consideration should be given to having the higher limits for the newly merged firm. Doing so will ensure that all of the previous work will continue to have the same level of coverage it had in the past.

CHAPTER SIX

Ethics Considerations

Five Things Solo and Small Firm Lawyers Should Do Before Taking Down Their Shingles

Aviva Meridian Kaiser
State Bar of Wisconsin

If you are a solo or small firm practitioner who is retiring or closing shop, there are a number of things to consider in closing the practice and winding down the business. For instance, what do you do about current clients? What do you do with electronic or physical client files?

From an ethics perspective, this article focuses on five major areas to consider when closing a law practice including current clients, trust accounts, closed files, electronic equipment, and malpractice insurance.

Notify Current Clients

Current clients must be notified that a lawyer is closing a practice. The lawyer should write to clients with open files, notifying them that the lawyer is unable to continue representing them and that they need to retain new counsel.

The letter should inform current clients about time limitations and

dates that are important to their cases, and it should provide an accounting of fees, costs, and property held in trust. The letter should also explain how they can pick up copies of their files or have the files transferred to successor counsel, and should give a time deadline for doing this. The letter should be sent certified mail, return receipt requested, as well as by standard mail or email, so that a record is created of who was contacted and who received the notice.

In addition, the lawyer should notify opposing counsel and comply with the tribunal's rules for withdrawing. It is a good idea to keep a file-tracking chart that includes:

- the file name and file number;
- the date the file was last reviewed;
- a list of the important dates, tasks, and limitation periods;
- the date when the letter was sent to the client;
- the date when termination was discussed with the client; any instructions that were received from the client;
- whether the file was copied;
- whether the file was given to the client and a receipt obtained;
- whether the file was delivered to successor counsel and a receipt obtained; whether opposing counsel was notified;
- whether the tribunal's rules for withdrawing were complied with; and
- whether any further action is required.

Reconcile Trust Accounts

Reconcile trust accounts, and complete and update all records. The lawyer is required by SCR 20:1.15(e)(6) to retain the trust account records for at least six years after the date of termination.

Closed Files: Retain and Communicate Policy

The Rules of Professional Conduct do not require that you maintain

closed files forever, yet they do not provide a specific time period to retain closed files. SCR 20:1.16(d) states that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred."

Under this rule, the lawyer must provide the client with anything in the file to which the client is entitled. In the ideal situation, the lawyer would have discussed this right and the retention/destruction of the file in the engagement agreement and again in the letter at the conclusion of the matter.

If the lawyer has a file retention/destruction policy that has been communicated to the clients, then closed files should be kept as required by that policy. If the lawyer does not have a file retention/destruction policy and the client has not requested the file, the lawyer should retain the file for a minimum of six years.[1]

A lawyer who has retained a closed file for at least six years has given the former client sufficient time to claim the file and, in most situations, has retained the file past the point where the file is needed to protect the former client's interests.

Some files must be retained longer than six years, and the length of time that a file must be retained depends on the nature of matter. For example, lawyers should maintain files involving minors until the minor reaches the age of majority and relevant statutes of limitations have run. Maintain files involving tax matters as long as client liability is possible. [2]

Although the Rules of Professional Conduct do not require notice to the former clients before the closed files are destroyed, as a matter of good practice, clients should be informed of their right to the materials in the file, that the lawyer will maintain the file only for the stated time, and that the lawyer will destroy the file at the end of that time. Having been so informed, no client can claim a reasonable belief that the lawyer would retain the file longer than the lawyer stated in the retention/destruction policy.

When the lawyer has not informed clients about his or her file retention/destruction policy, it is a good idea to place an announcement in a newspaper of general circulation in two consecutive issues and then wait a few months before destroying the files. Do not destroy original documents and documents that could not be reconstructed from other sources.

The destruction of the files must be done in a manner consistent with the duty of confidentiality that every lawyer owes to every client and former client under SCR 20:1.9(c)(2) and SCR 20:1.6. There must be a complete destruction of the materials in the file as would be the case with incineration or shredding. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.[3]

Electronic Equipment

Any electronic equipment with a hard drive, such as a fax machine, copier, computer, tablet, or smart phone, has information relating to the representation of the clients stored on it, and that information must be protected from disclosure. If the equipment is to be sold, given away, or used for personal purposes, the lawyer must make sure the drives are clean, that all client information is removed. Many experts state that the only way to be certain that a drive is clean is to destroy it.

Malpractice Insurance

The lawyer should discuss a tail endorsement with his or her malpractice insurance carrier. The insurance industry defines the word "tail" as an extended reporting period. The purchase of tail coverage adds an extended reporting endorsement (ERE) to an existing policy that extends the time in which a claim may be reported to the insurance carrier. The purchased tail endorsement provides an attorney the right to report claims to the insurer after a policy has expired or been cancelled.

Under most ERE provisions, the tail endorsement is not one of additional coverage or of a separate and distinct policy. This means no cov-

erage will be available for a negligent act that takes place during the time the tail endorsement is in effect. For example, if a claim arises out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the tail endorsement.

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[1] A commonly suggested minimum period is six years because that is the statute of limitation for certain malpractice actions and because lawyers are required by SCR 20:1.15(e)(6) to keep trust account records for six years. Another suggestion is ten years because the statute of limitations for a client or other person to complain about a lawyer's conduct to the Office of Lawyer Regulation pursuant to SCR 21.18 is ten years.

[2] Kentucky Bar Association Ethics Opinion KBA E-436 (2013).

[3] ABA Informal Op. 1384

CHAPTER SEVEN

A Lawyer's Fiduciary and Ethical Obligations When Exiting the Practice of Law

By Edward A. Hannan and Dean Dietrich

Introduction

The Wisconsin Office of Lawyer Regulation reports that Wisconsin Bar membership consisted of 25,318 lawyers as of 6/30/2020.[1] The Wisconsin Bar reports that "[o]f the approximately 3,900 law firms in Wisconsin, the vast majority – 92% or about 3,600 — are small businesses consisting of five or fewer lawyers. 70% or 2,748 of those firms are solo practices consisting of only one lawyer."[2] Also, the bar is aging: As of 12/01/2019, approximately 21% were between 50-59, 19% were between 60-69, and 13% were 70 or older.[3] Accordingly, approximately 8,000 members are potential candidates for exiting the practice of law within the next five years; and approximately 5,600 (70%) are solo practitioners.

Fiduciary and ethical concerns involving the planning for an *involuntary* exit by way of death or disability are discussed generally in *The Solo Practitioner's Handbook for Death and Disability*, The Solo and Small Firm – General Practice Section of the State Bar of Wisconsin (Oct. 2013).[4] This Chapter will discuss the ethical and fiduciary duties a lawyer must consider when departing from the active practice of law.

Fiduciary Duties — Purpose and Role

As an agency relationship, the lawyer-client relationship is fiduciary as a matter of law.[5] *Thiery v. Bye*, 228 Wis. 2d. 221, 241, 597 N.W.2d 449, 453-454 (1999) succinctly defines the relationship:

> The relationship between an attorney and a client is fiduciary and confidential in character demanding a high degree of trust and confidence. *Ott v. Hood*, 152 Wis. 97, 104, 139 N.W. 762, 764 (1913). The attorney-client relationship is also one of agent to principal and as an agent, an attorney must act in conformity with his or her authority and is responsible to the principal if he or she violates that duty. Id.

Also:

> "A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence and loyalty are therefore vital."[6]

All common law fiduciary duties are standards of conduct that are intended to minimize the risk that the fiduciary will abuse entrusted authority and powers to the beneficiary/client's detriment.[7]

Core Duty of Loyalty

Loyalty is the primary and overarching duty all fiduciaries owe to their beneficiaries.[8] More firmly stated, "[a]ttorneys owe a fiduciary duty of loyalty to their clients…This obligation of absolute loyalty means that attorneys are required to act solely for the benefit of their clients…"[9]

As a fiduciary of the highest order, an attorney's loyalty to her or his clients and their interests is paramount. Understanding how to discharge

a lawyer's overarching duty "to act loyally for the benefit of the principal in all matters connected with the agency…,"[10] requires an understanding of and respect for the primary purpose and intent of the core Rules of Professional Conduct (RPC) and the common-law fiduciary duties governing the lawyer-client relationship: to protect and foster client autonomy and the overarching fiduciary duty of loyalty by minimizing the fundamental risk that that the fiduciary will abuse entrusted authority to the beneficiary/client's detriment.

