NEBRASKA
State Bar Association

Practice Management for Nebraska Lawyers:

Planning for Your Unexpected Absence, Disability or Death

The Nebraska State Bar Association Senior Lawyers Section

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Practice Management for Nebraska Lawyers: Planning for Your Unexpected Absence, Disability, or Death

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Sources:

In addition to the authors' and others' knowledge and experiences, many resources shaped this practice manual. In particular the authors recognize the American Bar Association resources located on its website, americanbar.org; *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, published in 2014 by the Oregon State Bar Professional Liability Fund; *Succession Planning Handbook for New Mexico Lawyers*, published in 2014 by the New Mexico Supreme Court Lawyer Succession and Transition Committee and the State Bar of New Mexico; and *NYSBA Planning Ahead Guide (How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death)*, Second Edition, 2015-2016, published by the New York State Bar Association.

Contents

1. Why Prepare?

Lawyers are experts at helping clients prepare for the disastrous and unexpected, but personally may never get around themselves to the planning they recommend to their clients. And yet, many events may cause an abrupt, lengthy interruption or an end to a lawyer's practice, such as:

- Suspension from practice
- Inpatient drug or alcohol treatment
- A stroke, car accident, or something else requiring a lengthy recovery period
- A family emergency that takes a lawyer away from his/her practice for an extended period of time
- Expected long term or permanent physical or mental incapacity or disability
- Death

Humans are good at thinking the disaster will happen to someone else, or that they'll be a little less busy next week or next month, and will make some arrangements then. It's ironic that a lawyer doesn't let clients get away with these approaches, but may not be as rigorous in managing his or her own affairs. The further irony is most lawyers can likely come up with all of the reasons they should plan for disaster, including the reasons discussed below.

A. Ethics and Rules

Although planning for disaster isn't required[1] by the Nebraska Rules of Professional Conduct, the recommendation does appear in the comments. § 3-501.3. Diligence says "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment [5] provides in part, "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."

The comment addresses sole practitioners, but some jurisdictions suggest or require that all lawyers plan. A universal requirement recognizes the reality that a lawyer's partners may not be able to assume another lawyer's practice for a variety of reasons. A lawyer in a large firm may have a niche or boutique practice that no other lawyer in the firm could handle or assume. In smaller firms with some specialization amongst the members, the remaining lawyers may also lack the needed expertise to assume another's practice. In a very small firm, the remaining lawyer or lawyers simply may not have the time to assume or take responsibility for another's practice, especially with little or no prior notice. In an office of any size where lawyers are essentially sole practitioners practicing within a loose "partnership," the remaining lawyers may know little or nothing about each other's practices.

[1] The Nebraska Supreme Court has considered requiring that sole practitioners designate an attorney to protect clients' interests in the event of a sole practitioner's absence, disability or death, but no rule was adopted as of the publication of this manual.

Nebraska Rules of Professional Conduct § 3-501.6. Regarding confidentiality of information, included in Comment [17], "The duty of confidentiality continues after the client-lawyer relationship has terminated." Similar provisions in other jurisdictions, along with broader readings of rules related to competence and communications with clients, safekeeping of client property, and terminating representation have been interpreted to include a lawyer's duty to plan for the unexpected interruption or ending of practice.

Obviously, an ethics complaint cannot be filed against a deceased lawyer, but it's a possibility for a lawyer whose practice is interrupted. While it may seem unfair to file an ethics complaint against a lawyer who's suffered a stroke, or met with other disaster or misfortune, an unhappy client whose interests have been harmed may do so. Viewed from the perspective that a lawyer has an obligation to have a plan that cares for clients when he or she can't or is unable to do so, an ethics complaint seems less unreasonable.

Ethical duties aside, most lawyers feel responsible for taking good care of their clients who rely upon them, and have a sense of pride in how they carry out this responsibility. Planning for the unexpected is one more way of caring for clients.

For more discussion regarding the ethical obligation to plan for the unexpected, *see* American Bar Association Formal Opinion 92-369, *infra*.

B. Professional Liability

A client who is harmed may file a malpractice claim, even if the client understands and is sympathetic to a lawyer's interruption or cessation of practice. Unlike the ethics situation, a client may file a malpractice claim against a lawyer's estate. Having a plan in place will significantly increase the likelihood that clients' interests will be protected on a timely basis. Some professional liability insurance carriers require a sole practitioner to name a designated attorney who will protect clients in the event the insured's practice is interrupted by absence, disability or death. Policies should be examined.

