MAINE HANDBOOK FOR WITHDRAWAL FROM THE PRACTICE OF LAW

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Introduction

This handbook is designed to assist Maine attorneys who may be contemplating or actively involved in the closure of an existing law practice. While no single document or checklist can address all the possible questions or circumstances that an attorney will encounter in the process of closing his/her practice, this handbook attempts to address the essential responsibilities that will shape the events. To this end, the guide begins with a short discussion of the practical matters of closing a practice; then provides a checklist of tasks to follow. An appendix includes sample letters to clients for both active and closed files, a sample "Notice of Closure" for publication, and a sample "Receipt" for the transfer of client files to their owners. A second appendix contains the ethics opinions which are referenced. Questions may arise for which this handbook provides no answer. Readers are encouraged to consult colleagues who may have experience in closing a practice. Readers are also invited to contact Bar Counsel at the Maine Board of Overseers of the Bar for advice about specific situations. Bar Counsel may be reached by email at board@mebaroverseers.org or by phone at (207) 623-1121.

This guide does not focus on the situation where a law firm continues to exist notwithstanding the departure of an attorney and clients may choose to continue representation by that firm. Nor does this guide contemplate the dissolution of a practice upon the death, inexplicable absence, or disability of a

client's principal attorney. For more information on unexpected practice closures under M. Bar R. 7.3(f), see the Maine Board of Overseers of the Bar's "Handbook for a Receiver of the Law Practice of a Disabled or Missing or Deceased ("DMD") Maine Attorney" available at http://www.mebaroverseers.org. Finally, this guide does not address the sale of a law practice, although it may indirectly assist that process. If a law practice is being sold; an attorney should carefully examine and abide by the requirements of M. R. Prof. Conduct 1.17.

Planning Ahead

Thoughtful planning can make for a smooth transition. In fact, planning the organized wind down of a law practice is essential to avoid unnecessary breaches of professional duties resulting in grievance complaints, malpractice claims, missed deadlines, and client confusion.

An attorney, especially a solo practitioner, should consider writing an office manual. Once complete, the manual should be stored in a safe, secure, readily-accessible location. The manual should then be periodically reviewed and updated. The following information should be considered for inclusion in the manual:

- Key personnel records
  (Office sharers, of-counsel attorneys, office manager, secretary, bookkeeper, accountant, landlord, malpractice carrier and other insurance brokers, personal representatives and other important

contacts)
    - Names
    - Addresses
    - Phone Numbers
    - Service Descriptions
- Business And Trust Accounts:
    - Institution names and locations
    - Account numbers
    - Signatory name(s)
- Safety Deposit Box And/Or Storage Facilities:
    - Location
    - Access information
- Computer And Voice Mail:
    - Access codes/passwords
- Important Business Documents
    - Leases
    - Maintenance contracts
    - Business credit cards
    - Client ledgers
    - Other books and records relating to business and trust accounts
- Computer Data and/or Hardcopy Backups of:
    - Conflicts
    - Calendaring backup
    - Time billing records
    - Accounts receivable/payable
    - Active client file inventory
    - Closed file storage location and inventory

Additionally, responsible practice planning by a careful attorney will address the foreseeable needs of a practice suddenly left untended. Best

practice requires that a solo practitioner secure the commitment of an area attorney who agrees to cover or wind down the solo practitioner's practice in the event of death, unforeseen absence, or disability. For more information, see Ethics Commission Opinion #143, which is included in Appendix B, and the Handbook for a Receiver of the Law Practice of a Disabled or Missing or Deceased ("DMD") Maine Attorney, (*infra*).

Closing A Practice

Client Interests

Protecting the interests of clients is of paramount importance. Care and skill should be employed to ensure adequate communication with clients regarding the schedule of a practice closure, how information held by an attorney will be handled to insure continuing confidentiality and the manner in which client files and property will be managed in both the short- and long terms. See M. R. Prof. Conduct 1.6 and 1.8(b).

Client Notice

Once the decision to close a law practice has been made, an attorney should promptly contact all current clients to notify them of the decision. Withdrawal from or termination of representation will not be effective until the attorney or client offers direct notice to the other of his/her intention to terminate the representation. See M. R. Prof. Conduct 1.16.

Furthermore, for a matter in active litigation, the rules of the tribunal before which the matter is pending may require the tribunal's permission before withdrawal may be effected. See M. R. Prof. Conduct 1.16(a)(c)(d). In attempting to withdraw from representation in active matters, an attorney must proceed cautiously, examining each file to avoid foreseeable prejudice to the client's rights. See M. R. Prof. Conduct 1.16(d).

Beyond these steps, an attorney is also required to give notice of the cessation of his/her practice by publication in a newspaper of general circulation in each county in which that attorney has engaged in the practice of law. Such notification must appear at least thirty (30) days before the attorney intends to transfer the files from the office to long-term storage. See M. R. Prof. Conduct 1.17(d)(2).

An attorney's obligation to prevent disclosure of confidential information continues after representation has been terminated. See M. R. Prof. Conduct 1.6; 1.8(b) and 3.3. In the case where an attorney retains files in storage pursuant to M. R. Prof. Conduct 1.15(f) this duty remains in effect.

Client Files and Other Property

The conclusion of representation and/or an attorney's closing of a law practice does not nullify an attorney's obligation to retain certain documents See M. R. Prof. Conduct 1.15(f), nor does it nullify an attorney's duty to return (or turn over) such materials contained within the file to which a client is entitled M. R. Prof. Conduct 1.15(b)(2)(iv) upon request.

As outlined in M. R. Prof. Conduct 1.15(f), an attorney is obligated to retain documents which may be of intrinsic value in their particular form, such as original signed documents, until they are out of date and no longer of consequence, and to retain or return all other information and data still in the attorney's possession to which the client is entitled for a minimum of eight (8) years, unless the client has agreed to a different duration. Opinions of the Professional Ethics Commission exploring the issue of client file management may be found under the heading "Client Files" at: http://www.mebaroverseers.org/Ethics_Opinions.

