

**HANDBOOK FOR A RECEIVER
OF THE LAW PRACTICE OF AN INCAPACITATED
OR SUSPENDED OR DISBARRED OR MISSING
OR DECEASED MAINE ATTORNEY**

Maine Bar Rule 32

A Publication of the Maine Board of Overseers of the Bar

Revised May 2016

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I. Introduction

This handbook is a reference for Receivers of the law practice of attorneys who cannot continue to practice, whether due to incapacity, suspension, disbarment, death or any other reason. Along with guidance on applicable rules, this handbook provides checklists and sample forms to assist the Receiver in the execution of his or her duties. Accepting an appointment as a Receiver under Maine Bar Rule 32 (“Rule 32”) provides a great service to the public, the courts and to the Maine Bar.

Although the goal of this handbook is primarily to address the responsibilities and duties of a Receiver, an attorney acting as a proxy should consider this handbook a resource and guide.

Each Receiver’s experience is unique. This handbook may not answer all of your questions. You are encouraged to discuss any questions with Bar Counsel at the Maine Board of Overseers of the Bar (“Board”), by email at board@mebaroverseers.org or by phone at (207) 623-1121.

II. Proxy and Receiver

Rule 1.3 of the Maine Rules of Professional Conduct requires each attorney to act with reasonable diligence. The duty of diligence requires practitioners to prepare a plan that designates another competent lawyer, a “Proxy,” to review client files, notify each client of the lawyer’s death or disability, and determine whether there is need for immediate protective action. (See M. R. Prof. Conduct 1.3 Cmt. [5].) Maine attorneys submit annual registration statements to the Board. Every attorney admitted in Maine who is engaged in the private practice of law in Maine must designate a Proxy who has consented to serve on behalf of the attorney. (See Maine Bar Rules 1(g)(12), 4(b)(1), and 32.) The designated Proxy must be an attorney registered with the Board who holds “Active” status.

A Receiver and a Proxy have similar duties and responsibilities. Both are called upon to manage or conclude the law practice of an attorney. They protect the interests of the clients. The Receiver is a licensed Maine attorney in good standing who is appointed by the Maine Supreme Judicial Court when an attorney is alleged to be incapacitated, or is missing, has died, has been disbarred, or is subject to an administrative or disciplinary suspension. (See Me. Bar R. 32(a).)

Any attorney learning another attorney is incapacitated or missing, has passed away, or otherwise is incapable of managing his or her practice should discuss the matter with Bar Counsel to allow Bar Counsel to consider whether a Receiver appointment is necessary.

The principal difference between the role of a Proxy and a Receiver is that the Court is involved in the appointment of the Receiver, whereas the Proxy is not court-appointed. The order appointing the Receiver provides legal authority for the Receiver to deal with third parties,

such as banks and financial institutions; to manage the law practice, which includes such tasks as supervising and paying professional and support staff; and to ‘take any and all other appropriate action consistent with the discretion vested in the Receiver by the Court and/or as specifically ordered by the Court.’ (See Me. Bar. R. 32(a)(13).) Thus, the Receiver generally has more authority than a Proxy. Moreover, through the court’s appointment order, the Receiver is protected from liability for professional services rendered pursuant to the Appointment Order. (See Me. Bar R. 32(e).) The Receiver serves until formally discharged by the Court. (See Me. Bar R. 32(c).) By comparison, a Proxy serves solely under authority of the designating attorney.

If the Proxy is able to protect the interests of the clients, appointment of a Receiver may not be necessary. In such a case, the proxy would have to be capable of managing or concluding the law practice without a formal court order appointing a Receiver. This may require a Power of Attorney to the Proxy from the designating attorney, or other pre-event planning such as having a disaster plan in place.

Even if a Proxy has been designated, appointment of a Receiver may still be necessary. Circumstances include a proxy identified on an annual Registration Statement who may be unable or unwilling to fulfill the duties necessary to manage or conclude the law practice; or a proxy finding that financial institutions and other entities will not deal with the proxy without if there is no power of attorney or court order.

C. Importance of Advance Planning

Thoughtful advance planning may eliminate the need for the appointment of a Receiver entirely. At the very least, appropriate safeguards can dramatically assist a Receiver should one become necessary. This type of planning is an essential part of responsible law practice and should address all the foreseeable needs of a practice suddenly left untended. See Ethics Commission Opinion #143 (Appendix B). See the Proxy Planning Questionnaire at http://www.mebareverseers.org/docs/Proxy_Planning_Questionnaire.pdf.

