

Succession Planning for Iowa Lawyers As Revised May 2011

Office of Professional Regulation

Why Succession Planning is Important

The Office of Professional Regulation (“OPR”) frequently receives inquiries regarding the proper procedure for closing the practice of a deceased sole practitioner. Often the decedent had plans in place to avoid formal probate of his or her estate, but did not specifically plan for transition or disposition of the law practice after death. The lawyer engaged by a surviving family member then contacts OPR to ascertain who has or can acquire authority to transfer active case files, close out the decedent’s trust account, dispose of old case files, and perhaps sell the practice.

A similar scenario can arise when a sole practitioner becomes disabled and no longer able to practice. The disabled practitioner often has not made arrangements for administration of his or her practice in the event of disability. Eventually other lawyers and judicial officers in the practice area become aware of the disability, and contact the district chief judge or the OPR office to ascertain what should be done to protect the interests of the lawyer’s clients and maintain the practice pending resolution of the disability.

The demographics of Iowa’s private practitioner community suggest that the death or disability of sole practitioners will occur commonly in coming years:

Today there are over 4,300 lawyers in full-time practice in Iowa.¹

Over twenty percent of our members in firms of five or fewer lawyers have been in practice 31 or more years.²

The median age of our private practitioners in firms of five or fewer lawyers was 51 to 55 in 2006, up from 49 in 2000, and 44 in 1995.

Twenty-six percent of our 4,300 private practitioners appear to be engaged as sole practitioners.³

¹ Client Security Commission statistics as of May 9, 2011.

² Iowa State Bar Association, The Economics of Law Practice in Iowa: Breakdown of firms 5 or less for 2006 Solo and Small Firm Conference

³ Iowa State Bar Association, The Economics of Law Practice in Iowa - 2006

The purpose of this outline is to assist Iowa's sole practitioner community in preparing their practices for maintenance, closure, or sale incident to their death or disability.

Applicable Iowa Rules

Until 2005, no Iowa rule specifically required that practicing lawyers prepare their practices for maintenance, closure, or sale incident to their disability or death. The Iowa Rules of Professional Conduct, adopted in 2005, now address the requirement:

To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Iowa Ct. Rs. 35.16(6), 35.17 (where reasonable necessity exists, the local chief judge shall appoint a lawyer to serve as trustee to inventory files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons of a deceased, suspended, or disabled lawyer).

Iowa R. of Prof'l Conduct 32:1.3, cmt. 5.

Several of our other rules suggest what our obligations to clients may be upon disability or death.

Iowa Rule of Professional Conduct 32:1.9(c)(2) (Confidentiality of Information). A lawyer may not reveal information relating to representation of a former client except as the ethics rules otherwise permit or require with respect to a client. Arguably the requirement to formulate a backup plan falls within the exception for disclosures permitted or required by the ethics rules, so that your clients' written, informed consent to your backup lawyer accessing their confidential information is not required. Nonetheless, disclosure of the existence of the backup agreement to clients in your standard fee agreements or engagement letters may be prudent.

Iowa Rule of Professional Conduct 32:1.5(e) (Fees). A lawyer should not divide a fee for legal services with another lawyer who is not in the same firm, absent disclosure to the client of the arrangement, and consent by the client confirmed in writing. Depending on the terms of your backup agreement regarding the scope of duties and compensation of the backup, the disclosure

and consent contemplated by rule 32:1.5(e) may be required at some point during your backup lawyer's administration of your practice.

Iowa Rule of Professional Conduct 32:1.16 (Declining or Terminating Representation). A lawyer must withdraw from representation of clients when his or her mental or physical condition materially impairs his or her ability to represent the client. The withdrawal may require permission from the tribunal where any action on behalf of the clients may be pending. The withdrawal also triggers obligations to reasonably notify the client, return papers and property to them, and refund any unearned advance fees.

Iowa Rule of Professional Conduct 32:1.17 (Sale of Law Practice). This rule prescribes the manner in which a law practice may be sold by one lawyer to another, and includes good will as a saleable component of a law practice. Comment 13 to the rule contemplates sale of a practice by a non-lawyer representative, such as the estate of a deceased lawyer, and implies that the purchasing lawyer is obligated to ensure that the provisions are observed even though the seller is not a lawyer.