All other client property should be returned at or before the termination of representation. Types of client property that should be returned include the following: personal property, money held in trust for reasons other than to pay attorney fees, and fees held in trust but not yet earned.

Staff and Contractor Interests

After fulfilling obligations to current and former clients, an attorney should take reasonable measures to ensure that any outstanding commitments, principally contract performance and remaining debt(s) to staff and contracted parties have been met.

Conclusion

Formulating an exit strategy with these considerations in mind will minimize the likelihood of later complications and make transition to life beyond law practice more pleasant. Following this section, you will find a checklist of issues to consider before closing a law practice. Appendix A contains sample documents an attorney may choose to consult when drafting communications relating to the closure of a practice. Appendix B contains the ethics opinions which have been cited herein. Any Maine attorney should feel free to email or telephone Bar Counsel at the Board of Overseers of the Bar with relevant questions (See page 3).

Maine Board of Overseers of the Bar
Practice Closure Checklist

This list is intended to be a useful resource, but no checklist can be comprehensive.

OBJECTIVE	*Target Date:*	*Date Complete:*	*Assigned To:*
ACCOUNTANT - Meet with accountant to discuss:			
□ Practice closure accounting	_____	_____	_____
□ Tax returns	_____	_____	_____
□ Dissolution of registered corporate, company or partnership entity	_____	_____	_____
□ Relinquish Federal and State identifiers (i.e. FEIN)	_____	_____	_____
□ Preparation of final W-2 or 1099 documentation for employees and contractors	_____	_____	_____
□ Consider conversion options for retirement accounts of firm employees	_____	_____	_____
ACCOUNTS:			
Pooled Client Trust Accounts			
□ Arrange for turn-over of funds to clients	_____	_____	_____
Individual client trust accounts			
□ Arrange for turn-over of funds to clients	_____	_____	_____
Operating account			
□ Retain adequate funds for closure expenses	_____	_____	_____
□ Close revolving credit lines			
□ Credit cards	_____	_____	_____
□ Vendor/Service Credit Lines	_____	_____	_____
□ Cancel legal reference material accounts			
□ hardcopy subscriptions	_____	_____	_____
□ Online subscriptions	_____	_____	_____
ADVERTISING/COURT LISTS:			
□ Cancel Advertisements	_____	_____	_____
□ Notify Lawyer Referral Services to Remove Name	_____	_____	_____
□ Notify Courts to Remove Name from Court Appointment Roster(s)	_____	_____	_____
CLIENTS:			
□ Inventory Client Files	_____	_____	_____
□ *Active Open Files*			
□ *Inactive Open Files*			
□ *Closed Files*			

OBJECTIVE	*TARGET DATE:*	*DATE COMPLETE:*	*ASSIGNED TO:*

MANAGEMENT OF CLIENTS WITH ACTIVE AND INACTIVE OPEN FILES:

CLIENTS (CONTINUED):

PRIORITIZE ACTIVE OPEN FILES

- ☐
- ☐ NOTIFY CLIENTS _____ _____ _____
  - ☐ *HIGHLIGHT TIME LIMITATIONS OR DEADLINES*
  - ☐ *DISCUSS SUCCESSOR LAWYER (CONSIDER PRESENTING A LIST OF POSSIBLE SUCCESSOR LAWYERS)*
  - ☐ *PREPARE TRANSFER MEMO WHEN APPROPRIATE*
- ☐ WITHDRAW/TERMINATE REPRESENTATION _____ _____ _____
  - ☐ *OBTAIN PERMISSION FROM TRIBUNAL AS APPROPRIATE*
  - ☐ *TAKE STEPS TO AVOID PREJUDICE TO CLIENTS*
- ☐ ARRANGE FOR TURNOVER OF FILES _____ _____ _____
  - ☐ *NOTIFY CLIENTS OF DEADLINE FOR FILE COLLECTION*
  - ☐ *OFFER OPTION OF PICK UP AT OFFICE LOCATION BY DATE CERTAIN*
  - ☐ *OFFER TERMS FOR MAILING OR DELIVERY*
  - ☐ *PREPARE FORM FOR CLIENT ACKNOWLEDGMENT OF RECEIPT OF FILE (SEE APPENDIX A)*
- ☐ ARRANGE FOR APPROPRIATE TRANSFER OF:
  - ☐ CLIENT PROPERTY, INCLUDING FUNDS IN TRUST _____ _____ _____
  - ☐ FUNDS IN TRUST _____ _____ _____

☐ CLOSED FILES

- ☐ NOTIFY FORMER CLIENTS BY PUBLICATION AT MINIMUM _____ _____ _____
  - ☐ DETERMINE WHICH FORMER CLIENTS REQUIRE NOTIFICATION BY LETTER _____ _____ _____
- ☐ ARRANGE FOR TURNOVER, STORAGE, OR CONFIDENTIAL DESTRUCTION (WHEN APPROPRIATE) OF FILE(S) _____ _____ _____
  - ☐ *SEE 'FILE' SECTION BELOW, AS WELL AS PROFESSIONAL ETHICS OPINIONS #74, #143, #187 (INCLUDED IN APPENDIX B), AND M. R. PROF. CONDUCT 1.15(F)*
  - ☐ *KEEP CONFIDENTIALITY CONSIDERATIONS IN MIND WHEN STORING CLOSED FILES*
  - ☐ *LEGAL INSTRUMENTS WHICH REQUIRE SPECIAL HANDLING:*
    - ☐ *ORIGINAL VERSIONS*
    - ☐ *INTRINSICALLY-VALUABLE MATERIALS (I.E. WILLS, CORPORATE OR PROPERTY RECORDS)*
  - ☐ *FOR ABANDONED CLIENT PROPERTY SEE TITLE 33 M.R.S. §41*