IV. Appointment of the Receiver

A. Eligibility

To be eligible for appointment as a Receiver, an attorney must be licensed to practice in Maine, must be registered as an “active” practitioner, and must be in good standing. In addition to a willingness to perform the Receiver’s duties, Bar Counsel and the Court will consider geography, experience and practice type of the proposed Receiver. While it is not required that a Receiver’s experience include the same fields of law as the attorney for whom the Receiver will act, such experience is relevant to the selection of the Receiver.

B. Compensation

Working as a Receiver can be time consuming. The Receiver and the support staff should track and log time spent on Receiver activities. Any expenses incurred by the Receiver in the performance of his or her duties should also be recorded.

The court can award payment of counsel fees to a Receiver. Upon court approval, fees could be paid from the general account of the office or the estate of a deceased attorney. If appointed as Receiver for the office of a deceased attorney, notice of the Receiver's claim for fees should be provided to the Personal Representative of the Estate, if one has been appointed.

In the case of an incapacitated, suspended or disbarred attorney, it may be possible to collect a modest fee directly from the attorney.

If an attorney is missing, the court may award fees from the ascertainable assets of the missing attorney.

C. Appointment Procedure

1. **Recommendation.** When selecting a Receiver, the Court considers the Bar Counsel's recommendation. Bar Counsel may decide that the proxy indicated on the annual registration statement under Rule 4(b) would be an appropriate Receiver. There are instances when the designated Proxy would not be an appropriate Receiver. Reasons could include the capacity of the Proxy to take on the additional work of a Receiver, or expected conflicts of interest. Depending upon the size and complexity of the practice, appointment of two Receivers may be recommended. Bar Counsel may also provide its recommendations concerning fees.

2. **Petition**

A petition for an Order appointing a Receiver must be filed.

- a. **Content.** The petition is addressed to the Maine Supreme Judicial Court, and should include:
 - the name of the proposed Receiver;
 - a statement of the grounds necessitating appointment of a Receiver;
 - a request for broad and general authority;
 - a request for any foreseeable specific authority that may be required for the orderly dissolution of the (such as access to the office's operating fund to pay existing employees or administrative and overhead expenses); and
 - any payment terms negotiated between the Receiver and the Board, as fees must be approved by the Court.
- b. **Notice.** While there is no specific guidance on service in the Bar Rules, consideration should be given to broad concepts of due process. Care should be taken to serve notice on, or attempt to give notice to the attorney in those circumstances when the attorney is available, or the estate of a deceased attorney.

- c. **Review.** The Chief Justice of the Supreme Judicial Court assigns the petition to a single Justice for review. The petition may be granted without a hearing.
 - d. **Order.** The Order of appointment grants the Receiver a range of authority to address his or her duties. The Receiver will serve until discharged/released by order of the Court.
 - e. **Supplemental Orders.** As circumstances unfold, it may become necessary to seek supplemental orders granting additional authority to address specific or unique issues. For example, once the Receiver determines the ownership of the funds in the ISDMD's trust accounts, the Receiver should file a petition, requesting the court to authorize the Receiver to disburse funds.
3. **Claim for Compensation.** Once the Order of Appointment is entered, the Receiver can serve notice of a claim for fees. Notice would be served on either the ISDMD's estate's personal representative or on the incapacitated, suspended, missing or disbarred attorney.

V. Duties of the Receiver

A. Authority Granted

The Receiver's duties will vary. Essentially, the Receiver will manage then wind down the law practice. The Appointment Order is broadly written so the Receiver authority to:

- enter the office, to efficiently delegate tasks and the ability to:
- secure the professional files, client data, law office mail, office and client property in an appropriate location and notify the board of that location;
- hire appropriate trade professionals (movers, bookkeepers, administrative assistants);
- notify clients;
- return and/or retain open and closed client files;
- prioritize open, active and time sensitive client matters;
- manage and disburse the ISDMD's trust accounts; and
- manage and make disbursements from the ISDMD's office accounts.

B. Gaining Access to the Office & Securing Client Data

After the Order of Appointment is signed, the Receiver should immediately secure or confirm the security of the files of the ISDMD's clients. For solo practitioners, relatives of the ISDMD, an administrative assistant, or personal representative of the estate can provide the Receiver with access to the ISDMD's office. In rare cases a Receiver has been forced to seek a court order authorizing the Receiver to gain access to the ISDMD's law office.