Opinion 78-30, Iowa Board of Professional Ethics and Conduct, Disposition of Files of Deceased Lawyer (1978). Opinion 79-72, Iowa Board of Professional Ethics and Conduct, Deceased Partner's Files – Disposition or Retention (1979). Both opinions place responsibility for proper disposition of client files on the executor of the deceased lawyer's estate. The opinions appear to contemplate notice to the clients and an opportunity for a client to retrieve the client's file before the file may be destroyed. If no address is available for a particular client, the opinions specify retention of that client's file for a period of five years after notice, before the file may be destroyed.

Opinion 08-02, Iowa State Bar Association Committee on Ethics and Practice Guidelines (2008). This opinion recommends creation of a written file destruction policy, disclosure of the file destruction policy in engagement letters and closing letters, and a final notice before destruction of a client file. The opinion suggests sample disclosure or notice language.

As noted in comment 6 to rule 32:1.3, our rules also provide a framework for judicial supervision of a practice when a lawyer has not planned for disability or death.

Iowa Court Rule 35.16. (Disability Suspension). Iowa Court Rule 35.16 provides for suspension of a lawyer's license to practice upon disability, and for appointment of a trustee to protect the interests of clients and other affected persons. The principal duty of the trustee is to protect the interests of the disabled lawyer's clients. The trustee has little if any duty to protect the interests of the disabled lawyer, and will not attempt to keep the disabled lawyer's business viable during the suspension period.

Iowa Court Rule 35.17. (Death or Suspension of Practicing Attorney). Iowa Court Rule 35.17 provides for appointment of a trustee to protect the interests of clients and other affected persons upon the death or suspension of a lawyer, provided reasonable necessity exists. Here also, the principal duty of the trustee is to protect the interests of the dead or suspended lawyer's clients. The trustee has little if any duty to protect the interests of the deceased or suspended lawyer or the deceased lawyer's estate, and will not attempt to preserve the value of the practice for the estate or for sale.

What Happens at Death if No Succession Plan Exists

Three courses of action are commonly used for disposition of the practice of a deceased sole practitioner if no succession planning has occurred.

Iowa Probate Code. The first course of action is to proceed under the Iowa probate code. The personal representative of the decedent appears to have authority to administer the practice as part of the general administration of the decedent's estate. Iowa Code § 633.350 (2009); *see* Ethics Op. 79-72. The personal representative would be entitled to assistance from the attorney designated to assist in administration of the estate. Iowa Code § 633.82 (2009). A special appointment of another lawyer to assist with disposition of the practice would be possible under Iowa Code section 633.84 (delegation of authority to outside specialists with court approval).

Iowa Court Rule 35.17. A second course of action is to petition for appointment of a lawyer (or lawyers) as trustee or trustees to administer the practice under Iowa Court Rule 35.17.

An application for the trustee appointment may be made on behalf of the Attorney Disciplinary Board or the county bar association. The application must show that the lawyer involved has died, and that reasonable necessity exists for appointment of a trustee.

Authority for the appointment is placed with the chief judge in the district where the deceased lawyer practiced. The appointment by the chief judge is subject to confirmation by the Supreme Court. Thereafter, the trusteeship is supervised by the chief judge through final report and closure. Closure of the trust is appropriate when all pending representation of clients has been completed, or the purposes of the trust otherwise have been accomplished. The trust is terminated by order of the appointing chief judge.

Informal Administration. If knowledgeable law firm staff members are available to assist and the decedent lawyer's family is supportive, it sometimes is possible to close a law practice without court supervision. This approach

appears to be most suitable when a non-lawyer family member, such as a spouse, has been a long-term, integral part of the law firm staff. Another lawyer known to the family often assists with informal administration. Even under this approach it still may be necessary to seek a trustee appointment under rule 35.17 for the limited purpose of administering and closing out the decedent lawyer's trust account, as the decedent may have been the only account signatory, or the depository bank may not recognize the authority of any signatory who survives the decedent.

Comparing the Courses of Action. The courses of action offer different advantages and features, and are not mutually exclusive. In recent years, one or more of the courses of action have been employed in particular situations. The considerations in selecting the proper course or courses of action include the following:

The trustee's duty to protect the interests of the clients is narrower than the duties of a fiduciary for a deceased lawyer's estate. For this reason, trustees sometimes are able to move more quickly to advise active clients of their need to engage new counsel, distribute trust account balances to those persons entitled to them, and distribute files to clients.