OBJECTIVE	*TARGET DATE:*	*DATE COMPLETE:*	*ASSIGNED TO:*
CLIENT FILE HANDLING:			
□ WHEN TURNING OVER CLIENT FILES, CONSIDER RETAINING COPIES OF SOME, OR ALL, FILES, AS YOU DETERMINE TO BE APPROPRIATE	_____	_____	_____
□ DESTRUCTION OR RETENTION OF CONFIDENTIAL MATERIALS:			
□ CONSIDER HIRING TECHNICAL SUPPORT FOR ELECTRONIC DATA	_____	_____	_____
□ ARRANGE A STORAGE LOCATION FOR UNCLAIMED CLIENT FILES AND A MEANS OF FUTURE ACCESS	_____	_____	_____
□ ESTABLISH RETENTION DURATION & DESTRUCTION SCHEDULE (SEE M. R. PROF. CONDUCT RULE 1.15(F))	_____	_____	_____
□ INFORM BOARD OF OVERSEERS OF FILE STORAGE LOCATION	_____	_____	_____
NOTIFICATION OF CLOSURE TO:			
□ CLIENTS (SEE 'CLIENT' SECTION ABOVE)	_____	_____	_____
INSURERS (SEE 'INSURANCE CONSIDERATIONS' SECTION BELOW)	_____	_____	_____
□ BOARD OF OVERSEERS:	_____	_____	_____
□ *NOTICE OF NEW ADDRESS*			
□ *NOTICE OF LOCATION FOR FILES KEPT IN STORAGE*			
□ *NOTICE OF PURCHASER OF PRACTICE (IF APPLICABLE)*			
□ *CHANGE OF REGISTRATION STATUS TO INACTIVE*			
□ BAR ASSOCIATIONS: STATE, LOCAL, SPECIALTY AREA	_____	_____	_____
□ VENDORS: GOODS & SERVICES, E.G. SUBSCRIPTIONS, UTILITY SERVICES	_____	_____	_____
□ CONTRACTUAL OBLIGATIONS, E.G. LEASES	_____	_____	_____
□ STATE AND FEDERAL AGENCIES (IF APPLICABLE)	_____	_____	_____
□ NOTIFICATION METHODS:	_____	_____	_____
□ *PERSONAL CORRESPONDENCE*			
□ *EMAIL/WEBSITE*			
□ *NEWSLETTERS*			
□ *NEWSPAPER AD (SEE APPENDIX A)*			
□ *OUTGOING VOICEMAIL MESSAGE*			
□ SAFEGUARDS:			
□ KEEP EMAIL ADDRESS(ES) FOR ONE YEAR	_____	_____	_____
□ KEEP POST OFFICE BOX FOR ONE YEAR	_____	_____	_____

OBJECTIVE	*TARGET DATE:*	*DATE COMPLETE:*	*ASSIGNED TO:*
INSURANCE CONSIDERATIONS:			
□ Consider liability insurance tail	_____	_____	_____
□ Cancel unnecessary policies:			
□ Office liability insurance	_____	_____	_____
□ Unemployment insurance	_____	_____	_____
□ Worker's compensation Insurance	_____	_____	_____
□ Consider COBRA options for health insurance	_____	_____	_____
PERSONNEL MATTERS:			
□ Discuss with staff:			
□ Retirement plan roll-over options	_____	_____	_____
□ COBRA health insurance options	_____	_____	_____
□ Preparation of final W-2 payroll documentation	_____	_____	_____
□ Determine destruction date for personnel files and notify staff	_____	_____	_____
PRACTICE PROPERTY:			
□ Disposal of office related equipment including legal reference materials	_____	_____	_____
□ *Sale*			
□ *Donation*			
□ Consider confidentiality concerns related to electronic data	_____	_____	_____

APPENDIX A

RECEIPT AND RELEASE FOR CLIENT FILE(S)

Law office of FIRM NAME HERE

I,_____ hereby confirm that on _____, 20____, the law firm of FIRM NAME HERE located at FIRM ADDRESS HERE

provided me with my file(s) concerning the following type of legal matter(s):

_____

_____

I affirm that I am entitled to receive said file(s) because I am a current or former client or duly authorized representative of a current or former client of ATTORNEY NAME.

Full Name: _____
Signature

_____
Type or Print Date

Current Address: _____

_____

Telephone Numbers:

_____
Office Home

For Office use:

File(s) identified as (name/number on file):

_____

Identity of Recipient confirmed by:

□ Drivers license number □ Other: _____

Staff Witness Signature: _____

SAMPLE LETTER TO CLIENT WITH CLOSED FILES

DATE

NAME
ADDRESS

Re: Notice of Law Office Closure

Dear Clients and Friends:

It is with mixed feelings of satisfaction and sadness that I write to tell you that I am closing my law practice effective DATE HERE. I established this practice in YEAR HERE and have taken great pride in serving my clients and the community since. I will miss all of you.

As you know, I retain a file for all closed legal matters, including yours, for a minimum period of eight years after the time the file is closed. After that eight year time span, I typically arrange for the file and its contents to be destroyed in a fashion that preserves its confidentiality. I am obliged to keep certain documents beyond the eight (8) year time frame but, wherever possible, I dispose of closed or inactive files as soon as possible. If you would like to retrieve your file from my office before I close it, you are welcome to do so. I do ask that you make arrangements to pick up the file before DATE HERE. I have included herein a copy of the release form you should complete and bring with you when you come to pick up your file. If you are unable to retrieve your file in person, it may be possible to arrange delivery of your file to you by postal mail. Please contact me directly to discuss this possibility. If you choose to leave the file in my possession please know that I will be relocating the file to a new storage facility where it will be held until it is destroyed.

Once the office is closed, I expect that I will have postal mail forwarded to a post office box for approximately six months. In addition, I will retain my email address, EMAIL ADDRESS HERE. These modes of communication may or may not be reliable and should be used for only routine, administrative purposes. You should seek another attorney to answer urgent questions and obtain legal advice.