Five core duties inherent in a lawyer's overarching duty of loyalty to clients and former clients are:

1. Acknowledging and fostering *client autonomy* by respecting *client ownership* of the client's matter and the client's control over the goals of the representation, provided that the client's goals are not unlawful, criminal or fraudulent, and by treating the client honestly and fairly;
2. *Diligently* initiating and maintaining *communication* with the client;
3. *Diligently* providing *competent* legal services;
4. *Diligently* keeping and maintaining client *confidences* as required by law; and
5. *Diligently* avoiding and resolving *conflicts of interest*.[11]

The RPC essentially codify as ethical obligations all core common law fiduciary duties a lawyer owes to a client:[12]

a. Client control – SCR 20:1.2 and 1.14;
b. Competence & Diligence – SCR 20:1.1 and 1.3;
c. Communication – SCR 20:1.4;
d. Confidentiality – SCR 20:1.6;
e. Avoiding and resolving *conflicts of interest* – SCR 20:1.7 through 1.18.

Though the RPC define reasons for lawyer discipline, the Wisconsin Supreme Court repeatedly has said that the RPC derive from, and coincidentally foster and protect, a lawyer's common law *fiduciary* duties to prospective, current and former clients.[13]

Ceasing the practice of law necessarily terminates all prospective and current lawyer-client relationships and triggers all duties imposed by the RPC, other statutes and the common law regulating a fiduciary relationship.

Minimizing Risks of Conflicts of Interest When Exiting a Law Practice

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living…[14]

Two critical *preparation* considerations for a solo or small firm practitioner intending to exit a law practice and *competently* discharge the fiduciary and ethical duties attending the closure of a law practice are:

1. allowing sufficient time to plan and properly complete closure, and
2. budgeting the cost of closure and setting aside the funds necessary to pay closure expenses.

Avoidance of economic costs, particularly where fee generation has ceased, is fertile ground for a "personal interest" conflict of interest: The lawyer's personal interest in reducing operational expense and maximizing a return of capital and profit creates a "significant risk that the representation of one or more clients will be materially limited…by a personal interest of the lawyer."[15] Serving a personal economic interest creates a formidable temptation to put the lawyer's personal interests ahead of the client's interests.

Minimum Prerequisites for Protecting Client's Interests on Termination of the Lawyer-Client Relationship – SCR 20:1.16(d)

SCR 20:1.16(d) recognizes and protects both client autonomy and the lawyer's duty of loyalty by mandating that to properly terminate the lawyer-client relationship, the lawyer "*shall take steps to the extent reasonably practicable to protect a client's interests…*" This RPC specifies four *minimum* acts that must occur with reasonable diligence and promptness in every termination:

1. "giving reasonable notice to the client,"
2. "allowing time for employment of other counsel,"
3. "surrendering papers and property to which the client is entitled," and
4. "refunding any advance payment of fee or expense that has not been earned or incurred."

Note that SCR 20:1.16(d) is not exhaustive: RPC 1.16(d) mandates that to properly and effectively terminate a lawyer-client relationship any step *to the extent reasonably practicable to protect a client's interests must be achieved.* Before the lawyer can fully terminate a lawyer-client relationship, all applicable RPCs pertinent to terminating the lawyer-client relationship must be complied with. Accordingly, a consensual client – as opposed to a court-appointed client relationship terminable only by court order — remains a "current client" until a lawyer has completed termination of representation and has satisfied all obligations imposed by the RPCs, including those imposed by SCR 20:1.16 (b)(1) and (d).

Mandatory termination activities include, but are not limited to:

- Making and documenting reasonable efforts to locate and contact former clients. Reasonable effort means that degree of effort that a reasonable person would exercise under the same or similar circumstances. It is an objective, fact intensive requirement. Satisfying the reasonable diligence requirements of Wis. Stat.

(Rule) §801.11(1)(c) for substituted service of process in a civil action generally should constitute "reasonable effort" for purposes of SCR 20:1.16(d).[16]

- Giving all clients, former clients and tribunals ample notice of the intent to exit and the anticipated exit/closing date: The timing of notice must be reasonably sufficient to allow all current clients, which include clients whom the lawyer has served on a "variety of matters over a "substantial period" but for whom no activity is pending,[17] reasonable time to find, investigate and negotiate engagement agreements with suitable replacement attorneys, and to enable tribunals to continue processing open matters without undue interference with the tribunal's duties and schedules.
- Notifying/reminding all current clients in writing of any impending deadlines and the effect of a default.
- Inventorying, accounting for, and reviewing for "critical" or "non-critical" current and former client property, including file(s) and documents – whether in written or digital format—and either returning to the client, delivering to the successor lawyer, or destroying with the client's informed consent using destruction procedures reasonably capable of protecting client confidences.

NOTE: Though the Wisconsin Supreme Court has not addressed the issue comprehensively, the Wisconsin Bar Committee on Professional Ethics counsels that "the client's file is the client's property even though it is maintained in the lawyer's office,"[18] and that the majority of jurisdictions recognize that the "entire file" is presumptively client property.[19] The American Law Institute and the ABA agree that "at a minimum a lawyer's obligation under the Rules reasonably gives rise to an entitlement to those materials that would likely harm the client's interest if not provided."[20] Also, The Wisconsin Bar Ethics Committee has opined that the caveat to SCR 20:1.16(d) permitting the lawyer to "retain papers relating to the client to the extent permitted by other law" does not itself recognize a "retaining lien:" a common law possessory lien granting a

lawyer a security interest in the client's papers for purposes of securing payment of fees. The Wisconsin Bar Ethics Committee's Formal Ethics Opinion 9 EF-16-03 (2016) opines:

> The so-called "retaining lien" has not been expressly recognized in Wisconsin, and therefore, any claim by a lawyer that there is, under Wisconsin law, a general right to retain client papers to secure payment of a fee is tenuous, at best. Id.

- Taking reasonable steps to protect the "critical documents" of former clients if the lawyer is unable to locate or communicate with a former client: The importance of a document will depend on the nature of the representation and the needs of a client. The lawyer is obliged to continue to safeguard any critical documents which may have particular significance to the client for as long as is reasonably practicable and under such circumstances reasonably calculated to keep the documents safe and recoverable.[21]

NOTE: "[A] lawyer who leaves a firm may leave with that firm the documents of clients the lawyer represented while with the firm, provided that the lawyer reasonably believes the firm has appropriate safeguarding arrangements."[22]

- Obtaining from the client or the successor lawyer written acknowledgement of the date and place of delivery and receipt of client files and property or documenting the timing and manner of destruction of the client's files.
- Reconciling and accounting for in writing, returning to the client any advance payments for fees or expenses that have not been earned or incurred and closing any trust and fiduciary accounts containing any client funds or other property in accordance with all requirements of SCR 20:1.15.[23]
- Locating vendors providing confidential destruction/shredding

services for paper and electronic devices, investigating them for reasonably adequate procedures for protecting client confidences when destroying client paper files and office electronic devices, and hiring such vendor(s).

Competence, Due Care, Diligence and Communication — the Essential Means for Discharging Fiduciary Duty

The ethical duties of *diligence* SCR 20:1.3 (acting "with reasonable diligence and promptness") and *communication* SCR 20:1.4 (initiating and maintaining reasonable consultation, conveying reasonably adequate and clear information, and complying with reasonable client requests) are congruent with common law fiduciary obligations: All mandate that a lawyer who intends to withdraw from the practice of law must *promptly, reasonably* and *adequately* inform the client of the decision; and *promptly and reasonably cooperate* with and assist the client to prevent or minimize harm to the client.

Not uncommonly, a breach of the fiduciary and ethical duties of diligence and promptness accompany a breach of the fiduciary and ethical duty of communication.[24] Lawyers who have closed their offices and terminated services to clients without properly notifying clients are deemed to have abandoned the clients and have been sanctioned for violating SCR 20:1.3, 1.4 and 1.16(d).[25]

SCR 20:1.16(b)(1) grants a lawyer permission to terminate a client relationship if "withdrawal can be accomplished *without material adverse effect on the interests of the client*…"

SCR 20:1.4(a)(1) through (4) mandate that lawyer who terminates a client relationship must:

(1) "Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;"
(2) "reasonably consult with the client about the means by which the client's objectives are to be accomplished;"

(3) "keep the client reasonably informed about the status of the matter;"
(4) "promptly comply with reasonable requests by the client for information…"

SCR 20:1.3 mandates that the lawyer must discharge these duties with reasonable diligence and promptness.