Trustees do not attempt to preserve the practice for sale, collect receivables, or address dissolution of the business aspects of the practice. Absent use of a parallel course of action by the decedent's survivors, a trusteeship generally dismembers the client base of the practice and may reduce the value of the practice remaining for the decedent's estate.

The allowable fees and expenses of a trustee are to be paid first from the decedent's estate. It appears the trustee's fees and expenses are entitled to administrative priority. See Iowa Code § 633.425(2) (2009) (other costs of administration). If the trustee cannot be paid from the estate, the Client Security Commission has authority and discretion to pay those fees and expenses. If there is any concern regarding the solvency of the estate, a trustee appointment under rule 35.17 therefore offers a second avenue for payment even if formal probate is undertaken also.

Administration of the law practice through formal probate, with the appointment of professional assistance if required, offers more encompassing authority than a trustee appointment. In addition to the tasks normally undertaken by a trustee to protect the interests of clients, representatives of the estate can attempt to sell the physical assets and good will of the practice, collect earned but unpaid fees including the value of work performed but unbilled at the time of the

decedent's death, and dissolve the business aspects of the practice. If one professional handles these tasks in addition to those normally undertaken by a trustee, the overall cost to the estate may be reduced. Use of the probate process may be especially attractive if a likely purchaser of the practice is readily available.

As the nature of law practice becomes less reliant on staff support and more reliant on lawyer technology skills, it is less likely that knowledgeable, experienced staff members will be available to assist with informal administration of your practice in the event of your death.

What Happens Upon Disability if No Succession Plan Exists

The course of action commonly used to administer the practice of a disabled sole practitioner, if no succession planning has occurred, is appointment of an Iowa lawyer (or lawyers) as trustee or co-trustees under the provisions of Iowa Court Rule 35.16.⁴

An application to the Supreme Court for the disability suspension of an Iowa lawyer may be made on behalf of the Attorney Disciplinary Board or the county bar association. The application must show that the lawyer involved is not discharging professional responsibilities, due to disability, incapacity, disappearance or abandonment of the practice. The Supreme Court also may enter a suspension order based on the certification by any clerk of court in Iowa that an attorney has been adjudicated mentally incapacitated, an alcoholic, a drug addict, or has been committed to a hospital or institution for treatment.

Upon notification that a disability suspension has been ordered by the Supreme Court, an appointment of trustee *shall* be made by the chief judge in the district where the disabled lawyer practiced. The appointment by the chief judge is subject to confirmation by the Supreme Court. Thereafter, the trusteeship is supervised by the chief judge through final report and closure. Closure of the trust is appropriate once the disabled attorney has been reinstated to practice, or all pending representation of clients has been completed, or the purposes of the trust otherwise have been accomplished. The trust may be terminated by order of the appointing chief judge.

⁴ Another course of action might be appointment of a conservator under the provisions of Iowa Code section 633.566. This course of action would be available if a lawyer's disability has not resulted in suspension under rule 35.16. Once a disability suspension occurs, appointment of a trustee appears to be required under the provisions of rule 35.16.

Duties of the Trustee Appointed under Iowa Court Rules 35.16 or 35.17

Under both Iowa Court Rule 35.16 and Iowa Court Rule 35.17, the overarching purpose of the trust is to protect the interests of clients and other affected persons. Both rules describe the trustee's tasks as inventorying files, sequestering client funds, and taking other action appropriate to the purpose of the trust.

The practice among trustees appointed under Iowa Court Rules 35.16 and 35.17 has been to file an initial report shortly after appointment to advise the chief judge of the initial findings and actions taken by the trustee. The initial reports typically are followed by periodic interim reports as needed, and a final report once the trust is ready for closure.

The trustee is entitled by the rule to seek reasonable fees and expenses from the suspended or disabled lawyer, or the deceased attorney's estate, and otherwise by application to the Client Security Commission. Although the rule does not specify, trustees generally have first submitted their claim for fees and expenses to the appointing chief judge for approval before attempting collection from the suspended or disabled lawyer, or from the decedent's estate, or from the Client Security Commission. Approval of a claim for fees nonetheless is discretionary with the Client Security Commission. In practice, the Commission generally approves fees for expenses plus all reasonable time expended in trust administration, at the prevailing hourly rate in the area where the trustee practices.