Once access to the physical office space and/or file storage area has been accomplished, the Receiver needs to secure the professional files, client data, law office mail, office and client property in an appropriate location and notify the board of that location.

The ISDMD, their proxy or administrative assistant should be able to provide the Receiver with passwords to gain access to electronic client files, email accounts, and voicemail. It may be necessary to hire professional assistance in order to gain access.

C. Reviewing Client Files

1. **Creating an Inventory.** Once in possession of the ISDMD's client files, the Receiver's first step is to review the files in a systematic manner in order to create a master file inventory. Once completed, the master inventory should detail which files have been returned and which files contain documents of intrinsic value. Ultimately, the master inventory is attached to the petition seeking discharge of the Receiver upon the completion of his or her duties. It is a key tool whether the Receivership is of a long-term or short-term nature.
2. **Identify Urgent Matters in Active Files.** In creating the inventory, the Receiver's priority should be to review active files for time sensitive matters. Given the potential for upcoming deadlines, clients with urgent matters should immediately be notified of the need to seek new counsel or to represent themselves. (See below.)

Prior to successor counsel being engaged, the Receiver may need to seek protection for certain clients by giving notice to tribunals or other parties concerning the circumstances necessitating the Receivership. In many cases, the court clerk or other administrator will be able to bring calendar issues to the attention of the presiding judge for sua sponte relief. The Receiver should not enter an appearance or act as attorney for the ISDMD's clients or provide legal services. Even after client notification, the Receiver must take necessary steps to prevent harm to the ISDMD's clients until they obtain successor counsel.

3. **Identify Documents of Intrinsic Value.** During the review of client files, it is critical that the Receiver determine which files contain documents of intrinsic value. (See Ethics Commission Opinion #187 in Appendix B and M. Bar R. 32(b).) This value identification is key to completing the required discharge plan upon the conclusion of the Receiver's duties.

It must be very clear which of the client files contain documents of intrinsic value; moreover, these files should be kept separate from the files facing ultimate destruction. Additionally, as ultimately these files will be transferred to a file caretaker, the storage bins containing these files must be clearly marked that they contain intrinsic value documents that should not be destroyed.

4. **Managing Closed Files.** Once the urgent matters associated with ISDMD's client files have been addressed, the Receiver should expand the master inventory to include closed client files.

D. Notice of Appointment to Clients and Tribunals

1. **Tribunal Notice of Appointment.** In certain circumstances, it may be necessary to provide notice of appointment to all Courts and relevant state and county agencies.

2. **Client Notification.** After creating the master file inventory, the Receiver should notify all clients that the Receiver is managing or concluding the ISDMD's law practice.
 - a. **Content.** If on behalf of the client, the Receiver has given notice to any Courts, agencies or other parties concerning the circumstances giving rise to the Receivership, this should be indicated in the notice.

Clients with active matters should be advised to select another attorney immediately. Further, clients with cases in litigation for which the ISDMD had been retained should be instructed to contact the court clerk. It should be explained that these cases would be treated as *pro se* until successor counsel is retained. Clients with cases in litigation for which the ISDMD was court appointed counsel should be advised to request successor counsel from the court clerk.

Additionally, the notice should invite the client to make arrangements to pick up his or her file. Security measures in regards to retrieval should be explained (bring identification, only released to client unless written instructions otherwise). If not retrieved, the notice should explain that for files closed within the last eight years a designated file caretaker safeguards files until they are ultimately destroyed eight years from date closed. If the case was closed more than eight years ago, files can be destroyed immediately pursuant to M.R. Prof. Conduct 1.15 (f).

- b. **Format.** Such notice may be by letter, phone, email, newspaper advertisement in a newspaper in general circulation in the county where the ISDMD's law practice was located and/or such other method as will effect notice. However, notice to clients with open matters should be made by as direct means as possible.

E. Successor Counsel

1. **Making Recommendations.** Often, the ISDMD's clients will ask the Receiver to recommend successor counsel. The Receiver can make recommendations, so long as it is made clear that the selection of successor counsel is up to the client. Occasionally, local bar members may agree to complete the ISDMD's pending matters at no additional charge to the clients or at a rate agreed to by the ISDMD. No client file should be sent to a successor attorney without the client's prior written authorization.
2. **Assuming Representation.** The Receiver may also agree to serve as the attorney for a client of the ISDMD, although the Receiver is not required to do so. Prior to assuming representation of the ISDMD's client, the Receiver should inform the client in writing that the client is free to employ any attorney and that the Court's appointment of a Receiver in no way mandates that the client employ the Receiver. (See M. Bar R. 32 (d).) In some instances, it may imprudent for the Receiver to represent ISDMD clients and any such representation should be undertaken only after careful deliberation.