Collectively, the mandates of SCR 20:1.3, SCR 20:1.4 and SCR 20:1.16(b)(1) require that a lawyer desiring to terminate a client relationship must:

(1) always be mindful of each client's interests;
(2) promptly inform each client in writing of the lawyer's decision to terminate the relationship, the anticipated termination date, and that, unless the client chooses to decline successor representation, the client relationship will not terminate before a qualified successor lawyer acceptable to the client has been hired and the client's property, including the client's file, has been transferred to and received either by the client or by the successor lawyer;
(3) consult with and advise the client about successor attorneys and the client's desires concerning file disposition;
(4) reasonably investigate the potential successor attorney's educational, professional, and experiential backgrounds, including any disciplinary or criminal issues, and explain to the client why you believe that the recommended successor lawyer appears to have the requisite knowledge, skill, experience and integrity to properly protect the client's interests;[26]
(5) fully disclose in writing whether any recommendations as to successor counsel in any way, directly or indirectly, involve any financial arrangements with the recommended successor lawyer, and, if so, the essential terms and conditions of those financial arrangements;
(6) keep the client reasonably informed of the status of representation pending transfer to a successor lawyer and reply promptly

to reasonable client requests for information; and

(7) inform clients regarding the status of matters entrusted to the lawyer and on matters necessary to protect the client's interests pending transfer to the successor lawyer, such as extensions of time and the means and timing of file or matter transfer.

What is "prompt" and "adequate" communication with client or former client is a function of the client's needs and circumstances. A sound standard for assessing situational "promptness" and "adequacy" is: Put yourself in the client's position and ask, "[w]hat would I want my lawyer who is quitting to do for me and when? Also, as the lawyer, ask yourself: "What do I need to do to be confident that I've done my best to protect the client and that the client understands my advice?"

Lawyers intending to exit the practice of law need to be sensitive to the potential for actual or constructive abandonment of clients when exiting from the practice of law. Lawyer conduct that reasonably leads a client to believe that s/he is withdrawing from or abandoning representation without client consent, justifiable cause and to the client's detriment can constitute a "constructive" withdrawal or abandonment in breach of at least the fiduciary and ethical duties of diligence and communication under SCR 20:1.3 and 1.4.

Confidentiality

The scope of a lawyer's duty to protect client confidences is broad. SCR 20:1.6(a) mandates:

A lawyer shall not reveal *information relating to the representation of a client* unless the client gives *informed consent*, except for disclosures that are impliedly authorized in order to carry out the representation and except as stated in paragraphs (b) and (c) (which ordinarily would not apply when attempting to find a successor lawyer for a client).

Also, SCR 20:1.6(d) mandates:

A lawyer shall make reasonable efforts to prevent the inadver-

tent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

SCR 20:1(f) defines "informed consent" as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Comment 7 to SCR 20:1.0 counsels that "[i]n general, a lawyer may not assume that a client's silence grants the requisite consent."

Unless the client has given written informed consent as defined by SCR 20:1.0(f), or disclosure is impliedly authorized to carry out the representation, SCR 20:1.6(a) constrains a lawyer from revealing any information relating to a client's representation, even if the information is generally known, not adverse to the client, or the client does not consider the information to be confidential.[27]

Comment 18 to SCR 20:1.6 counsels:

> A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

Comment 20 to SCR 20:1.6 notes that "[t]he duty of confidentiality continues after the client-lawyer relationship has terminated."[28]

If a lawyer has informed the client of her or his intent to withdraw from the practice of law, and the client has requested the lawyer's assistance in finding successor counsel, then the client has granted the lawyer "implied authorization" to reveal to the prospective successor lawyer such *minimum information* as reasonably is necessary for the prospec-

tive successor lawyer to identify and clear conflicts of interest. However, because the concept of "implied authority" addresses a wide variety of circumstances, it is necessarily both vague and ambiguous:

> "Implied authority" is often used to mean actual authority either (1) to do what is necessary, usual and proper to accomplish or perform an agent's express responsibilities, or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.[29]

Vagueness or ambiguity imposes the risks of disputes and the costs of resolving them. It is always best to confirm in writing communications regarding client requests for assistance, and the grant and scope of authority to contact prospective successor counsel.

Avoiding Conflicts of Interest is Essential: Clients Remain Current Clients Until Termination is Completed in Accordance with the RPC

The lawyer-client relationship is unconditionally "at-will" with respect to consensual clients – i.e., clients who are not court-appointed clients,[30] but conditionally "at-will" with respect to the lawyer.

Before the lawyer can fully terminate the relationship, the RPC must be complied with. Accordingly, a consensual client remains a "current client" until a lawyer has completed termination of representation and has satisfied all obligations imposed by the RPC, including those imposed by SCR 20:1.16 (b)(1) and (d).

SCR 20:1.7(a)(2) states that "conflicts of interests" with respect to "current clients" include any imposing "a *significant risk* that the representation of one or more clients will be *materially limited*…by the lawyer's *responsibilities to a third person or by a personal interest of the lawyer.*" (emphasis added). The concepts of "significant risk" and "material limitation," operate prospectively and focus on a potential, foresee-

able and plausible, though not certain or even probable, constraint on the lawyer's independent professional judgment or ability to act in the client's best interests.

The ABA Comment 8 to SCR 20:1.7 advises:

> [A] conflict of interest exists if there is a significant risk that the lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests….
>
> The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that differences in interest will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or forecloses courses of action that reasonably should be pursued on behalf of the client.

The American Law Institute's Restatement (Third) of the Law Governing Lawyers counsels: "[S]ubstantial risk" means that in the circumstances the risk is significant and plausible, even if it is not certain or even probable that it will occur."[31]

The Wisconsin Supreme Court has construed SCR 20:1.7 to "not require any particular degree of likelihood that adverse effects (to the client) will accrue…"[32]

In summary, the lawyer must always be aware of conflicts situations arising when the lawyer is planning his/her departure from the practice and seeking to protect the interests of the client.

General Business Closure Steps

In addition to the steps mandated by SCR 20:1.16(d) with respect to terminating client relationships, the lawyer also must either accomplish or supervise the accomplishing of closing the office, including:

- Reviewing office business records and files for mandatory retention – e.g., wage and hour records (see Permanent Records Which Must be Kept by Employers (wisconsin.gov); tax records (see DOR Individual Income Tax Keeping Records (revenue.wi.gov) and "How long should I keep records?" | Internal Revenue Service (irs.gov); and trust and fiduciary account records. (see SCR 20:1.15(g)(1)trust accounts – 6 years "from the termination of representation" & SCR 20:1.15(k)(7) fiduciary accounts– "at least 6 years from "termination of the fiduciary relationship.")
- Properly preparing and filing all documents required by governing administrative agencies to close government mandated accounts such as unemployment compensation accounts.
- Procuring an extended reporting endorsement ("tail coverage") for the Lawyer's Professional Liability insurance policy.
- Timely terminating office leases, utility and service provider contracts (e.g., telecommunication contracts, mailing meters, and copier and electronic data base leases), and employment contracts. Employment contracts pose certain compensation challenges as respects benefits – e.g., unused vacation time – and unemployment compensation.

Two of the more comprehensive law practice termination checklists available on the internet are:

1. Illinois Attorney Registration and Disciplinary Commission, *The Basic Steps to Ethically Closing a Law Practic*e, (iardc.org/files/closing_a_law_practice.pdf) ("Illinois Bar Checklist"); and,
2. North Carolina Lawyer's Mutual Insurance Company, Plan Ahead for Closing A Law Practice (Closing_Practice.pdf) (lawyersmutualnc.com).

* * *

[1]*2019-2020 Annual Report of the Lawyer Regulation System*, at pg. 34.

[2]Wis. State Bar Firm Size Statistics (2021), available at Member Statistics (wisbar.org)

[3]Wis. State Bar Member Data & List Rental Fees (12/01/2019), available at ListOrderForm.pdf (wisbar.org)

[4]Available at After All, You Are Only Human Version 131028.pdf (wisbar.org).

[5]*Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶ 41, 752 N.W. 2d 800; *Burkes v. Hales*, 165 Wis. 2d 585, 478 N.W.2d 37 (Ct. App. 1991).

[6]Restatement (Third) Law Governing Lawyers § 16 cmt. b (2000) at 146.

[7]Tamar Frankel, Fiduciary Law, 71 Calif L. Rev. 795, 808-810 (1983).

[8]Restatement (Third) Law Governing Agency § 1.01 (2006) at 17; Restatement (Third) of Agency § 8.01(2006)(Agents owe "a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.")