Iowa Court Rules 35.16 and 35.17 address potential conflicts of interest on the part of the trustee. First, the rules make clear that while serving as trustee, the lawyer so appointed may not also serve as attorney for any client of the disabled or decedent lawyer or any other affected person. Second, the trustee is forbidden from examining papers or otherwise acquiring information regarding real or potential conflicts of interest with the trustee's own clients. If the trustee inadvertently acquires such information, he or she is required to promptly recuse himself or herself from, or refuse employment in, the matter presenting the conflict of interest.

Trustees appointed under these rules have found it necessary to accomplish some or all of the following tasks:

Secure the office, files and other property including trust and business accounts. If the disabled, suspended, or deceased lawyer maintained client files or trust account records electronically, it may be necessary also to secure the computers, along with the user names and passwords for access.

Protect the confidences of clients just as the disabled or decedent lawyer would have protected them.

Provide notice of the death, suspension, or disability to clients, opposing counsel, and the court in all pending matters, and notify clients of their right (and need) to pick up their file and engage other counsel. See Iowa R. Prof'l Conduct 32:1.16(d)(duties to clients upon termination of representation). Clerks of court or court administrators for those counties where the disabled, suspended, or decedent lawyer practiced can provide lists of open cases in which the disabled or decedent lawyer has appeared.

Be alert for conflicts of interest with the trustee's own practice and address them as contemplated in rules 35.16 and 35.17.

Identify imminent deadlines if possible, and provide specific notice to clients regarding these deadlines.

Locate all trust account monies and records, coordinate with the depository institutions to execute new signature cards to prevent dissipation by former signatories on the accounts, reconcile the account statements and client ledger cards, and then make arrangements to return all monies to the rightful owners. See Iowa R. Prof'l Conduct 32:1.15(d), Iowa Court Rule 45.2(2) (prompt accounting and return of funds or property clients or third persons are entitled to receive). Accounting assistance from the Client Security Commission should be requested if the condition or complexity of the accounting records exceeds the capabilities of the trustee, especially if there may be shortages in the account. Trustees should be careful about returning trust account monies to clients before the account is completely reconciled or without approval by the district judge. If the trust account balance will not be sufficient to reimburse all parties for whom trust account balances should exist, the only solution may be to formulate a plan of distribution and present it to the district chief judge for approval.

Refer clients with potential claims to the Client Security Commission for claims process, when appropriate. Claim forms are available at the Client Security Commission web page:

http://www.iowacourts.gov/Professional_Regulation/Attorney_RegulationCommissions/Client_Security/

Inventory and return files to clients to the extent possible; provide proper notice before destruction of any files; make recommendations to the chief judge regarding destruction arrangements for files eligible

for immediate destruction, long-term storage of files not eligible for immediate destruction, and the retention period and ultimate destruction authority for retained files. See Iowa R. Prof'l Conduct 32:1.16(d).

Maintain a record of all actions taken, and file interim reports and a final report with the appointing chief judge regarding the actions taken.

Submit a detailed statement of time and expenses devoted to service as trustee to the appointing chief judge, and request approval thereof. The order approving the fees and expenses then is submitted to the suspended or disabled attorney or deceased attorney's estate for payment. If payment is not reasonably forthcoming from those sources, the order and detailed statement should be submitted to the Client Security Commission for approval and reimbursement.

The principal duty of the trustee is to protect the interests of the disabled, suspended, or deceased lawyer's clients. The trustee has little if any duty to protect the interests of the disabled, suspended, or deceased lawyer, or the deceased lawyer's estate, and should not attempt to keep the lawyer's business viable during the suspension period or preserve the value of the practice for the estate or for sale. If a legal representative of the deceased, suspended, or disabled lawyer appears and seeks to preserve the value of the practice for sale, the trustee should cooperate to the extent possible. A sale of the practice could produce sufficient return to help pay the fees and costs of the trusteeship.

Why Planning for Death or Disability Makes Sense

Planning for the effect of your death or disability on your practice is appropriate and necessary for ethical, personal, and professional reasons.