F. Finances

1. **Operating Accounts.** The Receiver must prudently utilize the ISDMD's operating accounts to effect the management or conclusion of the practice, including the temporary retention of office staff or hiring other personnel as necessary and appropriate. It may be necessary for the Receiver to establish a bank account in the Receiver's name to protect assets to manage or conclude the practice and/or protect the clients' interests.
2. **Refund Request.** Clients who believe that they are owed a refund of fees should be encouraged to seek independent legal counsel to resolve those matters. The Receiver should not act as an advocate for the clients in fee dispute matters.
3. **Fee Collection.** The Receiver is not obligated to take extraordinary steps to collect fees owed to the ISDMD.
4. **Client Trust and IOLTA Accounts.** It is the Receiver's duty to prudently utilize clients' trust accounts, including IOLTA accounts, in the appropriate distribution of client funds and property held in trust. The Receiver must review and audit any CTAs in accordance with M.R. Prof. Conduct 1.15 and Maine Bar Rule 6.

Trust accounts should contain only client funds and a minimal amount to cover bank service charges. IOLTA accounts should have only client funds, with service charges paid from the ISDMD's operating account. The Receiver should refer to M.R. Prof. Conduct Rule 1.15 and Maine Bar Rule 6 for further guidance.

The Receiver should first review the ISDMD's trust account record, reconcile the monthly bank statements and bring individual client ledgers up to date. If the ISDMD had an administrative assistant or bookkeeper, this individual is often able to perform most of the auditing tasks for the Receiver. In those instances where the complexity or condition of the financial records exceeds the expertise of the Receiver, outside accounting assistance should be considered. This is especially true where the condition of the financial records suggests that errors or inconsistencies may exist.

After the Receiver determines the ownership of the funds in the ISDMD's trust accounts, the Receiver should file a petition, requesting the court to authorize the Receiver to disburse funds. For the protection of the Receiver, it is necessary to seek separate court approval prior to making any disbursements from the trust account. If for any reason there is not enough on deposit in the trust account to pay all claims, the Receiver should attempt to formulate a plan for the distribution of these funds and submit this plan as part of the petition to the Court for approval. In these cases, clients who have a claim against funds in the ISDMD's trust account should be given notice and the opportunity to be heard on the petition to adopt the Receiver's trust account disbursement plan.

G. File Management

1. **Electronic Files.** Regardless of whether the ISDMD's office computers are being transferred to a new owner or are slated for disposal, all electronic files must first be preserved to a durable storage format and wiped from the computers' memory. It may be best to hire a specialist to transfer the data to a durable storage media and ensure that no

residue of confidential information is left behind. The data contents should be cataloged. In addition, the care of both the catalog and the storage media should be addressed in the Letter of Instruction to the file caretaker. The catalog and storage media should remain with the files when they are delivered to the caretaker.

2. **Copying Client Files.** At his or her discretion, the Receiver may make duplicates of files before the original contents are returned to the client. However, there are financial and practical limitations that prevent large-scale copying efforts. A Receiver who has questions about whether copies of records from a file should be made in a specific situation should call the Board for guidance. If copies of file materials are made, the cost must be charged to the ISDMD or the ISDMD's estate, rather than to the client (see Ethics Commission Opinions #51, #74 #120 and #187 in Appendix B).
3. **Releasing Files to Clients.** Files must be released to clients even if clients have not paid the ISDMD or the ISDMD's estate for work done. (See Professional Ethics Opinion #51, #74, #120 and #187 in Appendix B.) Professional Ethics Commission Opinion # 187 also provides the Receiver guidance as to which materials can be released to the client.

When the ISDMD's clients pick up their files, each client should sign a release, indicating that the file has been received. The Receiver should require clients produce appropriate identification before releasing file materials. In addition, file materials should not be released to anyone other than the client, unless written instructions from the client directing otherwise are received. It helps to tell clients in the initial notification letter how the files will be returned and the reason for the security measures.