[9]*Sands v. Menards*, 2010 WI 96, ¶53, 328 Wis. 2d 647, 673, 787 N.W.2d 384, 397-398; accord *Brockemuhl v. Jordan*, 270 Wis. 14, 18, 70 N.W. 2d 26 (1955)("[a]bsolute fidelity and loyalty to the interests of his principal is the first duty and the highest obligation of an agent.")

[10]1 Restatement (Third) Law of Agency § 8.01 (2006) at 249.

[11]Susan R. Martyn, Lawrence J. Fox and Andrew Pollis, eds., *Back To The Future: Fiduciary Duty, Then And Now – A Century of Legal Ethics*, Faculty Research Paper, University of Toledo College of Law (2009)(citing to Susan R. Martyn & Lawrence J. Fox, *Traversing The Ethical Minefield, Problems, Law and Professional Responsibility*, 57, ch. 3-10 (Aspen 2d ed. 2008)); *see also, Preamble* SCR Chapter 20 cmt.4 ("In all professional functions a lawyer should be *competent, prompt and diligent*. A lawyer should *maintain communication* with a client concerning the representation. A lawyer should keep in *confidence* information relating to representation of a client except so far as disclosure is required or permitted by the RPCs of Professional Conduct or other law.")

[12]*See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶¶ 85-86, 333 Wis. 2d 402, 797 N.W.2d 789 and the other authorities cited in note 6, supra.

[13]E.g., *Thiery v. Bye*, 228 Wis. 2d 231, 241-243, 597 N.W.2d 449 (Ct. App. 1999)(SCR 20:1.9 cited in support of lawyer's fiduciary duty to maintain confidentiality of former client information); *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶¶ 85-86, 333 Wis. 2d 402, 797 N.W.2d 789 ("Appellate courts have often cited the Rules of Professional Conduct for guidance in non-disciplinary cases, including disqualification cases."); *Sands v. Menard*, 2010 WI 96, 328 Wis. 2d 647, 787 N.W.2d 384 (attorney's fiduciary duty of loyalty based on Rules of Professional Conduct); *Tensfeldt v. Haberman*, 2009 WI 77, ¶62 n.25, 319 Wis. 2d 329, 768 N.W.2d 641(("The Supreme Court Rules of professional conduct for attorneys provide guidance regarding the scope of representation.").

[14]SCR 20, Preamble, cmt. 9.

[15]Cf., SCR 20:1.7(a)(2) and cmt. 10 (Noting as one example of a conflict of interest arising

from a lawyer's financial interests: "[A] lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.")

[16]See e.g., *Welty v. Heggy*, 124 Wis.2d 318, 369 N.W.2d 763 (1975)(generally discussing "reasonable diligence.")

[17]SCR20:1.3, cmt. [4]

[18]Wisconsin Ethics Cmte. Formal Op. EF-16-03, The Ethical Obligation of the Lawyer to Surrender the File upon Termination of the Representation (12-29-2016).

[19]*Id*., at fn. 8, page 3. Prudence suggests obtaining and carefully reading Formal Op. EF-16-03 which is available on the State Bar's web page at https://www.wisbar.org/formembers/ethics/pages/formal-opinions.aspx

[20]ABA Formal Ethics Opinion 471 (2015); Restatement (Third) of the Law Governing Lawyers § 46, cmt. b. (2000).

[21]Restatement (Third) of the Law Governing Lawyers § 46, cmt. b. (2000).

[22]See the Wisconsin OLR Guidelines for Trust Account and Fiduciary Account Records available at OLR Guidelines for trust account records (wicourts.gov) and OLR Guidelines for fiduciary account records (wicourts.gov).

[23]See the Wisconsin OLR Guidelines for Trust Account and Fiduciary Account Records available at OLR Guidelines for trust account records (wicourts.gov) and OLR Guidelines for fiduciary account records (wicourts.gov).

[24]See, e.g., *In re Kaupie*, 2015 WI 81 (7/15/2015); *In re Dahle*, 2015 WI 29 (3/18/2015).

[25]See, e.g., *In re Grade*, 2007 WI 108, 304 Wis. 2d 531, 735 N.W.2d 523 (Violated SCR 20:1.3 and SCR 20: 1.4(a) by abandoning practice without notice to clients: license revoked); *In re Erlandson*, 2005 WI 143, 286 Wis. 2d 53, 704 N.W.2d 910 (2005)(same: consent revocation); In re Jackson, 221 Wis. 2d 616, 585 N.W.2d 151 (1998)(Same: one year suspension); *In re Glickman*, 208 Wis. 2d 136, 559 N.W.2d 905 (1997)(Same: 60 day suspension.)(NOTE: In each case, the RPC 1.3 violation was but one of many violations of other RPCs.)

[26]Attorney malpractice for "negligent referral" is a recognized cause of action. See Karen J. Feyerherm, Recent Development, Legal Malpractice-Expansion of the Standard of Care: Duty to Refer, 56 Wash L. Rev. 505, 507-08 (1981); *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975); (holding that an attorney has a duty to use reasonable care in selecting and referring a case to outside counsel); Miller v. Metzinger, 91 Cal. App. 3d 31, 42 (1979) (holding that an attorney who declined a case and referred the prospective client to more specialized counsel was negligent for making the referral because he had failed to warn the client about the need for immediate action by successor counsel).

[27]With respect to *former clients*, SCR 20:1.9(c)(1) allows a lawyer to *use* (but not *disclose*) information received during the representation of the former client in a *specific matter that is material to the subsequent representation* "to the disadvantage of the former client" *if and only if* SCR 20:1.6 would permit disclosure, *or if* the information is "*generally known*." See ABA Formal Opinion 97-409 (Aug. 2, 1977), at 9 fn 8. Information published

in a "public record," such as a court record, is not "generally known" solely because it has been published in a "public record."

[28]*Also see, Thiery v. Bye*, 228 Wis. 2d 231, 241-243, 597 N.W.2d 449 (Ct. App. 1999). For an astounding breach of the duty of confidentiality, see In re O'Neill, 2003 WI 48, 261 Wis. 2d 404, 661 N.W.2d 813 (Lawyer hired by husband in divorce proceeding, orally and in response to subpoena duces tecum, discloses to police without notice to client or client's consent, his privileged statements to lawyer, husband's financial and other evidence used by prosecution to establish husband's motive for murdering wife and to secure husband's conviction of 1st degree intentional homicide of wife. Lawyer's excuse: He thought he was acting in his client's best interests.)

[29]Restatement (Third) Law of Agency § 2.01 cmt. b (2000) at 80.

[30]*Fidelity & Deposit Co. v. Madison*, 201 Wis. 609, 611-612, 231 N.W. 170 (1930); Restatement (Third) Law Governing Lawyers § 14 cmt. b (2000) at 126 ("The client may at any time end the relationship by withdrawing consent…").

[31]2 Restatement (Third) Law Governing Lawyers, § 121 cmt. (c)iii (2000) at 248.

[32]*In re Trewin,* 2004 WI 116, ¶ 45, 275 Wis. 2d 116, 684 N.W. 2d 121 (2004).

CHAPTER EIGHT

Ethical, Fiduciary, Legal and Practical Issues of Selling a Law Practice or Area of Practice

By Edward A. Hannan and Dean Dietrich

There are five ways to exit a law practice while still living:
(1) closing the practice;
(2) transferring client matters between attorneys in a law firm;
(3) transferring matters on a case-by-case basis to other lawyers with the client's informed, written consent and/or a tribunal's approval and with full compliance with all requirements of Rule 1.5 if fee division is desired;
(4) merging with another firm; or
(5) selling the law practice or area of practice pursuant to SCR 20:1.17.

This chapter addresses the ethical, legal and practical issues arising in the context of selling a law practice or merging law practices.

SCR 20:1.17 – Terms, Purpose & Intent

SCR 20:1.17 mandates:

A lawyer or a law firm may sell or purchase a law practice, or an area

of practice, including goodwill, if *and only if* the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area or in the jurisdiction in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's affected clients regarding:

(1) the proposed sale;

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

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Axiomatically, any purchase and sale agreement under SCR 20:1.17 must be written, signed by all parties, and exchanged and delivered.