Very truly yours,

SAMPLE LETTER TO CLIENT WITH OPEN FILES

DATE

NAME
ADDRESS

Re: Notice of Law Office Closure

Dear Clients and Friends:

It is with mixed feelings of satisfaction and sadness that I write to tell you that I am closing my law practice effective DATE HERE. I established this practice in YEAR HERE and have taken great pride in serving my clients and the community since. I will miss all of you.

If your legal matter is in active litigation before the courts, I will be filing a motion to withdraw as counsel. I expect any such motion to be filed no later than DATE HERE. It is up to the court to grant or deny my motion on a case by case basis. In most instances, I expect my motion to be approved very quickly. Once this motion is granted you will be WITHOUT REPRESENTATION unless you retain another attorney to represent you. Please see below for more important information on this topic.

If litigation is not pending before any court I will be contacting opposing counsel directly to inform them that I am closing my practice. At the same time, I would be glad to provide to opposing counsel the name, address and phone number of your new attorney. I expect to communicate my withdrawal to opposing counsel no later than DATE HERE and you will, of course, be copied on that letter. After that letter has been received, opposing counsel will communicate with you directly unless we have indicated that you are represented by a new attorney.

I expect that many of you will choose to retain new counsel and to that end I am enclosing herein a list of local attorneys with whom I have had strong working relationships and are well positioned to meet the needs of clients. To assist you in your examination I have tried to indicate the areas of law in which practitioner concentrates. In many instances attorneys will practice in areas beyond what I highlight in my list. This listing of attorneys is, by no means, comprehensive and you are entitled and encouraged to retain any attorney you desire, on or off this list. You are also entitled to continue in your legal matter without an attorney, a status the court terms, *pro se*. You need not retain

successor counsel if you wish to proceed *pro se*. Please understand that I would advise against such a choice.

In the coming days and weeks you and I will need to work quickly and efficiently to transfer representation of your legal matter to another attorney or, if you prefer proceed *pro se*, back to you. To that end I have laid out below some of the decisions we should begin to consider.

As you know, I retain a file for all ongoing legal matters, including yours. If you would like to have me transfer this file directly to successor counsel, I am happy to assist you with that transfer. However, if you prefer to have the file contents returned directly to you are welcome to retrieve the file from my office. I have included herein a copy of a release form where you may direct what you would like done with your file. This form should be returned to me no later than DATE HERE to avoid any possible delay in the handling of your legal affairs. If you choose not proceed with your legal matter and leave the file in my possession please know that I will be relocating the file to a new location where it will be held for eight years, after which the file and its contents will be destroyed in a fashion that preserves its confidentiality. I am obliged to keep certain documents beyond the 8 year time frame but, wherever possible, I will dispose of closed or inactive files as soon as possible.

I will render a final invoice to you for services rendered. In most cases, I expect that these invoices will be available for mailing around DATE HERE.

If any funds are currently retained by the office in trust for you, you may direct how you wish those funds to be handled. If these funds were deposited to cover your legal fees, the amount of the law office's final invoice to you will be deducted before a final distribution is made.

Once the office is closed, I expect that I will have postal mail forwarded to a post office box for approximately six months. In addition, I will retain my email address, EMAIL ADDRESS HERE. These modes of communication may or may not be reliable and should be used for only routine, administrative purposes. You should seek another attorney to answer urgent questions and obtain legal advice.

Very truly yours,

SAMPLE NEWSPAPER ADVERTISEMENT:

NOTICE OF OFFICE CLOSING

The Law Office of Attorney Name will close on
Date of Closing
All clients having either pending or closed legal matters handled by Attorney Name are urged to pick up their files at the Law Offices of Attorney Name, located at Attorney Office Address prior to Date of Closing. Please call Contact Name at Contact Phone Number to ensure your file(s) will be ready when you arrive. If you have any questions, please contact Attorney or Contact Name during normal business hours.

APPENDIX B

RELATED PROFESSIONAL ETHICS COMMISSION OPINIONS

Opinion #74
Issued 10/1/1986

THE PROFESSIONAL ETHICS COMMISSION OF THE BOARD OF OVERSEERS OF THE BAR

Law Firm X does not wish to retain custody of its closed client files on matters for which it is no longer providing services. Can it return these files to the client absent such a request from the client? If the client refuses to take custody of the files, may the firm dispose of them? May the firm in the latter case assess the client for the cost of the storage of the files if it elects to retain the files to protect the client or the firm from future litigation?

Opinion

Before addressing each question raised, there are two rules in the Code of Professional Responsibility that provide general principles that have some application to the questions raised. Rule 3.5(a)(2) states:

> A lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Rule 3.6(f)(2) states:

> A lawyer shall:
>
> (i) Promptly notify a client of the receipt of his funds, securities, or other properties;
>
> (ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe-deposit box or other place of safekeeping as soon as practicable;
>
> (iii) Maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and render prompt and appropriate accounts to his client regarding them; and

(iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

From the above Rules several general conclusions can be made that have some application to the questions raised. First, a lawyer's duty to safeguard a client's property in his possession does not cease merely because his representation ends. Secondly, a client file containing any information of value to the client should not be destroyed without the client having been given timely advance notice and full and ample opportunity to take custody of it. Thirdly, no general rule can be made as to when it is safe to destroy a client file.[1] For example, a file should not be destroyed if the lawyer knows or has reason to know that the information may be necessary or useful to the client in a matter in which the applicable statute of limitations has not run. Finally, it must be recognized, on the other hand, that increasing the lawyer's overhead expense by requiring him to indefinitely store all client files even if they contain no useful information serves no useful purpose for the client or the public.

With these general principles in mind, the Commission answers the specific questions raised by the inquiry as follows: The firm may return the file to the client absent a request from the client as long as in so doing it is satisfied that the client in fact will receive it under circumstances in which he is able to take reasonable measures to secure it and dispose of it responsibly. For instance, the attorney cannot simply deliver possession of a file to a client who is incapable of understanding or appreciating the importance of making an appropriate decision as to its disposal. There must also be no reasonable expectation on the part of the client that the firm would retain custody of the file for a period longer than the time it seeks to dispose of it.