C. Additional Benefits of Preparation

Preparing for an unexpected absence, disability, some other type of practice disruption, or death can be very useful to your practice, even if none of the events you plan for occurs. Good preparation requires documenting office procedures and compiling information, such as passwords, lists of professional services and other services you pay for, names and other information related to bank and other business accounts, etc. It includes up-to-date client lists with contact information, along with lists of open files. If you have a methodology for keeping files, it is quite helpful to delineate which types of files are stored in which file cabinets, or drawers. Some drawers may contain only active files. Others may contain only closed files. Still others may contain just the personal files of the attorney. The documentation of your office procedures should include an active process for closing and destroying completed files. Particularly relevant for an attorney who has died is information regarding time keeping practices, current accounts receivable, and work in progress, etc. In a computer and Internet-based world, your information should include passwords and backups of systems that would allow you to recreate your practice as needed.

In addition to being good practice management for every lawyer, the steps you take now that prepare those who will follow you, including a designated lawyer, to act after your unexpected absence, disability, or death will also be extremely valuable if by chance your office is destroyed by a fire, tornado, or flood. If you want to bring in a new lawyer or partner, or sell your practice, your well-organized practice will be much more appealing and valuable. If the day comes when you go on the bench, change careers or retire, it will be much easier to close a well-run office.[2]

D. If a Lawyer Fails to Plan

What if a lawyer fails to plan? Cases are very individual, but it is typical that some combination of lawyers and non-lawyers step in with varying levels of assistance, doing the best they can with whatever information is available, and with mixed success in terms of safeguarding clients' interests, your interests, and/or your family's interests. Partners, staff, family members, personal representatives and area lawyers may all respond. Depending on why a lawyer's work is interrupted, and how well or poorly the practice is organized, helping to maintain or close a practice can be a significant and unfair burden on others.

If there is no one to step in and protect clients' interests, the Nebraska Supreme Court, through the Counsel for Discipline's Office, and perhaps the Nebraska Lawyers Assistance Program, will become involved. The Counsel will first try to find volunteers to see that clients' interests are protected. Typically this involves other area attorneys who are best positioned to know the lawyer's practice and clients. If that fails, as a last resort the Counsel for Discipline will oversee appointment of a paid trustee. There are several downsides to a paid trustee. It may take time, to the detriment of clients' interests, for a trustee to be appointed and begin work. A trustee's obligation is to protect clients' interests,[3] and not those of the affected attorney. And, a trustee can end up costing tens of thousands of dollars. Trustees are paid from annual licensure fees paid by all Nebraska lawyers. If there are too many demands on the funds, it's possible licensure fees will need to be raised to provide adequate funds for trustees. If the affected attorney or the affected attorney's estate is solvent, the court will seek reimbursement for fees and costs.

Whether you ask lawyers who've been forced away from their practices temporarily, or lawyers who've been involved with closing another's practice, the universal message is "have a plan." As one closing lawyer put it, even an incomplete, imperfect plan is much better than nothing. Another lawyer who was forced away from his practice for several months following a stroke lost roughly half of his practice during his two months away, and another quarter over the next two years as his recovery continued but clients assumed he was moving away from his/her practice. He/she notes how quickly a practice can deteriorate, and believes careful preplanning, including thoughtful and consistent messaging to clients and the community, can help reduce the negative impact of absence.

E. Impacts on You, Your Staff, and Your Family

If none of the reasons above are persuasive, consider the impacts visited upon you, your staff, and your spouse and other family members if you fail to plan.

[2] For advice and a step-by-step manual on voluntarily closing your practice, *see Practice Management for Nebraska Lawyers: Closing a Practice,* Nebraska State Bar Association, 2017.

[3] *See* Nebraska Rules of Professional Conduct § 3-328. Appointment of a trustee, *infra*.

If you are away from your practice but plan or hope to return, having a plan in place will significantly increase the odds you have a practice to return to. If you expect to return to practice after an extended absence, you'll need your staff to help hold your practice together. If you can't return, your staff will be very valuable in closing your practice. Either way, they'll need to be paid so you need plans in place. Particularly if you have long-time staff, you want to be as loyal to them as they've been to you. If you aren't able to return to practice because of your disability or death, having a plan in place will help protect your practice and its value, increasing the sale price and the likelihood someone will be interested in the purchase. In addition, having a plan with a designated attorney with responsibilities to you in addition to your clients will increase the likelihood that the maximum value will be realized as unpaid fees are collected and property disposed of, and as time and expenses to close the practice are reduced.

If you're unexpectedly disabled or die, have you considered your grief-stricken spouse and family members, if they have to take calls from anxious clients when they need to be at your hospital bedside or planning your funeral?

If you receive a terminal diagnosis, would you prefer to spend your remaining time scrambling to protect your clients and sorting through decades of old files, or would you rather walk away to spend time with your family and close friends, knowing you've also taken good care of your clients and that your well-organized practice will be as easy as possible for a designated attorney to close?

F. A Nebraska Lawyer's Best Advice

When he got up one December morning, a Nebraska lawyer wasn't planning to be seriously injured in a car accident that day. The sole practitioner was fortunate to have another local lawyer who was willing to step in and take care of his clients, with the help of the injured lawyer's two administrative assistants. The injured lawyer was completely unable to communicate for a month, unable to work for an additional two months, and then worked part-time for two months—a total of five months away from full-time practice. Like most lawyers, he hadn't planned in advance to be away from his practice, and he now counts himself very fortunate that he had a practice to return to. Here are the lessons he learned and the advice he shares with other lawyers:

- Yes, your world can be turned upside down in seconds. It doesn't always happen to someone else.