Once representation of a client has been undertaken, a lawyer has an ethical duty of diligence. The duty includes planning to safeguard the client's interests in the event the lawyer no longer is able to practice due to death or disability. See Iowa R. Prof'l Conduct 32:1.3, cmt. 5.

A lawyer has a specific obligation to take appropriate action to safeguard the confidences of clients upon the lawyer's death or disability. Iowa R. Prof'l Conduct 32:1.6, cmt. 18; Iowa R. Prof'l Conduct 32:1.9.

Contingency plans for your extended absence may be a condition precedent to issuance of coverage by your professional liability insurance carrier, or at least a consideration in the insurer's issuance of coverage.

If a lawyer is temporarily disabled, preserving the viability of the practice pending resolution of the disability may be in the lawyer's economic interest. If the lawyer is permanently disabled or deceased, planning will assist in transfer of the practice to another lawyer. See Iowa R. Prof'l Conduct 32:1.17 (sale of practice may include good will).

In both situations, prior planning is likely to ease the burden of winding up or selling the practice on surviving family members.

Law practices not prepared for the practitioner's disability or death have been a common source of claims against the Client Security Trust Fund, generally based on retainers inadequately accounted for. In addition, trustee claims for compensation and expenses often are ultimately submitted to the Client Security Commission for payment. Orderly practice transition can reduce both kinds of claims.

Finally, effecting a smooth transition for clients following your death or disability is a suitable final demonstration of your professionalism and competence as a practitioner.

Succession Planning If You are a Member of a Firm

The focus of this outline is on planning for death or disability on the part of sole practitioners. Trustee appointments appear to occur less frequently with respect to lawyers who practice as part of a firm. However, a firm also can plan to ease transition of the practice when a lawyer member of the firm becomes disabled or dies.

The law firm organizational document is an appropriate place to include provisions relating to the death or disability of lawyer members of the firm.

One possible topic for the firm organizational document is a list of duties of all lawyer members of the firm during routine practice, with the goal of maintaining an orderly practice that is amenable to transition. The list of duties might include many of the topics addressed in this presentation under the heading "Preparing Your Practice for Death or Disability."

Other possible topics for the firm organizational document are law firm authority and duties after the death or disability of a lawyer member of the firm. The list of topics under the heading "Possible Provisions of Your Backup Agreement and Power of Attorney" suggests some possible inclusions within these topic areas.

The firm also may want to consider formalizing backup attorney or practice group arrangements, wherein lawyers working in similar areas will maintain some level of familiarity with the matters assigned to another attorney or attorneys in the group.

Disability Planning for the Sole Practitioner

An initial task is selection of another attorney to serve as your backup. This could be a mutual arrangement. This selection should be made with care, as your backup attorney will be responsible for the transition of your clients and your office, and probably also for proper disbursement of client funds in your trust account.

A written agreement between you and your backup regarding the scope of the duties to be performed and your consent to their performance is highly recommended. The agreement should include language sufficient to make the backup attorney's powers durable in the event of your disability. See Iowa Code § 633B.1 (2009) ("this power of attorney shall become effective upon the disability of the principal" or similar words). Other possible provisions of the agreement are discussed in the paragraph below entitled "Possible Provisions of Your Backup Agreement and Power of Attorney."

Your backup attorney should be familiar with your office procedures and system. Consider providing your backup attorney a tour of your office, with introductions to your staff, explanations to staff on the role your backup likely will play in the event of your death or disability, and familiarization with where to locate and how to use the key practice organizational tools of your office.

You should provide your clients full disclosure of the existence and purpose of the backup agreement. An appropriate vehicle for this advisory may be your standard engagement letter or retainer agreement.

You also should consider advising your family regarding the existence and purpose of the backup agreement.

Possible Provisions of Your Backup Agreement and Power of Attorney

Your agreement should describe each of the events that will trigger the authority created in the agreement, and who the decision-maker will be on the occurrence of each such event.

You will want to specify in the agreement whether your backup will act as your agent or as your lawyer. A brief discussion of the considerations involved in this designation is included elsewhere in this outline.