If the firm cannot release custody of the file due to the existence of one of the above conditions, the firm can destroy it only if it determines there is no reasonable likelihood that the file contains valuable and useful information, not otherwise readily available to the client, that the firm knows or has reason to know would be useful to that client in a future matter. The firm should be particularly careful not to destroy original documents if there is any reasonable possibility that they may be needed in the future.

If the firm determines it can neither surrender custody of nor destroy the file for any of the reasons cited above, and if there has been no prior agreement with the client with respect to a charge for the cost of storage and the client had a reasonable expectation that the firm would retain custody of the file as part of its legal services, the firm may not assess a

fee for storage without the client's consent even if it determines it is doing so to protect the client from future litigation. Under no circumstances may it assess a fee without the client's prior consent when the purpose of the storage is solely to protect the firm from future litigation.

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[1] The lawyer's own interests may be served by retaining a client file beyond the six year limitation period when there is any reason to suspect that a client grievance may be brought concerning the subject matter which the file contains. The Supreme Court has impliedly held that no statute of limitations applies to client grievances. See Supreme Court order of April 11, 1979, 396 A.2d at p. LV.

Opinion #143
Issued 7/26/1994

THE PROFESSIONAL ETHICS COMMISSION OF THE BOARD OF OVERSEERS OF THE BAR

Question

The Commission has been asked for guidance by attorneys faced with the following problem. Within the State there still remains a significant number of solo practitioners. As the years pass, these attorneys discover they are custodians of an overwhelming number of client files. As long as the lawyers are working, the secure storage of this material is the only major concern. However a serious problem arises when a lawyer's practice is unexpectedly terminated through death or disability. What arrangements should solo practitioners make in advance to insure all/ any obligations to their then former clients?

Opinion

It must be recognized that the Commission cannot establish an exhaustive set of specific procedures that all solo practitioners must follow to meet their obligations in this difficult situation. However, it can identify the concerns that must be addressed by these circumstances, and at least proffer some specific suggestions that would meet these concerns. See also ABA Formal Opinion 92-369 for further discussion and suggestions.

I. The Rules of Professional Conduct [Bar Rules]

First of all, the Rules of Professional Conduct [Bar Rules], while not directly addressing the problem, do articulate some requirements that relate to the question. Rule 3.6(e)(2) states:

A lawyer shall:

(i) Promptly notify a client of the receipt of the client's funds, securities, or other properties;

(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe-deposit box or other place of safekeeping as soon as practicable;

(iii) Maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and

render prompt and appropriate accounts to the client regarding them; and

(iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Rule 3.5(a)(2) states:

> A lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the lawyer's client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Rule 3.6(a) states:

> A lawyer must employ reasonable care and skill and apply the lawyer's best judgment in the performance of professional services. A lawyer shall be punctual in all professional commitments.

Rule 3.6(h)(1) states that a lawyer shall not. . .knowingly reveal a confidence or secret of the client.

II. The Need for a Plan

From these Rules two obvious principles emerge. First, the files must be kept secure at all times. They cannot be abandoned or simply casually passed on to some accommodating custodian. See Opinion 74. Arrangements must be made not only to prevent destruction but to preserve the confidential information that is contained within the files. Furthermore, many documents (e.g. wills, contracts, and notes) may not only be confidential but irreplaceable.

Secondly, arrangements must be made to inform the client of the termination and protect the client from deadlines in pending proceedings that require replacement representation in a timely manner.

To carry out the above obligations it is obvious that the solo practitioner should adopt a plan *in advance* of his departure. It is obviously too late to wait until death or disability to let unprepared successors deal with an impossible situation. Spontaneous improvisation when the crisis occurs is unacceptable.

III. Suggestions as to Plan Provisions

The specific content of the plan is a matter for each practitioner to determine based on his or her practice. Due to the complexity of the problem and the variety of circumstances surrounding any given solo practice, it is impossible for the Commission to promulgate what *must* be in every plan. However, the Commission makes the following suggestions it hopes will assist the lawyer in designing a plan that will meet the clients' legitimate needs and expectations.

First, a plan should include as one of its elements the engagement of an attorney to supervise the winding down of the practice.

Second, the plan ought to provide that clients be promptly notified of any termination. They should be advised of the name of the supervising attorney and key staff who might be employed to assist in the transition. They should be invited to retrieve the files and seek replacement counsel if further legal services are required to complete a task.

The above provisions are not unlike those that take place when a lawyer is disbarred or suspended. See Maine Bar Rules 7.3(i)(1)(B) and 7.3(i)(1)(c). The procedures in such instances also include prompt notification of opposing parties and courts in which the lawyer has any matters which might in any way be deemed ongoing.

Third, for those files that are not seasonably retrieved by clients, a determination should be made by a lawyer, presumably the supervising attorney described in the first suggestion, as to what to do next. Can the file be delivered even if the client makes no effort to retrieve it? Is destruction possible and permissible? See Opinion 74 for further discussion of this issue.

Fourth, what is to be done with those remaining files where destruction appears unreasonable at the time of transition and no client takes custody of the material? In those cases a suitable custodian ought to be engaged by the lawyer or the lawyer's estate, who is willing to assume custody of the files.

Finally, the Commission suggests that the supervising attorney notify the Board of Overseers of the Bar of the location of the unclaimed files. This gives former clients who were unable to be contacted during the transition period a chance to locate the file at some later date.

While the suggestions in the previous paragraphs may satisfactorily discharge the departing lawyer's duties, it will be argued that they are based on an unrealistic expectation that any lawyer can be found who

would be willing to undertake the supervisory obligations described. While many lawyers extend the courtesy of "covering" for one another during a vacation or temporary disability,[1] it is unlikely in the extreme that any lawyer would have the time or desire to assume virtually a second practice—especially when there is no real possibility he will be compensated for it by clients. Furthermore, the lawyer contemplating his professional demise may be apprehensive about involving another attorney in such a position due to problems such as preserving confidences with respect to specific clients. However, the Commission believes that the Bar Rules require that the solo practitioner make suitable arrangements in advance to both oversee the notification process and take custody of the files.