- Have an agreement with another lawyer to take over your practice if something happens. Even if you have a wonderful, long-time administrative assistant or other staff, you still need a lawyer with an active license. Ask the lawyer who will assist you to visit your office, meet your employees, and see how you do things. It is a good idea to have in the file for the lawyer taking over for you a letter dated and signed by you introducing your clients to your designated attorney. Remind your clients that ethics require you to inform them they are free to secure the services of any other attorney to serve them, if you cannot do so. But tell them about the confidence you have in the attorney you have chosen to administer your practice. This will not only facilitate the work your designated successor attorney will be doing, but it will also ease the minds of your clients knowing that you have selected a capable attorney to serve them.

- Value your employees and keep them in the loop. If he hadn't had great administrative assistants who knew the status of many of the cases, the lawyer believes his practice would have closed.

- Since his accident, the lawyer has improved how he runs his office. The original goal was to make it as easy as possible for another lawyer in the event of another disaster, but the result has been a better organized and run practice on a day-to-day basis. Improvements include:

  - A list of all open files, including the status of work and client contact information.

  - A more complete and detailed calendar. A calendar entry that used to say "10 am, Tuesday, courthouse" now includes the case name and the purpose of the event or meeting.

  - Every file now has a paper timeline/checklist in the front of the file with various dates/ events associated with the case, in addition to the important dates which go on the lawyer's general calendar.

  - The lawyer does a better job of keeping his administrative assistants informed of the status of cases.

G. Best Advice From Designated Attorneys

Nebraska lawyers who've stepped in to manage or close another lawyer's practice unanimously advise having a plan in the event such assistance is needed. Best advice from those lawyers includes:

- Make a plan for your unexpected absence, disability or death. Do it NOW!

- An incomplete or imperfect plan is better than no plan. Any planning you get done will likely be helpful.

- If for no other reason, make a plan so you've protected your family to the best of your ability. Lawyers who've closed practices for others all report how hard the process can be for families, both financially and emotionally.

- Organize and manage your files and file cabinets so it's easy to tell whether files are open or closed, and maintain up-to-date client contact information, particularly for open files.

- Implement a file closing, retention, and destruction policy that includes returning or delivering important documents to clients when the case is closed. Periodically prune closed files for papers and documents no longer needed to be kept. Destroy old files when the appropriate time arrives.[4]

- The biggest concern expressed by attorneys who've managed or closed another's practice is that they are missing something important. The better organized your practice is, the less designated attorneys will worry that your clients—and perhaps you or your family—will be harmed because a designated attorney simply didn't find a problem in time to address it.

[4] For advice on document retention, *see The NSBA Guide to Document Retention,* Nebraska State Bar Association, 2021.

2. Preparing to Plan

A. Overall Approach

Planning can seem daunting, but there are several truisms that apply, including that an imperfect plan beats no plan. Even if you're a sole practitioner you're not in this alone, and there's no time like the present.

There are many resources beyond this manual that are available and helpful. And there are other attorneys who've engaged in this type of planning, and will be happy to share their experiences with you. Increasingly, professional liability carriers are requiring advance planning, particularly for sole practitioners. Even carriers without a requirement may encourage planning and offer sample forms or advice. Nearly all lawyers have staff and/or family who can assist or should be included in the planning. For lawyers with partners this is an issue for the firm.

If you wait until "next month when I have more time" to start planning, it won't get done. Some lawyers set aside time every week until their plans are completed, while others take a day or two and get everything done. Once your plan is done, calendar time to review your plan once a year to update it as needed. Even if you can't get a plan completely done, whatever you do manage will be helpful.

Generally, planning includes the following steps:

- Gather information about your practice, both the legal and business aspects.
- Identify one or more lawyers who will assist you in an emergency.
- Determine how legal and business aspects of your practice will be handled in an emergency, whether it's a temporary absence or your practice will need to be closed.
- Determine how maintaining or closing your practice will be funded.
- Create the written documents needed for your plan.
- Be sure all the key players—professional and personal—know what's in your plan and how to access your plan if needed.
- Review and update your plan once a year.

Planning is an iterative, rather than a linear, process. As you work your way through the process, you may realize you need to revisit decisions and re-work your plans. Planning is presented as a linear process in this manual, but a lawyer making plans may work on several aspects of a plan at the same time, or take the steps in whatever order makes sense.