Durability language as described in Iowa Code section 633B.1 is a crucial inclusion in your backup agreement. The agreement should make clear that it is intended to serve both as the recordation of your agreement regarding the duties and responsibilities of your backup, and as a durable power of attorney vesting your backup with full authority to execute the duties and responsibilities provided in it, despite your disability.

Other issues you will want to consider addressing in your backup agreement include the following:

- Authority to enter the office, take charge of equipment, supplies, files.
- Authority to receive and process mail.
- Authority to contact current clients regarding their files.
- Authority to obtain continuances or extensions as necessary.
- Authority to collect fees.
- Payment of firm expenses and client costs.
- Authority to prepare final accountings and statements for clients.
- Authority to make trust account disbursements and deposits.
- Authority to arrange "tail" professional liability coverage.
- Provisions for compensation of the backup attorney.
- Provisions for compensation of staff.
- Authority to properly dispose of inactive files.
- Authority to arrange for storage of files and trust account records as required.
- Authority to terminate leases.
- Authority to liquidate or sell practice.

Capacity of Your Backup as Counsel or Agent

A key issue for discussion with your backup attorney is whether he or she will function as your lawyer, or simply as your agent. It is recommended that his or her status as lawyer or agent be explicitly designated in your backup agreement. At least some of the considerations in this decision are as follows:

If your backup attorney is acting as your lawyer, then his or her primary duty is to you. He or she would not be able to inform your clients of any errors discovered in the work you had performed, unless you expressly consent to and direct such disclosures. The backup attorney would be reliant on his or her own professional liability coverage for errors made during performance of duties under the backup agreement. The backup's duties as your counsel could increase the probability that conflicts of interest would prevent the backup from assuming duties as successor counsel for your clients.

If your backup attorney is acting solely as your agent, he or she could provide your clients notice of errors, just as you would have done had you been able. However, the backup attorney's professional liability coverage may not provide coverage for services as an agent, and some arrangement for indemnity of the backup might be necessary. Acting solely as your agent, the potential for conflicts likely would be diminished, such that the backup could more easily assume duties as successor counsel for your clients.

Death Planning for the Sole Practitioner

The authority of your backup attorney under the backup agreement and durable power of attorney will terminate at your death. At that time, your personal representative (if any) will possess general authority to administer the practice incident to administration of your estate. Your personal representative may be assisted by the lawyer designated for the estate, or another lawyer specially appointed to administer the practice.

Accordingly, you will want to maintain a current will, designating your personal representative and alternates, so that probate of your estate can be opened and a personal representative can be appointed quickly upon your death.

Consider including language in your will empowering your personal representative with broad authority, along with such professionals as the personal representative may engage, to administer your practice in an effort to preserve its value pending disposition and assist with orderly transition of client matters.

Consider instructing your personal representative to engage your backup attorney for that purpose, with the appointment order or engagement incorporating provisions of the backup agreement.

You will want to consider the likely cash flow situation of your practice upon your disability or death. If the remainder of your property (other than your practice) is likely to pass by operation of law to your spouse or other family members, your practice might be placed in a cash-poor situation, especially if your accounts receivable are not amenable to rapid billing. Cash flow needs of your practice for routine expenses and compensation of staff likely will continue for some period after your departure. You may want to consider practice interruption insurance, disability insurance, and insurance on your life as the sources for interim capital to operate the practice in the event of your disability or death.

Preparing Your Practice for Death or Disability

Much of the confusion and expense involved in transition of your practice after your death or disability can be minimized by some prior planning and disciplined conduct of your practice prior to your departure. Some recommended tasks in preparation of your practice are as follows:

Consult with your bank to ensure that the provisions of your backup agreement pertaining to authority over bank accounts will be honored.

Ensure your staff or software can produce an accurate list of current clients, addresses and telephone numbers.

Ensure your staff or software can produce an accurate list of deadlines in pending matters.

Keep your billing and trust account records up to date.

Avoid keeping original client documents (e.g., wills, abstracts) in client files; consolidate and index your holdings of these documents or return them to clients.

Periodically purge old files after proper notice to the clients and passage of the minimum retention period suggested in the following section of the outline.

Include provisions in your engagement letters and fee contracts regarding disposition of client files once a matter is concluded, and notice regarding the existence of your backup plan and its purpose.