Client files can also be returned by certified mail and/or sent "collect" only with the client's consent. The Receiver should keep proof of delivery of the file. As mailing files to the ISDMD's clients can be expensive, Receivers are encouraged to have clients pick up files in person if possible.

4. **Create Long-Term Storage Plan.** The Receiver needs to create a plan to address the issues inherent in long-term storage of files containing valuable client information and unique, original or otherwise intrinsically valuable documents. This plan should be included in the Receiver's Petition for Discharge so that it can be formalized in the order of the court.
 - a. **Primary Caretaker.** Essential to a long-term storage plan is identifying caretakers for the unclaimed client files. Ideally, the primary caretaker will be a Maine attorney; however, a member of ISDMD's family may be appropriate in the absence of a willing attorney. A good candidate must have the means to properly store the materials and the ability to follow the instructions of the Receiver as to the final disposition of the various files.
 - b. **Secondary Caretaker.** The Receiver needs to identify a secondary file caretaker that can assume the role if the primary file caretaker is unable to execute his or her duties at some future point. The secondary caretaker is necessary to ensure the continued confidentiality of the files.

As with the Primary Caretaker, preferably this will be another Maine attorney. In some instances, the Receiver may choose to volunteer for this duty. As the majority of remaining files are likely to contain intrinsically valuable documents, it is preferable for the second caretaker to be an organization that can provide the open-ended storage customary with these types of documents.

In most cases, the second caretaker will only be called upon to take possession of the documents sometime after the destructible files have been disposed of and all that remains are a small number of permanent files.

- c. **Reference Binder.** The Receiver should create a binder containing everything the caretakers will need to maintain and properly track the ultimate disposition of all the files. The binder will be delivered to the Primary Caretaker at the same time as the unclaimed files. The binder should contain all relevant file inventories, client file releases for all delivered files, the documented procedure for releasing client files to future claimants, a copy of the Letter of Instruction, complete contact information (name, address, phone numbers and email address) for the Secondary Caretaker, and empty Client File Release forms.
- d. **Written Instructions.** Once the caretakers have agreed, the Receiver should carefully explain, in writing, to the Primary and Secondary Caretakers the various elements of archiving the ISDMD's files. The content of the letter should include:
 - Location. The file caretaker need not keep the ISDMD client files in their original storage location (usually the ISDMD office) and may move the files to a more convenient and cost-effective location (e.g., their home or a commercial storage unit).
 - Releasing Files. Procedures involved with releasing client files (including identification requirements and forms) should be outlined.
 - File Maintenance and Destruction. Provide process for maintaining and destroying files. Explain that there are two types of files to maintain: 1) files with documents of intrinsic value and 2) all other files.
 - o Files with Intrinsic Value. These files are clearly marked and their disqualification for confidential destruction is noted prominently on the storage container(s).
 - o All other files: Files eligible for confidential destruction should be held intact and available to former clients for a minimum of eight years *after the closing of the ISDMD's practice*. While it is possible that some files could be technically destroyed prior to the eight years, it simplifies the process. Detailed instructions for the confidential destruction of files should be included in the caretaker binder.
 - Electronic Files. Explain that all electronic files will be transferred to a durable storage format. The Primary Caretaker will receive both the storage media and a catalog outlining the media's contents. Instructions regarding accessing this media both for possible future release by clients and for ultimate destruction should be explained both in .

- Succession Plan. Request that the Primary Caretaker develop a plan to ensure the orderly transfer of any remaining files to the Secondary Caretaker at such time that the Primary Caretaker is no longer able to care for them.
- e. **Delivery.** The Primary Caretaker takes possession of unclaimed files and the reference binder only after the Court has discharged the Receiver and the Court approves of the Receiver's plan for long-term storage.

VI. Receiver Discharge

The Receiver's last duty is to report his or her activities to the court and file a petition to be discharged as Receiver of the ISDMD's practice. The Receiver must continue to act as Receiver until discharged by the Court in accordance with Rule 32(c).

The contents of the petition will vary, depending upon the services performed by the Receiver. At a minimum, the petition should contain a list of files distributed to the clients and a detail of the plan for the storage and destruction of unclaimed files. If trust or office funds were disbursed, a record of the disbursements should be included.

After the Receiver is discharged, he or she should provide a signed copy of the Order of Discharge to Bar Counsel at The Board. If the ISDMD is known to have practiced in other jurisdictions, a copy of the Order of Discharge should be provided to the bar governance agency of that jurisdiction.