Purpose & Intent: Allow a Retiring Solo Practitioner to Sell Her or His Law Practice's "Goodwill"

Before 1990, courts, the ABA Committee on Ethics and Professional Responsibility and state bar ethics committees "…strictly opposed the

sale of law practices themselves on the ethical grounds that such sales required the impermissible transfer of goodwill."[1] Then, lawyers seeking to obtain the financial benefit of their practice's "goodwill" upon retirement without running afoul of SCR 20:5.4 (prohibiting fee splitting with "non-lawyers"), could do so only with ethically permissible retirement plans or draws when their former partners' undertook assumption of their practice.[2]

When promulgating Model Rule of Professional Conduct 1.17 in 1990, the ABA asserted that the rule would "rectify the unfair financial treatment experienced only by solo practitioners as a result of certain ethical rules…" by permitting a solo practitioner to sell his or her practice's "goodwill"[3]; i.e., to capture the practice's value as a going concern – the value of a business or enterprise that is expected to operate into the future."[4]

"Goodwill" is "that *intangible asset* arising as a result of name, reputation, customer loyalty, products and similar factors not separately identified."[5] "Goodwill" consists of a 'practice goodwill' component that is attributable to the practice entity and a 'professional goodwill' component that is attributable to professional practitioners personally."[6] It is "the income stream capitalized to create those assets (practice goodwill and professional goodwill.)"[7]

Model Rule 1.17 facilitates the purchase and sale of a private law practice or area of practice by allowing the selling and buying lawyers to assume that they have client consent to transfer client files and matters provided that proper notice has been given to the clients.

Complying with SCR 20:1.17

SCR 20:1.17 (a) and (b) provide that to validly purchase and sell a "private law practice" or "area of practice" the "seller" must:

- "*cease*" (to bring or come to an end),
- "*engaging*" (to carry on an enterprise or activity);
- *in the entire* (with no part left out, all, whole) *private practice of law*; or

- *the entire* (with no part left out, all, whole) *area of practice* (law subjects: e.g., admiralty or maritime law, criminal law, corporations, environmental law, family law, intellectual property, media, property, tort, tax…);
- *in the geographic area or jurisdiction in which the practice has been conducted.*

SCR 20:1.17 (c) also mandates that the seller "give written notice to each of the seller's affected clients regarding:

(1) the proposed sale;
(2) the client's right to retain other counsel or to take possession of the file; and
(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice."

And SCR 20:1.17(d) also mandates that *"(t)he fees charged clients shall not be increased by reason of the sale."*

Cease Engaging In Private Practice Of Law or in the Area of Practice That Has Been Sold

One intent and purpose of SCR 20: 1.17 is to put retiring private practitioners and the estates of deceased private practitioners who are not partners in a law partnership in roughly the same financial position as the estate of a deceased or of a retiring law firm partner who captures the value of her or his private law practice on death or retirement by "selling" her or his practice to her or his law partners. SCR 20:1.17 extends the limited exemptions from the constraints imposed by SCR 20: 5.4 (fee division) and 5.6 (restricting right to practice law) that are available to retiring or deceased private law partners.

Living private practitioners intending to use SCR 20:1.17 to attempt to capture the value of his or her practice by selling the practice as a

going concern must understand that SCR 20:1.17 requires the Seller to withdraw from and to stop accepting clients, cases, or matters within the scope of the private practice that is being sold. This means that the Seller cannot continue to practice as "Of Counsel," partner, joint venturer, or in any other role or status within the scope of the practice or area of practice that was sold and purchased, or within the geographic area or jurisdiction in which the practice has been conducted.

A Seller may continue to provide post sale professional legal services in the public sector – e.g., judicial officers or as officers or employees of federal, state and local agencies. But private practitioners providing professional services to public bodies or entities on a contract basis or as a non-employee – e.g., a private practitioner hired by a municipal body to provide professional services in her or his private capacity and not as a municipal employee – must withdraw from providing such services if the scope of the sale of the private law practice included that type of practice.

Though the terms of ABA Model Rule 1.17 and SCR 20:1.17 clearly mandate a seller-lawyer to "cease engaging" in the law practice or area of practice sold contemporaneously with the sale, the ABA Committee on Ethics and Professional Responsibility's Formal Ethics Opinion 468 (October 8, 2014)[8] interpreted Model Rule 1.17 to allow a seller-lawyer to assist the buyer-lawyer for a reasonable period after the purchase and sale agreement closes:

> Neither the black letter nor the comments to Rule 1.17 address the timing of when a seller "ceases to engage" in the private practice of law for purposes of the rule. In particular, there is no discussion of whether a selling lawyer may continue to be involved in the practice to assist in the orderly transition of active client matters. It is clear from Comment [5] that the selling lawyer may no longer accept new matters in the relevant practice or area of practice, and that prohibition should logically take effect immediately upon the closing of the sale. However, given the history and purpose of the rule, as well as the black letter provisions and comments to the rule, it seems

> reasonable to conclude that the transition of pending or active client matters from a selling lawyer or firm to a purchasing lawyer or firm need not be immediate or abrupt. Id., at pg. 4.

NOTE: An ABA opinion interpreting a RPC *does not bind* the Wisconsin Supreme Court, particularly where the opinion arguably conflicts with the Rule's otherwise clear and unambiguous terms. To mitigate against the risk that the court ever would conclude that "cease engaging" mandates immediate cessation by the selling lawyer of all involvement in client matters upon closing the sale and purchase transaction, the sale and purchase agreement and the selling lawyer's notice to clients should contain a provision stating that the selling lawyer will remain available to clients for a reasonable time after closing, but only for purposes of assisting as needed in the orderly transition of active client matters to buying lawyer.

Sell the Entire Private Law Practice or Area of Law Practice

A sale pursuant to SCR 20:1.17 mandates that the Seller offers to sell and the Buyer agrees to purchase and accept, and undertake to serve post sale *all clients and client matters* within the scope of the law practice that was offered for sale – either the Seller's entire private law practice or the entirety of a specific area of a private practice. The purpose and intent of this condition is to deter emphasizing a law practice as a business rather than a profession, and treating clients and client matters as "commodities," excluding "less lucrative" client and client matters – including pro bono clients and matters – and favoring those clients having the financial capacity to absorb the cost of operating a private law practice.[9]

In the Geographic Area or Jurisdiction in Which The Practice Has Been Conducted

Considering the context, the sale and purchase of a private law practice's "goodwill," the term "*geographic area*" denotes the general spatial bound-

aries of the Seller's law practice, and "*jurisdiction*," denotes the territory *or sphere of activity over which the legal authority of a court or other institution extends – e.g., the nation or a state*. For example, some lawyers who represent persons charged with crimes provide services only within the federal judicial system, and then only within a few federal districts or only some federal courts, such as district courts or only federal appellate courts. Some private practitioners specializing in tax or intellectual property law – copyright, trademarks or patents – may have practices of international scope.

Current and future practices and technological developments, particularly developments in "remote work" practices and electronic communications pose challenges for determining the scope of a "geographic area" or "jurisdiction" in which the Seller's private law practice is conducted.

Issues pertaining to 20:1.17(a) and (b), defining the scope of the "practice" or the "area of practice" purchased and sold, and the identity of the "geographic area" or "jurisdiction in which the practice has been conducted," are subjects of negotiation between the parties. These subjects must be completely and clearly defined and detailed in the documents confirming the terms of purchase and sale.

No Increase In Fees "By Reason Of the Sale"

The purpose of SCR 20:1.17(d)'s mandate that "(t)he fees charged clients shall not be increased by reason of the sale" is to protect the seller's clients from financing the buyer's financial obligations to seller. The ABA Committee on Ethics and Professional Responsibility's Formal Ethics Opinion 468 explains:

> Finally, neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent on transition activity that does not advance the representation or directly benefit the client. The clear intent of the black letter and the comment of Rule 1.17 is that clients should not expe-

rience any adverse economic impact from the sale of a practice or area of practice. As noted above, Rule 1.17(d) unequivocally states: "The fees charged clients shall not be increased by reason of the sale." And Comment [10] further explains: "The sale may not be financed by increases in fees charged clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser." The need to spend time on transition activity arises only because of the sale of a practice or area of practice. Charging clients for time spent implementing the sale, activity that would not have been undertaken but for the sale, constitutes an "increase" in the original fee arrangement between the seller and the client "by reason of the sale." Even if the hourly rate is unchanged, billing for the additional time spent on transitioning matters will necessarily increase the fee otherwise due for the representation. Thus, time spent implementing the sale may not be billed to clients.[10]

Fiduciary and Ethical Concerns Arising In Negotiating The Terms of Sale of An Entire Law Practice or Area of Law Practice

At a minimum, prudent lawyers will assume that the Wisconsin Supreme Court will construe SCR 20:1.17's terms so as to harmonize them with all other applicable RPCs. Also, prudent lawyers will understand that if an attempted purchase and sale of all or part of a law practice fails to comply with any SCR 20:1.17, mandate, then both seller and buyer are at risk of disciplinary action involving charges of violating not only SCR 20:1.1, but also any other related RPC.