Handling Old Client Files

One of the most troublesome issues confronted incident to death or permanent disability of a practicing lawyer is the disposition of client files that never had been reviewed for client property or periodically purged by the lawyer. Proper handling of these files generally is a matter of considerable time and expense for the fiduciary or trustee, and likely will consume substantial time on the part of your backup attorney as well.

The Iowa Supreme Court has adopted the “entire file” approach to the question of who owns the contents of a client’s file. *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (Iowa 2007); Restatement (Third) of the Law Governing Lawyers §46(2) (2000). Subject to narrow exceptions, the client owns the entire file, including attorney work product. *Gottschalk*, 729 N.W.2d at 819-820.

Unless you have addressed disposition of client files in your engagement letters, fee contracts, or termination letters, it will not be permissible for your fiduciary, trustee, or backup attorney to summarily destroy client files. Before any file is destroyed, it should be checked for original documents (wills, abstracts, conveyance instruments) and any other specific client property that must be removed from file and returned to the rightful owners. The custodian then should attempt to contact the clients and return all files to the clients involved. If a client refuses to take custody of the file or otherwise fails to respond after being contacted and advised of the impending destruction of the file, the custodian would be authorized to destroy the remaining contents of the file if the normal file retention period has passed.

As a general rule, the best practice is to retain a client's file for a minimum period of six years after the last action taken on the file, as prescribed for trust account records and supporting documents under Iowa Court Rule 45.2(2). Your professional liability carrier may recommend a substantially longer minimum retention period. Your professional liability carrier may recommend a shorter retention period if claims against your estate are resolved through probate.

With respect to those files for which a client address cannot be found, the normal procedure ordered in the trustee cases has been to publish notice regarding the files, and then retain those files that are unclaimed for a period of five years during which these clients may come forward and claim their file.

Lawyers can minimize the burden of file disposition upon termination of their practice by adopting some procedures in their daily practice:

Consider including an agreement and consent regarding file destruction in your initial engagement letter or fee agreement with each client, or in the arrangements made upon termination of each representation.

Periodically examine all files for which the last action was completed more than six years ago (or more than whatever minimum retention period is prescribed by your professional liability carrier); remove documents or other client property for transfer to the client; and consider destruction of the file provided client consent exists.

Use a secure method to destroy client files, such as shredding, and document for future reference when and how each file was destroyed.

References

Grateful acknowledgement is made of the following resources, from which principles, concepts, tips, and narrative have been adapted in this outline.

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Relevant Rules

RULE 32:1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

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[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Iowa Ct. Rs. 35.16(6), 35.17 (where reasonable necessity exists, the local chief judge shall appoint a lawyer to serve as trustee to inventory files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons of a deceased, suspended, or disabled lawyer).

RULE 32:1.5 FEES

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(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

Comment

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Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they

render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See rule 32:1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

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RULE 32:1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

Comment

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Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 32:1.9(c)(2). See rule 32:1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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RULE 32:1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person, and

(2) about whom the lawyer had acquired information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

RULE 32:1.17 SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, 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 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 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 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.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See rules 32:5.4 and 32:5.6.

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Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see rule 32:1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see rule 32:1.7 regarding conflicts and rule 32:1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see rules 32:1.6 and 32:1.9).

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Applicability of the Rule

[13] This rule applies to the sale of a law practice of a deceased, disabled, or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

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Rule 35.16 Disability suspension.

35.16(1) In the event an attorney shall at any time in any jurisdiction be duly adjudicated a mentally incapacitated person, or an alcoholic, or a drug addict, or shall be committed to an institution or hospital for treatment thereof, the clerk of any court in Iowa in which any such adjudication or commitment is entered shall, within ten days, certify same to the clerk of the supreme court.

35.16(2) Upon the filing of any such certificate or a like certificate from another jurisdiction or upon determination by the supreme court pursuant to a sworn application on behalf of a local bar association or the Iowa Supreme Court Attorney Disciplinary Board that an attorney is not discharging professional responsibilities due to disability, incapacity, abandonment of practice, or disappearance, the supreme court may enter an order suspending the attorney's license to practice law in this state until further order of the court. Not less than 20 days prior to the effective date of such suspension, the attorney or the attorney's guardian and the director of the institution or hospital to which the attorney has been committed, if any, shall be notified, in writing directed by restricted certified mail to the last address as shown by the records accessible to the supreme court, that the attorney has a right to appear before one or more justices of the supreme court at a specified time and place and show cause why such suspension should not take place. Upon a showing of exigent circumstances, emergency or other compelling cause, the supreme court may reduce or waive the 20-day period and the effective date of action above referred to. Any hearing shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to the attorney in written form at a later time. A copy of such suspension order shall be given to the suspended attorney, or to the attorney's guardian and the director of the institution or hospital to which such suspended attorney has been committed, if any, by restricted mail or personal service as the supreme court may direct.