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[1][Malpractice insurance carriers for some time have required solo attorneys to have some other attorney be available to "back up" in cases of disability or vacations.]

Opinion #183
Issued 1/28/2004

THE PROFESSIONAL ETHICS COMMISSION OF THE BOARD OF OVERSEERS OF THE BAR

Question

Is an attorney obligated to keep a paper copy of the attorney's correspondence, if the attorney retains a copy of the correspondence in a computer or by other means of electronic storage?

Opinion

There is no provision of the Code of Professional Responsibility of the Maine Bar Rules that directly addresses the manner in which an attorney should retain records in connection with the representation of a client. Several provisions of the Code, however, when read together in connection with previous opinions of this Commission, provide the relevant framework for considering this question.

First, an attorney is obligated to "take reasonable measures to keep the client informed on the status of the client's affairs." Rule 3.6(a).

Second, as part of his or her obligation to preserve a client's property, an attorney must take steps to "[m]aintain complete records of all . . . properties of a client coming into possession of the lawyer" and "[d]eliver to the client, as requested by the client, . . . properties in possession of the lawyer which the client is entitled to receive." Rule 3.6(e)(2)(iii) & (iv).

Third, an attorney withdrawing from representation must "take reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled." Rule. 3.5(a)(2).

In Opinion #74, we addressed a question posed by a law firm that wished to return "closed client files on matters for which it is no longer providing services." The firm asked whether it could return files in the absence of a client's request for them and whether it could dispose of files of clients who did not take custody of their files. We answered those questions in the affirmative, identifying several principles that also are relevant to the instant inquiry. First, we recognized that the obligation of an attorney to safeguard a client's property does not cease simply because the representation has ended. Second, we recognized that when a file is returned to a client in the absence of a request, the attorney is

obligated to ensure that the client who receives the file is capable of understanding its importance and discerning what is valuable within it. Third, we recognized that an attorney unable to locate a client in order to return a file or obtain consent to its destruction must be careful not to destroy documents that might be valuable or useful in the future.

In Opinion #120, we addressed the question whether an attorney is obligated to undertake the expense of delivering a file to a client's new counsel. We concluded that an attorney satisfies the obligation to deliver paper and property to a client if the attorney makes the file available for the client to pick up at the attorney's office.

With these Rules and Opinions in mind, we answer the question posed with a qualified no.

While the specific steps that an attorney may take to discharge the obligation to communicate with clients during the course of representation may vary with the nature of the case and the needs of the client, the Code obligates an attorney to ensure that the client is aware of important correspondence and documents prepared or exchanged by the attorney on the client's behalf. Similarly, the obligation of an attorney to safeguard, retain, and return property to the client requires that important correspondence and documents created by the attorney on the client's behalf be retained in a way that insures that the client and the attorney are able to access these records in the future.

Whether an attorney chooses to discharge these duties by providing verbal or written summaries of correspondence, forwarding paper copies of correspondence to the client, providing electronic files, or by some combination of means, the goal of the effort is the same. The means by which the attorney informs the client and retains files must enable the attorney to discharge these duties and must consider the client's access to technology and comfort with it, as well as the ability of the client to comprehend the nature of the information provided by the attorney.

If an attorney dispenses with the retention of paper files in favor of computerized records, the attorney must be mindful that the obligation to the client may require the attorney to maintain the means to provide copies of those records in a format that will make them accessible to both the attorney and the client in the future. Because the attorney is obligated to ensure that the client is able to make informed decisions regarding the disposition of the file and also must take care in destroying files to be sure that useful information is retained, an attorney will need to consider how new hardware or software will impact future access to old computerized records. Thus, for example, it may be necessary for an attorney to retain old versions of software in order to ensure that

computerized records may be accessed or printed when requested by the client. Similarly, as part of the obligation to deliver files, an attorney may need to retain the means by which a client may review or print computerized records. While an attorney may satisfy these ethical obligations by providing paper copies of computerized records to the client, electronic file retention is also acceptable provided that the client will have meaningful access to the electronic file in the future. The attorney should consider whether the means by which computerized records are kept and stored might not be sufficiently universal at this time to allow that attorney, who retains only computer records, to discharge these obligations in the future simply by delivering to the client a disc with data stored on it. [Back to Index]

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[1] Our Opinions uniformly have considered "files" maintained by the attorney in the course of representation of the client to be property of the client. *See, e.g.* Opinion #51 (issued 12/5/84); Opinion #74 (issued 10/1/86); Opinion #120 (issued 12/11/90); Opinion #143 (issued 7/26/94). We have never been asked, however, whether the Code requires that certain categories of documents be maintained as part of the file or whether all records maintained by the attorney as part of the file, including the attorney's notes and internal communications of an administrative nature, are property of the client. We note that this is an area upon which there is a wide divergence of opinion. *See, e.g.*, Brian J. Slovut, *Eliminating Conflict at the Termination of the Attorney-Client: A Proposed Standard Governing Property Rights in the Client's File*, 76 Minn. L. Rev. 1483, 146 (1992) (discussing the two standards applied by courts and state ethics opinions; one that assigns ownership of the entire file to the client and the other that allows attorneys to retain ownership in their work-product). Because resolution of the instant question does not require that we answer these questions, we will not answer them now.

Opinion #187
Issued 11/5/2004

THE PROFESSIONAL ETHICS COMMISSION OF THE BOARD OF OVERSEERS OF THE BAR

Question

An attorney has asked the Commission for guidance on the scope of the attorney's obligation to provide a client with the contents of the client's file. Specifically, the attorney has asked whether the client is entitled to receive everything that the attorney has maintained with respect to the client's matter or whether the attorney is entitled to retain the attorney's notes, internal research memoranda and administrative documents, and similar documents created during the course of representation.