As you plan, keep in mind you may have varying levels of control and communication ability depending on the circumstances that come your way. If you know in advance of a medical situation which will take you out of the office for an extended period, you may be able to tailor your plans and make last minute preparations, and perhaps you'll be able to consult and advise your support team during your recuperation. On the other hand, a sudden catastrophe may leave you unable to participate in protecting your clients' interests. The primary goal of your plan should be to protect your clients in the event you never return to practice and can't participate in protecting them; in other words, plan for the worst. However, a secondary goal can be to preserve your practice to the extent possible in the event you are able to return, or to maximize the funds available from your practice as it is closed or sold and minimize the work and stress for your designated attorney and your family.

B. Definitions and Roles

These are the definitions for terms used in this manual:

- Planning lawyer or attorney—the attorney planning for the unexpected, including an extended absence, disability, or death. It encompasses the attorney's estate and personal representative.

- Inventory lawyer or attorney—the attorney who steps in immediately to see that clients' interested are protected. The inventory attorney assesses client files, notifies clients of the planning lawyer's situation, instructs and perhaps helps clients to find new attorneys, and manages or closes the planning lawyer's office as needed. The inventory attorney does not have an attorney-client relationship with the planning attorney's clients. Note there may be more than one inventory lawyer, depending on individual circumstances.

- Successor lawyer or attorney—the attorney who assumes representation of the planning lawyer's clients. Note it's possible a successor lawyer may also be the inventory lawyer. It's also possible there may be more than one successor lawyer depending on the individual circumstances.

- Designated lawyer or attorney--For purposes of this manual, the term "designated attorney" will refer to any attorney who will assist you, regardless of his or her role. Additionally, this manual will refer to "designated attorney" even though more than one attorney may be involved.

- Trustee--For purposes of this manual, the term "trustee" will refer to an attorney appointed by the Court (under Nebraska Rules of Professional Conduct § 3-328: Appointment of Trustee) to inventory the files, sequester client funds, and take whatever other action seems indicated to protect the interests of clients and other affected parties.

3. Step-by-Step for the Planning Lawyer

A. Step One: Gathering and Documenting Information

Think about every aspect of your practice—both legal and business—that another lawyer would need to take charge of, and write down what that lawyer would need to know. Have your staff assist with this effort. Some lawyers create paper manuals or instructions, while others prefer electronic options. Some materials may be appropriate for a general office policy and procedure manual (a recommended office practice regardless of disaster), which could become part of your plan. Other material will be confidential, to be accessed only in case of necessity. Tailor the information to your practice. Consider the information below:

Legal Information:

- How to access a complete list of active clients with complete contact information.
- How to access case management software.
- How to access a list of open files.
- How to access a list of inactive/former clients for whom you still maintain files, with the most recent contact information you have for the clients.
- How to access any lists of closed or inactive files.
- How to check for conflicts of interest.
- How both active and inactive or closed files are stored, whether files are paper or electronic or both.
- Your file closing, retention and destruction policy.
- Your office policies on client engagement, original client documents, providing clients with copies of documents, and closing/disengagement.
- Where original client documents or other property are kept.
- Your case calendar showing all hearings, brief dates, statutes of limitations, etc.
- Your trust or escrow account information, including all ledgers and reconciliations.
- List of corporations or similar entities for which you are the registered agent.
- List of deeds of trust for which you are the trustee.

- List of other arrangements where you serve as a fiduciary or agent, such as powers of attorney, conservatorships, guardianships, farm management agreements, etc.

- Lists of courts in which you typically work and judges before whom you regularly appear.

- Details about your professional licenses, memberships, and professional commitments.

Office Policy and Procedure Manual/Business Aspects:

- All user names and passwords for computers and software, and details regarding authorized fiduciaries for each account or device.

- Details for every type of account or service, including location (physical or online), user names and passwords, account names and/or numbers, signatories or others with access to the accounts, etc. This could include bank accounts, service accounts, research services, employee benefits, safe deposit boxes, utilities, etc. Reviewing the last couple years' expenses and all financial accounts will help generate the list.

- Your office management calendar showing dates such as when various payments are due or services will expire, tax filing deadlines, etc.

- Your time and billing software, including how to generate bills and collect fees, and access unpaid invoices.

- Details of every type of insurance policy, including the type of insurance, policy numbers, expiration dates, and premium due dates. Policies could include professional liability, property, business liability, business interruption, life, health, and disability.

- How to access voice mail.

- Location of mail or post office box and how to access it.

- Details about the office space, such as building ownership or landlord information and deed or lease location, mortgages, building codes, parking places, who has keys, whom the designated attorney should contact for access, etc.

- Details about office furniture and equipment, including ownership, leases, maintenance contracts, etc.

- Details about the law practice website, including website hosting services and support services, user name and password.

- Firm financial records, including tax returns, and how to pay firm expenses, including payroll.

- Employee information, including personal contact information for all employees.

- Information needed in the event of your unexpected absence, disability or death, including contact information for the inventory and successor attorneys, and the documents or location of documents giving them instructions and authority to act.

- Information related to your estate plan, at least to the extent it relates to protecting your clients' interests.