35.16(3) Upon the voluntary retirement of an Iowa judicial officer for disability under Iowa Code section 602.9112 or upon the involuntary retirement of an Iowa judicial officer for disability under Iowa Code section 602.2106(3)(a), the supreme court may enter an order suspending the retired judicial officer's license to practice law in this state in the event the underlying disability prevents the discharge of professional responsibilities of a lawyer. The suspension shall be effective until further order of the court. A copy of such suspension order shall be given to the suspended attorney, or to the attorney's guardian and the director of the institution or hospital to which such suspended attorney has been committed, if any, by restricted mail or personal service as the supreme court may direct.

35.16(4) Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns; and acting as a fiduciary. Such suspended attorney may, however, act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

35.16(5) No attorney suspended due to disability under this rule may engage in the practice of law in this state until reinstated by order of the supreme court.

35.16(6) Upon being notified of the suspension of the attorney, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons. Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Iowa Supreme Court Attorney Disciplinary Board and as a commissioner of the supreme court for the purposes of the appointment. While acting as a trustee, the trustee shall not serve as a lawyer for the clients of the disabled lawyer and other affected persons. Neither shall the trustee examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. Should any such information be acquired inadvertently, the trustee shall, as to such matters, protect the privacy interests of the disabled lawyer's clients by prompt recusal or refusal of employment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the suspended attorney. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When the suspended attorney is reinstated to practice law in this state, or all pending representation of clients has been completed, or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

35.16(7) Any attorney so suspended shall be entitled to apply for reinstatement to active status once each year or at such shorter intervals as the supreme court may provide. An attorney suspended due to disability may be reinstated by the supreme court upon a showing, by clear and convincing evidence, that the attorney's disability has been removed and the attorney is fully qualified to resume the practice of law. Upon the attorney's filing of an application for reinstatement, the supreme court may take or direct any action deemed necessary or proper to determine whether such suspended attorney's disability has been removed, including an examination of the applicant by such qualified medical experts as the supreme court shall designate. In its

discretion the supreme court may direct that the expenses of such an examination be paid by the attorney.

35.16(8) The filing of an application for reinstatement to active status by an attorney suspended due to disability shall constitute a waiver of any doctor-patient privilege with regard to any treatment of the attorney during the period of the disability. The attorney shall also set forth in the application for reinstatement the name of every psychiatrist, psychologist, physician and hospital or any other institution by whom or in which the petitioning attorney has been examined or treated since the disability suspension and shall also furnish to the supreme court written consent that any such psychiatrist, psychologist, physician and hospital or other institution may divulge any information and records requested by the supreme court or any court-appointed medical experts.

35.16(9) Where an attorney has been suspended due to disability and thereafter the attorney is judicially held to be competent or cured, the supreme court may dispense with further evidence regarding removal of the disability and may order reinstatement to active status upon such terms as are deemed reasonable.

Rule 35.17 Death or suspension of practicing attorney.

Upon a sworn application on behalf of a local bar association or the Iowa Supreme Court Attorney Disciplinary Board showing that a practicing attorney has died or been suspended or disbarred from the practice of law and a reasonable necessity exists, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons. Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Iowa Supreme Court Attorney Disciplinary Board as a commissioner of the supreme court for the purposes of the appointment. While acting as a trustee, the trustee shall not serve as a lawyer for the clients of the disabled lawyer and other affected persons. Neither shall the trustee examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. Should any such information be acquired inadvertently, the trustee shall, as to such matters, protect the privacy interests of the disabled lawyer's clients by prompt recusal or refusal of employment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the deceased attorney's estate or the attorney whose license to practice law has been suspended or revoked. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When all pending representation of clients has been

completed or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.