Opinion

This question places squarely in front of us issues we left open in a footnote to a recent opinion, Number 183. *See* Opinion #183, n.1 (issued 1/28/04). In that Opinion, we were asked whether an attorney is "obligated to keep a paper copy of the attorney's correspondence, if the attorney retains a copy of the correspondence in a computer or by other means of electronic storage." *Id.* We answered that question in a qualified fashion. We determined that an attorney may "dispense[] with the retention of paper files in favor of computerized records," provided that the attorney is able to do so in a manner that comports with the attorney's obligation adequately to communicate with the client and to safeguard the client's property. *Id.* at 2. The attorney who sought our opinion on file retention understood that the attorney's correspondence was part of the client's file. We noted in Opinion #183, however, that we had not been asked to determine whether Maine's Code of Professional Responsibility "requires that certain categories of documents be maintained as part of the file or whether all records maintained by the attorney as part of the file . . . are property of the client." *Id.* 1 n.1.

File Maintenance

To guide attorneys on the scope of their obligation to provide a client with the contents of the client's file, we must at the outset discuss appropriate file maintenance, because an attorney can only discharge the ethical obligation to return materials to the client if the attorney has first discharged the ethical obligation to maintain the client's file.

Although the Maine Code of Professional Responsibility does not specifically deal with the obligation of an attorney to maintain files and, accordingly, offers no guidance as to the required contents of an attorney's file, it is inherently clear that adequate file maintenance is necessary in order for an attorney to discharge the obligation to "employ reasonable care and skill and apply the lawyer's best judgment in the performance of professional services." M. Bar R. 3.6(a). Files that are maintained in a comprehensive and orderly manner assist the attorney's own preparation and enable the attorney to review relevant notes, pleadings, correspondence, and documents before important telephone calls, interviews, meetings, and court appearances. *See* M. Bar R. 3.6(a)(2) (requiring attorneys to handle legal matters with "preparation adequate in the circumstances"). Furthermore, well-maintained files allow another attorney to provide subsequent representation to the client without prejudicing the client's interests. *See* M Bar R. 3.5(a)(2).

While we recognize that the amount of detail that any file contains will vary with the lawyer's practice style and the nature of the representation, we believe that attorneys should be guided by a standard of reasonableness, the end result of which is that a file, whether kept electronically or in hard copy, should contain material that another attorney or the client would reasonably need to take up representation of the matter. Most of that material will be substantively related to the representation, but it could also include materials that some might deem of an administrative nature if the information contained in those materials is reasonably necessary to protect or defend the client's interests.

Materials that Must Be Delivered To The Client

We turn next to an analysis of an attorney's obligation to deliver the file to the client. At the outset, we revisit Opinion #74 (10/1/86), which offered attorneys some guidance on the circumstances in which they may destroy client files.[1]. We do so in order to highlight two general principles that we believe should guide attorneys in making decisions about the nature of the file documents to which the client is entitled. First, an attorney has an obligation to safeguard client property in the attorney's possession, even after representation ceases. Second, an attorney cannot destroy a file without the client's prior notice and consent if the file contains any information "of value" to a client.

We believe that the identification of these two principles – one dealing with client property and one dealing with valuable information – highlights an important point. We do not read Maine's Code of Professional Responsibility to imply that all material created or maintained by an attorney necessarily becomes client property. We

likewise do not take the approach, underlying a variety of formulations offered by some courts, state ethics bodies, and commentators, that attempts to condition the return of file information on categorizing the material as property belonging either to the client (which must be returned) or the attorney (which need not be returned).[2] If a particular document's characterization as either client property or lawyer property were all that was required to determine an attorney's obligation with respect to the file, Opinion #74 would have had no need to identify a category of "valuable property" – it could have discussed the attorney's obligation simply by reference to Rule 3.6(e)(2)(iv), which requires a lawyer to safeguard client property and deliver client property to the client upon the client's request. Similarly, if all material created or maintained by an attorney in the file is automatically considered client property, Opinion #74 would not have recognized that an attorney might destroy files in certain circumstances, even without client consent.

In sum, therefore, employing the two principles set out in Opinion #74, an attorney should deliver the client's property and any material, not otherwise readily available to the client, that the attorney knows or has reason to know is or would be of value to the client. The attorney must assess value to the client in relation to the accomplishment of the services for which the attorney was retained.

Ascertaining Client Property and Valuable Information

We now offer guidance on how to ascertain what is and what is not client property and the factors that must be considered when attempting to determine what is or may be valuable information to a client.

We turn first to the category of client property. This category typically includes materials provided by the client to the attorney, whether the material has intrinsic value – *i.e.*, money, securities, or a promissory note – or value that is more dependent upon the particular item's relationship to the legal matter for which the client seeks advice – *i.e.*, certain items of real evidence, documents such as tax returns and insurance policies, or the client's own notes and research. Also included in this category is finished work product that the attorney prepared for the client, and for which the client paid, such as contracts and estate planning documents.

In evaluating the second category of documents, information valuable to the client, we begin by describing those types of documents that ordinarily need not be provided to the client because they would not be helpful to the client in achieving the result for which the client retained the attorney. Those documents would ordinarily include:

- Time sheets and billing records.
- Internal administrative documents such as conflict checking forms and case assignment or staffing memoranda.[3]
- Internal memoranda that set out a lawyer's general impressions of the client and the matter, the options for staffing or handling a case, and certain internal firm business information.
- Drafts of documents except as noted below.

We next turn to identifying those categories of documents that ordinarily should be provided to the client.[4] They include:

- All pleadings.
- All correspondence.
- Research memoranda.
- Notes and memoranda concerning information obtained from client interviews, witness interviews, facts of the case, and communications with other parties on the matter.
- Certain drafts of documents (*e.g.*, where prior drafts advanced legal arguments that might still be used in the matter, or where important to show the history of negotiations or otherwise pertinent to the future understanding of the outcome of the matter[5]).