More information related specifically to planning for your unexpected absence, disability or death is included with this section. Information related to office practices that will be beneficial under all circumstances is included, *infra*.

B. Step Two: Designating Inventory and Successor Attorneys

The hardest part of planning may be finding the right attorney or group of attorneys to assist you if needed. You may have one attorney who is willing to take on any role required, or you may have a team with different roles. You may make different plans for situations in which you would plan to return to your practice and those in which you would not return. Of course, anyone you reach an agreement with must have your trust and confidence, and they must feel the same about you. The person or persons who are right today may not be a year from now, so your mutual decisions should be revisited annually, or sooner if circumstances demand.

Details to discuss with your designated attorney include:

- Scenarios under which the designated attorney would need to act.

- Responsibilities to be assumed, including whether the designated attorney represents you or your clients.

- Documents needed to formalize and effectuate your agreement.

- What the designated attorney may expect from you in terms of the organization of your practice.

- Whether and how the designated attorney would be paid for his or her time.

As mentioned above some designated attorneys—referred to as inventory attorneys—provide triage services, stepping in immediately to see that clients' interests and the planning attorney's practice are protected, without taking on representation of clients. Other attorneys—referred to as successor attorneys in this manual—will step in to represent clients. These could be separate roles, or it could be the same attorney.

Many Nebraska attorneys who've closed another's practice recommend that the designated attorney serve only as an inventory attorney, taking on few if any of the cases personally. Reasons for this include:

- Depending on the situation, the role of inventory attorney can be time-consuming. There isn't enough time for the inventory attorney to also take over the planning attorney's clients and maintain his or her own practice.

- Related to the above, a designated attorney who takes on more than can reasonably be accomplished in a timely fashion increases the odds of ethics and malpractice complaints.

- Keeping in mind that the primary role of a designated lawyer is to protect client interests, clients may feel more comfortable with the inventory attorney if they know the designated attorney's sole purpose is to safeguard their interests until the client can hire a new lawyer. It can also reduce confusion for clients and others to have a clear line between the roles of inventory attorney and successor attorney.

- Some designated attorneys simply don't care to take over another lawyer's case, particularly if they have any concerns about the quality of the planning lawyer's work.

For young attorneys or those with niche practices or those in rural areas with few other attorneys, finding a designated attorney may be a significant challenge. For those with exceptionally busy practices or for solo practitioners, agreeing to be a designated attorney can be a significant commitment. One option is to form a group of attorneys who could agree to act as each other's designated attorneys so the burdens could be shared and possibilities of conflicts reduced. Some designated attorneys who've closed another's practice recommend having at least two attorneys to help share the work, minimize conflicts, and keep each other on schedule.

Malpractice coverage for designated attorneys is a relatively untested area for insurance carriers. However, the insurance carriers contacted as this manual was written agree that the trend is to encourage or require sole practitioners to designate a back-up attorney. Some carriers provide advice and sample forms, as well as continuing legal education seminars on the issues. The carriers also agree that the designated attorney should have malpractice coverage, either through the planning attorney's carrier or the designated attorney's own policy. This applies even for inventory attorneys who do not assume representation of planning attorney's clients. Designated attorneys are advised to contact planning attorney's and their own malpractice carriers, and then to act reasonably, document carefully, and not take on more than can realistically be managed. Having more than one designated attorney involved to accomplish tasks more promptly could help reduce liability. In addition, if managing or closing another lawyer's practice is viewed as a practice area or skill, there is currently little or no guidance on many of the issues that arise. Having another attorney involved could be helpful in vetting the most reasonable actions.

The relationships needed between planning and designated attorneys require trust and professional respect. Getting acquainted with colleagues through groups such as local bar associations and the Nebraska State Bar Association sections can help you identify potential colleagues to work with.

Once you've identified your designated attorney, be sure to have that attorney visit your office, meet your employees, and learn more about how your office runs.

What happens if a designated attorney can't act or declines to act when the time comes? If no other lawyer steps in as designated attorney, the Nebraska Counsel for Discipline (perhaps with assistance from the Nebraska Lawyers Assistance Program) will attempt to find a lawyer to act, and, if necessary, will request that the Supreme Court appoint a Trustee. The role of the trustee is to serve as the Inventory Attorney detailed above, protecting clients' interests and, through that, protecting the planning attorney's practice.

C. Step Three: Considerations and Decisions for the Planning Lawyer

Representation

A critical decision to be made early in the planning process is whether your designated attorney represents you or your clients. If your designated attorney represents you, he or she may not be able to represent your clients. If your designated attorney represents your clients, he or she may have an ethical obligation to inform your clients of any legal malpractice or ethical violations you may have committed.