The principal fiduciary and ethical concern related to negotiating a purchase and sale of a law practice is remaining sensitive to the conflicts of interests arising between the Seller's and Buyer's personal financial interests in the transaction and their fiduciary and ethical duties to competently and diligently provide their clients disinterested advice and services necessary to protect the clients' interests. Also, Seller and Buyer

must remain sensitive to their fiduciary duties governing the manner of conducting due diligence investigations and protecting client confidences.

Fiduciary and Ethical Duties Concerning Conflicts of Interest Between the Lawyer's Personal Financial Interests and the Affected Clients' Interests

SCR 20:1.7(a)(2) defines a conflict of interest with a current client to include "a significant risk that the representation of one or more clients will be materially limited by… a personal interest of the lawyer." Comment 10 to SCR 20:1.7 notes "a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest." Both Seller and Buyer must remain highly sensitive to how their personal financial interests in concluding the sale and purchase of a law practice may – might – conflict with the best interests of any of their current or former clients.

NOTE: SCR 20:1.7(a)(2) states that "Conflicts of interests" with respect to "current clients" include any imposing a "significant risk that the representation of one or more clients will be *materially limited*… by the lawyer's *responsibilities to a third person or by a personal interest of the lawyer*." (emphasis added). The concepts of "significant risk" and "material limitation," *operate prospectively* and focus on a *potential, foreseeable and plausible, though not certain or even probable, constraint on the lawyer's independent professional judgment or ability to act in the client's best interests.*

Fiduciary and Ethical Duties Concerning Due Diligence and Other Investigations

The sale and purchase of a "law practice" or "area of practice" imposes on the Selling Lawyer a fiduciary and ethical duty to "exercise competence (SCR 20:1.1) in identifying a purchaser who is *qualified to assume the practice*…" SCR 20:1.17 cmt. [11], quoting ABA Model Rule 1.17, cmt.

[11]. This means that the potential Buying Lawyer must have sufficient knowledge, skill, and experience to competently represent *all clients on all client matters* subject to transfer on sale of the practice areas or practice. Exercising "competence" in identifying a suitable potential successor lawyer, the Seller must, at a minimum, consider the nature and scope of the Seller's practice and the nature and needs of the Seller's current clients.

Next, to satisfy the fiduciary and ethical duties of *diligence* and *communication* both Seller and Buyer must ascertain whether the potential Buyer is qualified to competently represent *all clients* on *all client matters* subject to transfer on sale. Also, to discharge Seller's fiduciary and ethical duties concerning notice to Seller's affected clients, the Seller must reasonably investigate the prospective Buyer's educational, professional, experiential and disciplinary background.

The Buyer must investigate the nature of Seller's practice and client matters subject to sale and confirm that the prospective Buyer is able to and will accept and undertake to represent all clients on all client matters subject to transfer on sale.

The Seller Lawyer and Buyer must investigate and evaluate whether any conflicts of interest exist as to any former, current or pending prospective clients of both Seller and Buyer but must do so without compromising any specific information relating to the representation of the client. Factors subject to investigation and confirmation include, but are not limited to:

- The identity of clients and general nature of client matters subject to sale;
- Whether Seller has generally maintained regular communications with Seller's clients;
- Whether any problems are likely with respect to substituting Buyer for Seller in any pending proceedings whether by way of client objections, procedural rules, or other reasons;
- Whether any urgencies exist in any of Seller's pending client matters, such as imminent deadlines the lapse of which would

harm the client(s) whose matters are the subject to the deadlines: e.g., estate deadlines, statutes of limitation, pretrial order deadlines, or other deadlines;
- Whether any conflicts of interest exist with any member of Seller's or Buyer's client base;
- Whether Seller holds any unearned advance fees or expenses or other client property in Seller's trust or fiduciary accounts; and
- Whether any of Seller's pending or closed files contain confidential information requiring the affected client's written informed consent to disclose to Buyer, and whether and to what extent to inform Buyer of Seller's withholding of confidential information a client declines to authorize the Seller to disclose to Buyer. (Help in identifying client papers and property appears in ABA Ethics Committee Informal Opinions 1376 (2/18/1977) and 1384 (3/14/1977);
- How to document a transfer of Seller-client files or matters to a Buyer? How detailed should the inventory of clients and client matters be? Who should provide Seller receipts of client files and matters? The Buyer? The affected clients? Both?

These are just some of the issues requiring investigation, Seller-client informed consents, and Seller 's and Buyer's agreement on the terms and conditions of the sale of Seller's law practice or area of law practice.

Fiduciary and Ethical Duties Concerning the Content of the Written Notice to Seller's Affected Clients

SCR 20:1.17(c) specifies the content of the mandatory written notice to seller's affected clients. Seller's written notice must advise affected clients of:

1) "the proposed sale,
2) the client's right to retain other counsel or to take possession of the file; and

3) The fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or otherwise does not object within ninety (90) days of receipt of the notice."

The scope of the written notice of the "proposed sale" poses complexities respecting, serving and protecting the Seller's affected clients' interests. Seller's notice cannot be limited, in essence, to "effective [date] I am selling her or his practice to lawyer B. Seller believes that lawyer B has all the necessary knowledge, skill, and experience to serve as my successor as your lawyer. I recommend that you accept lawyer B as your lawyer." Instead, Seller's written notice must contain information sufficient to enable Seller's affected clients to make informed judgments on whether to accept Buyer to represent them as Seller's successor.

> When a law practice is sold, the seller usually refers her client to the buyer. This scenario could lead to a potential conflict of interest in that rather than being based on disinterested and informed considerations, the recommendation from the seller to the client will be based on financial self-interest. A conflict may arise between the concern for the client's interests (in which case the seller would want the most competent buyer) versus the seller's financial interest in selling the practice (in which case the seller would want the highest bidder, regardless of competence). The seller may thus refer her clients to an unreliable or unqualified successor if that successor happens to be the highest bidder. Furthermore, the conflict may escalate when the sale is for a fixed amount rather than for payments over a period of time (based on fees received from the seller's clients) because in the latter case, the seller would have to recommend a buyer who would maintain the attorney-client relationships over time in order to make money for the payments.

In order to comply with this obligation, the selling lawyer

should fully disclose to his or her clients all aspects of the proposed arrangement with the buyer when advising clients that they should retain the buyer as counsel. This situation is not significantly different from others in which there is a conflict of interest that is curable by full disclosure and informed consent.[11]

In addition, the written notice should generally explain the nature and scope of Buyer's background. It should include a description of Buyer's education; the general nature and duration of Buyer's professional practice, experience and bar membership; information and source of information respecting Buyer's professional reputation in the community; any history of professional discipline, and any other facts that might influence a Seller's client's decision on whether to accept or to decline Buyer as Seller's successor. The Seller's notice should contain such specific information as reasonably necessary to enable Seller's clients to make informed consensual decisions on whether to accept Buyer as Seller's successor.

Also, as respects notice of the "right to retain other counsel, or to take possession of the file…" the notice should clearly explain the nature of a consensual client's "at will" relationship with any attorney:

- The client is entitled to terminate a professional relationship with Buyer at any time or for any or no reason whatsoever.
- The client need not explain or justify client's decision to terminate a relationship with any lawyer.
- A lawyer is obliged to honor a consensual client's (a voluntary relationship as opposed to a court-ordered relationship) demand to terminate the relationship immediately.

Other Practical Considerations

A solo or small firm general practitioner's expectations regarding the market value of her or his practice as a going concern should be reasonable; they should anticipate a Buyer's demands for substantial discounts

of any projected value of the practitioner's "goodwill."

The most widely accepted definition of "market value" is: "The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified [asset] should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under duress."[12]

Since the principal "asset" offered for sale is "the (Seller's) relationships with the clients and the future stream of revenue they represent,"[13] a prudent Seller will recognize that any client who is not a client by court appointment, that are consensual clients, are autonomous. Any professional relationship between any lawyer and any consensual client is absolutely and unconditionally "at-will" from the client's point-of-view.[14]

Because a solo practitioner's personal relationships with her or his consensual clients is the most important factor in determining the market value of her or his "personal goodwill," the market value of the "asset," the potential future revenue stream due to Seller's relationship with clients, should be recognized to be hedged with significant uncertainty: The "asset" offered for sale is the probable market value of a client's "personal relationship" with a seller who *nullifies* "the asset" by ceasing to practice law. Also, the client whose "relationship" has been "purchased" absolutely and unconditionally is entitled to terminate a professional relationship with the successor lawyer at any time and for any or no reason whatsoever.