We also offer additional observations that should help guide attorney conduct, all of which suggest that the prudent course of conduct is for an attorney to err on the side of providing the client with documents, rather than culling and withholding them.

First, in order to determine what information is valuable to the client in relation to the accomplishment of the services for which the attorney was retained, the lawyer must assess the point in time when the client's request for the file is made and any information that the lawyer has regarding the reason for the request.[6] Thus, for example, an attorney's notes regarding potential witnesses to be interviewed in any litigated matter will be useful information before the trial, but may not be useful after the trial has concluded and the witness's testimony has been reduced to a transcript. Similarly, a first draft of a pleading or contract may have little utility once the final pleading has been filed or the contract executed.

Second, when an attorney withdraws from representation during the pendency of a matter, the Maine Bar Rules require the lawyer to provide the client with all the information that the client needs so as to avoid "foreseeable prejudice." M. Bar R. 3.5(a)(2).

Third, whether a matter is ongoing or concluded, the touchstone of "foreseeability" referenced in Rule 3.5(a)(2) is important and embraces

the idea that, as between the attorney and the client, the attorney is in a better position to assess the potential usefulness of any particular document to the client. The client should be able to depend upon the attorney's superior expertise in that respect.

Fourth, the fiduciary nature of the relationship between the lawyer and the client includes an obligation to be forthright and open, and to serve the interests of the client. It may be difficult for an attorney to maintain that he or she acted consistently with fiduciary obligations if documents are not provided to the client, but are later placed at issue in the course of the resolution of a legal or ethics dispute.

Finally, we offer several additional comments. There is nothing that prevents an attorney from maintaining at the attorney's expense, copies of all material provided to the client. We also see no reason to distinguish between materials stored electronically and materials kept in paper form. Thus, when deciding what material to maintain and return, attorneys should consider and evaluate material stored electronically. To aid in this process, attorneys and firms should consider developing file retention and disposition policies, and communicating those policies to clients at the outset of representation. Attorneys should also be mindful of substantive obligations that they may have under federal and state law with respect to document retention. For example, new provisions of the Sarbannes-Oxley Act impose significant criminal penalties on anyone who destroys documents "with the intent to impede, obstruct, or influence an investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . ." 18 U.S.C. § 1519.

Although we do not further address file destruction in this opinion, we note that newly-adopted Rule 3.4(a)(4) (eff. Aug. 1, 2004) offers some guidance on file retention and destruction. That Rule states that unless file material is returned to the client or is of intrinsic value, or as otherwise ordered by a court or by agreement between the lawyer and client, a lawyer must maintain "all information and data in the lawyer's possession to which the client is entitled" "for a minimum period of eight (8) years." The new Rule also recognizes that a file may contain materials "of intrinsic value" that may not be destroyed until "they are out of date and no longer of consequence." We observe, however, that once an attorney has complied with Rule 3.4(a)(4) by delivering to the client "all information . . . to which the client is entitled," the attorney's decision regarding destruction of any remaining materials may be subject to rules of evidence, rules of civil procedure, and substantive law, all of

which fall outside the scope of this opinion and our role in interpreting Maine's Code of Professional Responsibility.

We recognize that there is a wide divergence of opinions on this particular point. "A majority of courts have ruled that a document created by an attorney belongs to the client who retained him." *Swift, Currie, McGhee & Hiers v. Henry*, 581 S.E.2d 37, 39 (Ga. 2003) (collecting cases). This approach is also captured in Section 46(2) of the Restatement (Third) of the Law Governing Lawyers, which requires a lawyer to "allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse." Restatement (Third) of the Law Governing Lawyers § 46(2) (2000). Under this analysis, documents may be withheld only if providing them would violate a duty to another; the lawyer concludes disclosure would harm the client; or they were reasonably intended only for internal review. *Id.* comment C. "By contrast, a minority (although a substantial number) of courts and State bar legal ethics authorities . . . distinguish between the 'end product' of an attorney's services, the documents representing which belong to the client, and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney." *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985 (N.Y. 1997). The Commission here is taking neither approach, but one that is in between.

We underscore here that, while under the Bar Rules an attorney may have no obligation to provide a client with administrative documents of this nature upon a client's request for the file, a court or tribunal could order an attorney to provide those documents if the attorney and the client are involved in a dispute that would render the documents relevant. Thus, an attorney should take care not to destroy such documents, if the attorney is on notice of potential litigation in which the documents might constitute relevant evidence.

There may be documents that ordinarily should be provided to the client, but that might be withheld or screened in a particular case because of exceptional circumstances. For example, documents, or information within documents, the disclosure of which would violate a duty imposed by law or to a third party should be withheld. These would include documents that are subject to a confidentiality agreement imposed by a court that forbid disclosure to the client and entries in documents that contain confidential information concerning other clients and that therefore should be redacted. Material that might, in the attorney's reasonable judgment, cause significant harm to the client – for example, certain medical or psychiatric records that might be injurious to the client – can be withheld in limited circumstances (on this point, the

Restatement (Third) of the Law Governing Lawyers states: "[A] lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report. Ordinarily, however, what will be useful to the client is for the client to decide." Restatement (Third) of the Law Governing Lawyers § 46 comment C (2000)). Certain offensive personal statements made by witnesses or family members, not relevant to the legal matter for which the attorney was retained, might properly be withheld.

Bar Rule 3.4(a)(4) underscores this point by requiring the retention of materials "that have intrinsic value in the particular version." M. Bar R. 3.4(a)(4).

If the client provides the attorney with the reason for the request, what will reasonably be of value to the client may be assessed in light thereof. For example, if the client merely wants to maintain for posterity a historical record of what took place in court, providing copies of pleadings alone might satisfy the client's request. On the other hand, if the client expresses no reason, and the attorney has any reason to believe that the client might want to review the entire case for any purpose whatsoever, or have it looked at by another attorney for a second opinion, then the attorney should provide the client with a copy of the entire file subject to our suggestions, *supra*.