It's important that clients understand who represents whom. Clients could reasonably believe that a designated attorney represents them, and in the event of a dispute a court would likely lean toward deciding in favor of what a client could reasonably believe. Clarifying representation could occur at several points. Some planning lawyers mention their plans in engagement letters and/or retention agreements. Others rely on designated attorneys to notify clients promptly in the event it's necessary for a designated attorney to step in, including stating clearly the role of the designated attorney. The fact that it's ultimately up to clients to have the attorney of their choice should be included at every point where this is presented to clients, whether orally or in writing.

In addition to deciding whom the designated attorney represents, two options could be written into a plan. The first would call for the designated attorney to represent the planning attorney's clients, but to advise them directly that he or she will not represent clients in any actions against the planning attorney and that clients should seek independent advice on the issues. The second option occurs when the designated attorney represents the planning attorney, and the planning attorney refuses or fails for whatever reason to advise clients of errors. The planning attorney could specifically allow the designated attorney to advise clients of potential malpractice errors and advise clients to seek independent counsel.

A successor attorney who takes over representation of your clients does so under his or her own professional liability insurance. An agreement with an inventory attorney could provide for indemnity for the inventory attorney in the event his or her malpractice insurance would not cover activities on behalf of the planning attorney.

When a lawyer is appointed as a trustee, the Nebraska rule indicates that the lawyer's responsibility is to the clients. Specifically, Neb. Ct. R. § 3-328(A) requires the trustee "to inventory the files, sequester client funds, and take whatever other action seems indicated to protect the interests of the clients and other affected parties." The rule does not include an obligation to the absent, disabled, or deceased lawyer. However, with little guidance available, some trustees in Nebraska have taken a more neutral stance on issues such as possible malpractice. Some simply deliver files to clients with the advice that they promptly seek new counsel to review their cases. As of the writing of this manual, there is no guidance in Nebraska on the role of the designated attorney in terms of how far he or she must go to protect clients' interests. However, it does appear clear that the designated attorney—as an "other affected parties"—may also include protection of the planning attorney's interests, as long as clients' interests aren't harmed.

Triggering Authority

You'll need to determine how your designated attorney knows when it's time to act. Law license suspension or death is clear but knowing when to act in the event of your disability or disappearance will require instructions and documents. Obviously, if you're still able to make good decisions, this isn't an issue. In the event you aren't, the basic questions to consider are under what circumstances you want others to step in, how it will be determined that the circumstances have occurred, and who makes the decision. There are several options, including:

- Give your designated attorney and other possible assistants the authority to act on your behalf at any time.

- Your designated attorney acts only during a specific time period or after a specific event, AND:

  - Your designated attorney determines whether the necessary circumstances have occurred, OR

  - Someone else—spouse, family member, trusted staff member or friend—determines whether the necessary circumstances have occurred.

Scope of Authority

As you plan, you may wish to rely on one lawyer to handle everything related to your absence, disability or death—from stepping in immediately to assess the situation, to representing your clients, to managing the business end of your practice, and to closing your practice if needed. Or, you may find it's better to have more than one person, including non-lawyers, handling the multitude of actions required to properly serve in this role. The size and scope of each practice, along with the sheer volume of client matters and geographical footprint of each practice, will influence each planning attorney's decision as there is no "one-size-fits-all" resolution to this issue. In the event of your death, you may want your personal representative to have a role. Your decision will be based on many factors, including the nature of your practice, whether you are a sole practitioner or have law partners, the expertise and experience of your staff and/or family members, and all the factors related to the designated attorney, including their expertise and willingness to take on the responsibility. Your plans may vary depending on whether you could reasonably expect to return to practice or whether your practice will need to be closed.

If non-lawyers will be involved, all the ethics rules regarding client confidentiality apply, and the designated attorney is responsible for determining and enforcing boundaries.

If you have one designated attorney to handle everything related to managing or closing your practice, you can give that individual blanket authority to do everything needed to manage or close your practice. If you have multiple individuals acting, you'll need to be more specific about roles and responsibilities. Examples of specific activities include:

- Entering and using planning attorney's office and all equipment. This would include possession or access to planning attorney's electronic devices used for practicing law, and would include access to computers and other devices planning attorney maintained in a home office.

- Receiving all law practice-related communication to planning attorney, whether it arrives via mail, email, voicemail, text, etc.

- Taking possession of planning attorney's client files, whether located in the law office, at planning attorney's home or in off-site storage.

- Examining client files and practice-related calendars or other records that will allow designated attorney to determine which files are open, what action needs to be taken, and permitting designated attorney to take immediate action if needed to protect a client's interest.

- Returning original documents to clients.

- Notifying clients with open files of planning attorney's status, of pending court dates or case deadlines, and determining how clients would like to proceed. Depending on the designated attorney's role and a client's wishes, next steps may include transferring a file to a new attorney, acting briefly as a client's attorney to request continuances or take similar actions needed to immediately protect a client's interests pending hiring of new counsel, or taking on the role of a client's new attorney.

- Notifying opposing counsel of planning attorney's status and designated attorney's contact with planning attorney's clients.