Further, if the purchase and sales transaction contemplates paying Seller over time and in installments from the proceeds of liquidating Seller's accounts receivable, Seller should recognize that the gross proceeds on collection will be reduced by Buyer's fixed and variable overhead, and that Buyer will recognize the nature of the transaction to be a "factoring transaction,"[15] in which Buyer becomes a debtor financier of the winding up of Seller's practice, and as a "factor" assumes the risk of non-collection.

* * *

[1]Scott M. Schoenwald, *Model Rule 1.17 and the Ethical Sale of Law Practices: A Critical Analysis* 7 Geo. J. Legal Ethics 395,396 (1993) (citing authorities)

[2]See *Schoenwald, supra*., at 402.

[3]Schoenwald, supra., 7 Geo. J. Legal Ethics 395,402 (1993) (citing to Section of Gen. Practice & Section of Law Practice Management, Am. Bar Ass'n. & State Bar of California Report to the House of Delegates (2-4 1990)).

[4]AICPA Statement on Standards for Valuation Services No. 1, Appendix B, International Glossary of Business Valuation Terms. Available at at http://bvfls.aicpa.org/Resources/Business+Valuation/Tools (last accessed 4-25-2021).

[5]James R. Hitchner, *Financial Valuation: Applications And Models*, 855 (2d.ed. John Wiley & Sons, Inc. 2006) (quoting *International Glossary of Business Valuation Terms*).

[6]Hitchner, *supra*., at 856.

[7] Id. at 860; *also see Dugan v. Dugan*, 92 N.J. 423, 457 A.2d. 1 (1983)(recognizing, defining, and valuing "goodwill" as an intangible asset that was subject to equitable division as marital property upon the divorce of a lawyer practicing as a solo practitioner via a solely owned professional corporation.)

[8]aba_formal_opinion_468.authcheckdam.pdf (americanbar.org)

[9]See SCR 20:1.17 cmt. 6, quoting *ABA Model Rule* 1.17 cmt. 6 ("The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters."); see also Nina Fields, "*The Sale of a Law Practice in South Carolina: The Impact of Model Rule 1.17 on Sole Practitioners and Their Clients*," 50 S.C. L. Rev. 1029, 1029 (1999) ("A general premise of legal ethics was, and still is, that '[t]he practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will.'" (quoting Rule1.17 cmt. 1)).

[10]See also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993) (client should only be charged for legal services performed). Also, *Disciplinary Proceedings Against Armstrong*, 2015 W 60; Billing non-professional services at a professional services rate is unreasonable and violates SCR 20:1.5 (charging $4,118.95 to reduce a tax deficiency by $1,020, charging $3,256 to cancel an auto insurance policy and transfer a vehicle title, charging $562.50 to pursue reissuance of a $315 stale check, charging $385 to cancel an AOL account, billing $500 per month for services that generally required only 15 minutes of work per month, billing at a professional services rate of $250 per hour for non-professional services.)

[11]NOTE: SCR 1.0(f) "informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

[12]Gayle L. Coy, Permitting the Sale of a Law Practice: Furthering the Interests of Both Attorneys and their Clients, 22 Hofstra L. Rev. 969, 972-973 (1994).

[13]The Dictionary of Real Estate Appraisal (4th ed. Appraisal Institute, 2002) at 177.

[14]James D. Cotterman, a principal with Altman Weil Inc., a management consulting firm to the legal profession. (quoted in Maria Kantzavelos, *For Sale by Owner: Getting the Most for Your Law Practice*, Illinois Bar Journal, Vol 100, No. 10 at 524 (Oct 2012))

[15]Factoring is a financial transaction and a type of debtor finance in which a business sells its accounts receivable (i.e., invoices) to a third party (called a factor) at a discount.

CHAPTER NINE

What Do I Do With All Those Client Files?

Retention and Destruction of Closed Client Files

Ethics Opinion
EF-17-01
February 28, 2017

There is no one answer to the central question of how long a lawyer must keep closed files before they may be destroyed. As a general rule, if the former client has not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer. While six years is a floor, it is not a ceiling. A lawyer should carefully consider whether the file contains items that the lawyer should retain for a longer time or whether special circumstances exist such that the file should be retained for a longer time. Certain practice areas, such as estate planning, normally create those circumstances that require the lawyer to preserve closed files for a longer period of time. Before closed client files are destroyed, a lawyer must ensure that important original client property is returned and that steps are taken to preserve the confidentiality of client information. Lawyers should inform clients both of their right to the file and of the firm's file destruction policy in the engagement agreement and in any letter terminating or completing the relationship or engagement. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.

Introduction

How long must a lawyer retain closed client files? This question arises in several contexts: many times, a lawyer has former client files that are twenty or thirty years old, and the lawyer no longer has room to store them; sometimes, a lawyer is closing his or her office or retiring; and sometimes, a lawyer has died. This question is also difficult to answer because it often depends on a host of other questions, such as: whether the client files contain original client documents or records; whether a minor is involved in the representation; and what type of representation was involved.

This opinion addresses the questions of how long closed client files should be kept by the lawyer and what steps the lawyer should take before destroying closed client files. This opinion also addresses the responsibilities of the lawyer or law firm that represented the client in the matter. This opinion does not address the responsibilities of a lawyer who is winding up the practice of another lawyer, such as when a lawyer is appointed as a trustee under Supreme Court Rules Chapter 12.

Lawyers may choose to close client files in physical or electronic format, provided that the closed files are secure, accessible by the lawyer, and reproducible in a format that is usable by the client. The guidance provided by this opinion applies equally to physical files and files stored in an electronic format.

How long after the end of the representation must a lawyer keep closed client files?

The Wisconsin Rules of Professional Conduct (the "Rules") do not provide a required retention time for closed files, and thus there is no "magic number" to be found in the Rules. SCR 20:1.16(d) does, however, require lawyers to take steps to the extent reasonably practicable to protect the interests of the client upon termination of the representation. That Rule has consistently been interpreted to require lawyers to preserve closed files for a period of time sufficient to protect the interests of the clients.

In Wisconsin Formal Ethics Opinion E-84-5, the State Bar's Stand-

ing Committee on Professional Ethics (the "Committee") considered the question of dealing with closed client files in the lawyer's possession. While the Committee opined that lawyers did not have a duty to preserve all client files on a permanent basis, the opinion concluded, relying on ABA Informal Opinion 1384 (1977), that "former clients reasonably expect that valuable and useful information in their attorney's files, not otherwise readily available to the clients will not be prematurely and carelessly destroyed." The Committee, also relying on ABA Informal Opinion 1384, recognized the reasonable expectations of the former client, cautioned lawyers to maintain files for at least the duration of any applicable statute of limitations that might pertain to a client's claim, and instructed lawyers to return important documents to the client or to maintain them in storage.

In Ethics Opinion E-98-1, the Committee took the position that, if the former client had not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer, and we reaffirm that guidance here. This six-year minimum is consistent with SCR 20:1.15(g)(1), which requires lawyers to preserve complete records of trust account funds and other trust account property for at least six years after the date of termination of representation. It is also consistent with the statute of limitations for most malpractice actions,[1] and for most matters, should provide a sufficient period of time to protect the interests of the client.