- Notifying judges, court clerks, and other relevant individuals of planning attorney's status.

- Reviewing closed files, contacting former clients, determining whether files must be retained or can be destroyed, and making appropriate arrangements to destroy or store files.

- Taking possession of all financial and business records of the planning attorney's practice, determining the current status of all aspects of the financial and business management of the practice, and acting as needed to protect the interests of clients, the planning attorney, employees, and the planning attorney's family. This will include sending statements for legal fees owed the planning attorney. This may include the planning attorney's trust account, or it may be addressed separately. Either way, it should include a requirement for a full accounting for each client, return of client funds if appropriate, etc.

- Hiring or terminating employees as needed, as well as other individuals who may be needed such as accountants, IT experts, appraisers, other attorneys, etc.

- Accessing, updating, using and/or closing or discarding all digital assets and devices.

- Closing the financial and business aspects of the planning attorney's practice if planning attorney won't be returning.

- Selling the planning attorney's practice if appropriate.

A general broad authorization will cover most of what you'll likely want to authorize a designated attorney to do, but you need to be specific about authorization to manage or terminate digital assets and devices. Both state and federal laws now control who may access, manage and terminate digital assets, services and devices. The laws generally require specific authorization from the person or user who created or owns the assets, services or devices to a fiduciary to act on behalf of the user. Federal laws also make it a crime to access digital assets without such authorization. Examples of digital assets includes emails, text messages, social media accounts, websites, bank and investment accounts, online bill payments, anything stored online or on a computer or an external drive, word processing documents or pdfs, spreadsheets, E-books, and all hardware, including computers, storage devices, mobile devices such as phones and tablets. A planning attorney should include broad authorization to both the designated attorney and personal representative to access, review, distribute, manage, terminate or destroy any digital asset, service or device.[5]

The line between a lawyer's professional and personal interests isn't always bright, particularly for sole practitioners. In the interests of protecting both clients and your family, make sure the line between personal and professional is bright enough that a designated attorney doesn't have to guess on issues such as whom funds belong to. You'll want to consider how your personal business will be managed if you're not able, and may wish to be explicit in your agreement with your designated attorney. The person who would manage your personal business should be aware of your agreement with the designated attorney.

Powers of Attorney

A power of attorney outlining designated attorney's scope of authority will be needed as your designated attorney manages or closes your practice. It should include a provision that it is not affected by your disability or incapacity. A power of attorney usually does not survive your death, so your personal representative may need to provide authorization for your designated attorney to act beyond your written agreement to manage or close a practice if the individuals and institutions your designated attorney is working with require additional proof of authority.

If you are not comfortable giving the power of attorney to your designated attorney when the agreement is signed, consider whether it could be held by a third party until it is needed. If you decide to have the power of attorney held by a trusted third party, be sure this is with the agreement of the third party and that he or she understands your wishes. Your instructions to or agreement with the third party should be in writing and will include provisions that the third party is to deliver the power of attorney to the designated attorney upon your instructions, or if you are not able to conduct your own business the delivery will take place under whatever mechanisms you've created for someone to determine your incapacity. If your trusted third party will make the determination of your inability to conduct your own business, you can include the process for making the determination. You'll want to include a provision for the third party to be reimbursed for any expenses incurred in carrying out your instructions.

[5] This is a quickly changing area of law that is not going away. For an excellent review of estate planning involving digital assets, see the written seminar materials prepared by Edward A. Morse titled "Digital Assets in Decedents' Estates: Overview and Analysis" offered as part of the 2022 Probate Law Seminar. Contact NSBA CLE Staff for a copy.

Another option is a springing or conditional power of attorney, with the triggering mechanisms outlined in the document. While this provides protection if the authority isn't needed, there could be a delay of weeks at a time when a designated attorney needs to act swiftly to protect client interests.

Although your power of attorney may include your authorization to manage your trust account and other financial accounts, it's important to check with your bank and other institutions to determine what documentation they will require for your designated attorney to act on your behalf.

Health care powers of attorney and/or disclosure authorizations may be required to authorize someone to make decisions on your behalf or to permit your health professionals to release information about your health to your designated attorney or others who must determine when a designated attorney's obligation to act has been triggered.

Trust Accounts

Deciding whether to add an authorized signer to your trust account, and whom to add, requires thoughtful consideration. If you don't add someone and aren't able to act, client funds will likely remain in your trust account until a court orders otherwise. The time it takes for a court to intervene may harm the interests of clients who need their funds to hire new attorneys or otherwise. A client may be sufficiently harmed to file a malpractice suit, against either the lawyer or the lawyer's estate. Having an authorized signer also allows funds you've earned to be transferred to your business account, which could provide critical cash flow needed to maintain or close your practice. On the other hand, if you authorize an additional signer and client funds are mishandled, clients may also suffer harm. And either way, you or your estate may be responsible. One way to address this may be to require two signatures on trust account withdrawals.