While six years is a floor, it is not a ceiling. The interests of the client may require that the lawyer retain a closed client file for longer than six years. A lawyer should carefully evaluate whether the file contains items that the lawyer should retain for a longer time or whether circumstances exist such that the file should be retained for a longer time. Some files must usually be retained longer than six years, such as files involving claims of minor children, estate planning, and certain tax matters.[2] In determining how long to retain closed client files, the lawyer must be mindful of relevant statutes of limitations as well as the needs of the client in the particular matter. A lawyer's own interest may also cause a lawyer

to retain closed files for more than six years.[3] Many firms have written file retention policies that specify different retention periods for different types of files. For example, some firms may have policies mandating longer retention periods for estate planning files than for criminal defense files.[4]

While Wisconsin Ethics Opinion E-98-1 recognized that maintaining former clients' files forever was not practicable and that lawyers should not be burdened by the attendant economic costs, it also recognized that certain safeguards should be followed before a file is destroyed. While we agree with most of the safeguards recognized in E-98-1, we do not agree with all of them. One of the safeguards with which we disagree required that "[a]bsent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files."[5]

Although some practitioners may choose to follow this or a similar practice, such a requirement, regardless of the age of the file or the type of the matter, is not required by the Rules of Professional Conduct, nor by any Wisconsin case and can be unduly burdensome. We, therefore, adopt the following minimum safeguards that should be followed before closed client files may be destroyed. In doing so, we stress, as other ethics opinions have done, that there is "no one safe answer to the central question of how long must [a lawyer's] closed files be kept before they are destroyed."[6]

1. The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.

2. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15, and important documents or other materials given to the lawyer by the client should not be destroyed without consent of the client. The lawyer must be satisfied that the files have been adequately reviewed or that the firm's established procedures give rea-

sonable assurance that the file does not contain client property. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed. Client property or original documents such as wills[7] or settlement agreements ordinarily should not be destroyed.

3. Lawyers should review their firm's policies and ensure that the firm's engagement letters and closing letters contain a statement informing the client of the right to the file and the firm's file retention policy. While this is not explicitly required by the Rules, it is an important and relatively easy way to protect the client's interests upon termination of the representation.[8]

4. Likewise, the lawyer must take reasonable measures to ensure that the method by which closed client files are stored, whether the files are in physical or electronic format, protects the confidentiality of those files.

5. Lawyers must take reasonable steps to ensure that closed client files are destroyed in a manner that preserves the confidentiality of the information contained in the files.[9] This applies to files stored both physically and in electronic format. Normally, the retention of a professional shredding service that gives contractual promises of confidentiality will suffice for the destruction of physical files. With respect to electronic files, the lawyer must take steps to ensure that any information protected by SCR 20:1.6 is no longer retrievable from any hardware, software, or device that is no longer in the lawyer's control.

6. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.[10] Lawyers are reminded that they must maintain records of trust account funds and property for at least six years after the termination of the representation.[11]

Conclusion

Lawyers have a responsibility to take reasonable steps upon termination of the representation to protect the interests of the client, and preservation of client files for a minimum of six years is an important part of that

duty. Lawyers must ensure, both in the storage and eventual destruction of closed files, that client information is protected. Lawyers should also include the firm's file retention policy in engagement agreements and closing letters. Maintaining files in an orderly fashion with clear records of where they are and what is in them will assist lawyers in fulfilling their duty to protect client interests upon termination of the representation.

Wisconsin Formal Ethics Opinions E-84-5 and E-98-1 are withdrawn.

* * *

[1]See Wis. Stat. § 893.52. Note, however, that in actions for legal malpractice the date of injury, rather than the date of the negligent act, commences the period of limitation. Auric v. Continental Casualty Co., 111 Wis. 2d 507, 331 N.W.2d 325 (1983). Moreover, the "discovery rule" could extend the period even further.

[2]Similarly, the Tennessee Supreme Court Board of Professional Responsibility in Op. 2015-F-160 concluded that the type of representation is relevant because files should not be destroyed before the expiration of applicable statutes of limitations, which also vary from matter to matter. Accordingly, files "pertaining to minors should be retained until their majority," and certain taxfiles "should be maintained until the client is no longer exposed to tax liability," the board said. "A lawyer might also wish to consider retaining closed files for six (6) years, the usual statute of limitation period for contract claims in Tennessee, after the conclusion of the representation," it added. The Tennessee board's guidance aligns for the most part with advice in Kan. Bar Ass'n. Ethics Advisory Comm., Op. 15-01, 9/28/15. The Kansas committee emphasized that "no hard-and-fast rule can be declared"regarding how long lawyers must retain client files. Like the Tennessee board, it said the "nature and contents of some files may indicate a need for longer retention" because applicable statutes of limitations in client matters will vary.

[3]For example, SCR 21.18 establishes the time limitation for action by the Office of Lawyer Regulation: "(1) Information, an inquiry, or a grievance concerning the conduct of an attorney shall be communicated to the director within 10 years after the person communicating the information, inquiry or grievance knew or reasonably should have known of the conduct, whichever is later, or shall be barred from proceedings under this chapter and SCR chapter 22."

[4]In some circumstances, it is possible for a lawyer to obtain the client's express agreement to keep files for a lesser period. The client's agreement must meet the informed consent standard, as set forth in SCR 20:1.0(f), meaning the lawyer must fully describe the material risks of and alternatives to the lesser retention period to the client. The lesser retention period must still be reasonable under the circumstances (e.g. routine traffic cases). In most circumstances, lawyers should observe six-year minimum retention period for closed client files.

[5]E-98-1 recognized the following safeguards:

1. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15. The lawyer must be satisfied that the files have been adequately reviewed. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed.
2. The existence of client property, or information that could not be replicated from other sources if necessary, and the age of the materials in the files are all factors that should be considered in determining the reasonableness of the decision to destroy the file. For example, client property or original documents such as wills or settlement agreements ordinarily should not be destroyed under any circumstances, and the level of effort to locate a missing client should be more diligent where there is actual client property involved than where, for example, the file is a long resolved collection file. See S.C. Ethics Op. 95-18, ABA/BNA Man. Prof. Conduct 45:1208.
3. At a minimum the files should not be destroyed until six years have passed after the last act that could result in a claim being asserted against the lawyer. Cf. Kaap, The Closed File Retention Dilemma, 1 Wis. B. Bull. 25 (Jan. 1988).
4. In the ideal situation, the lawyer would have discussed the issue of file retention/destruction in either the engagement letter with the client or in the letter terminating or completing the relationship or engagement. Absent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files. See Los Angeles County Ethics Op. 475 (1993), ABA/BNA Man. Prof. Conduct 1001:1703.
5. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time. See ABA Informal Op. 1384.

[6]Tenn. Supreme Court Bd. of Prof'l Responsibility, Op. 2015-F-160 (12/11/15). The Tennessee Supreme Court Board reviewed authorities from other jurisdictions and distilled three "general guidelines" for lawyers to consult when assessing how long they must retain a client's file:

1. There is no Tennessee Rule of Professional Conduct that requires a retention period of greater than 5 years following the termination of representation; however, the type of representation involved may mandate a longer retention time.
2. Authority to dispose of a file should be obtained from a client whenever possible, so the better practice would be to address file retention initially or contact all clients and determine their wishes.
3. Absent client authority to dispose of files, an attorney should individually review files and be satisfied that no important papers of the clients are contained in the file before destruction.

[7]For example, Wis. Stat. § 856.05(1) states that a person having the custody of any will shall, within 30 days after he or she has knowledge of the death of the testator, file the will in the proper court or deliver it to the person named in the will to act as personal representative. If a lawyer cannot determine whether the testator has died, the lawyer must deposit the original will with the register of the probate court pursuant to Wis. Stat. § 853.09(1).

[8]Such a clause need not be lengthy and should state the firm's policy in plain language,

such as: [Firm] will retain your client file for ten years from the conclusion of the matter. After ten years, your file will be destroyed, without further notice to you, in a manner which preserves the confidentiality of your information. Should you wish to receive your file, please notify [Firm] before ten years have elapsed and we will promptly provide your file.

[9]See SCR 20:1.6(d).
[10]See ABA Informal Op. 1384.
[11]SCR 20:1.15(g)(1).

RESOURCES

1. **Solo and Small Firm – General Practice Section of the State Bar of Wisconsin – wisbar.org**
   After All, You Are Only Human: The Solo Practitioner's Handbook For Disability And Death.

2. **State Bar of Wisconsin Succession Registry**
   Christopher Shattuck: cshattuck@wisbar.org, (608) 250-6012

3. **State Bar of Wisconsin Lawyer Referral and Information Service**
   https://www.wisbar.org/formembers/lawyerreferralprograms/pages/lawyer-referral-and-information-service.aspx

4. **Legal Ethics Questions**
   https://www.wisbar.org/formembers/Ethics/Pages/Ethics.aspx
   Atty. Tim Pierce: tpierce@wisbar.org
   Atty. Aviva Kaiser: akaiser@wisbar.org
   State Bar of Wisconsin Ethics Hotline:
   (608) 229-2017 or (800) 254-9154

5. **Practice411—The State Bar of Wisconsin's Law Office Management Assistance Program**
   Christopher Shattuck: cshattuck@wisbar.org
   practicehelp@wisbar.org or call (800) 957-4670

6. **American Bar Association Succession Planning Resources**
   https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/

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