Some planning attorneys prefer to have someone other than their designated attorney be responsible for their trust accounts, believing it creates checks and balances. Additionally, if the trust account doesn't reconcile, separating the roles could avoid conflicts of fiduciary duties. Others believe a high degree of trust is needed to name someone as a designated attorney, and that trust extends to client funds. The authorized signer isn't required to be a lawyer but must have knowledge of, and be willing to comply with, the ethics rules related to trust accounts.

It's important to check with your banker to determine what the bank will require to allow your authorized signer access to your trust account. The bank may have specific forms it uses and may refuse to recognize your written agreement or the powers of attorney you create. You may wish to get written confirmation from your bank that it will accept the authorization you're creating.

Finally, review your trust account records from the viewpoint of your designated attorney to be sure it's clear to whom funds belong, and where funds have come from and gone to.

Other Bank and Financial Accounts

Consider the comments above as you decide how your other bank or financial accounts will be managed. Although the ethics rules don't apply to your other accounts, you have responsibilities to your employees, family, and yourself. Think carefully how to meet the competing demands of making it as simple as possible for your designated attorney to manage or close your practice while also protecting the interests of all involved. Be sure your bank or other financial entity will recognize any authorizations you give to someone else to act on your behalf.

Client Confidentiality and Conflicts of Interest

Your designated attorney will need to review client files without those clients' permission to determine how to act. The extent of review will be determined by the role(s) of the designated attorney. An inventory attorney is advised to review a client's file only to the extent needed to determine whether: a file is active, immediate action is needed to protect the client's interest, and to determine what to tell a client so the client can make an informed decision how to respond. For example, the designated attorney may need to advise a client of future deadlines or the type of expertise a successor attorney will need. A successor attorney may need to do a more extensive review of the file to determine whether he or she has the expertise and/or capacity to represent the client before contacting the client to determine how the client would like to proceed.

Ethics advisory opinions recognize this need to act without clients' permission. The Nebraska Rules of Professional Conduct seem to allow review of client files without a client's permission in the absence, disability or death situation. Rule § 5-501.3. Diligence Comment [5] says "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 protective action." Rule § 3-328. Appointment of a trustee provides for appointment of a trustee to protect client interests if a lawyer has failed to plan ahead. The rule says a trustee may be appointed "…to inventory the files, sequester client funds, and take whatever other action seems indicated to protect the interests of the clients and other affected parties." The same rule says a trustee is bound by the lawyer-client privilege with respect to the records of individual clients, except as needed to carry out the order of the court.[6]

The authority to act immediately needs to be balanced with the obligation of a designated attorney to avoid reviewing files when the designated attorney knows he or she has a conflict of interest. The obligation to avoid client files exists whether the designated attorney learns of a conflict through the planning attorney's conflict checking process or by starting to review a file and realizing a conflict exists.[7] There is no clear guidance for a designated attorney's next steps once a conflict is known. On the one hand, a client's confidences and secrets need to be protected. On the other hand, there still may be a need for immediate action to protect a client's interests. Options for the designated attorney could include involving another attorney to immediately review files where conflicts exist, contacting the affected clients immediately to ask how the clients would like to proceed, or asking the court for appointment of a trustee to review all files with conflicts. Planning attorney's staff and a meticulously maintained calendar may be

[6] *See* the full text of both rules, *infra*.

[7] Some experts advise listing all parties on the outside of a file as an additional alert to help avoid having a designated attorney look at a file where a conflict exists.

especially valuable in helping a designated attorney evaluate how urgent immediate action is and what to do. Additionally, a designated attorney shouldn't hesitate to contact the Office of the Nebraska Counsel for Discipline for help deciding how to proceed.

Some planning attorneys provide clients with a summary of the designated attorney's role in engagement letters and/or retainer agreements. A client's signature on a retainer agreement could be authorization for a designated attorney to act within whatever boundaries would be appropriate if the time came for a designated attorney to act. Some lawyers see this preparation and notice to clients as a way of distinguishing themselves from other lawyers. The basic message to clients is that a lawyer cares enough about clients to make sure their interests will be protected even if something unexpected happens to the lawyer. Of course, circumstances may change after a client signs an engagement letter or retainer agreement, so the designated attorney must use caution in reviewing files even with client permission. Opinions differ on whether to include the designated lawyer's name in engagement letters and/or retainer agreements. On the one hand, it gives clients a chance to indicate conflicts or preferences. On the other hand, unless ill health or other issues make it likely a designated attorney will need to act soon, being specific may create needless complications. For example, if a planning attorney tells clients who the designated attorney is and then changes designated attorneys, is the planning attorney required to notify clients of the change?

If you include mention of a designated attorney in retention documents, you'll want to include a brief statement regarding fees, such as: In the event planning attorney is unable to complete this matter due to absence, disability or death and another attorney is needed to complete this matter, fees may be split between the planning lawyer and successor lawyer based on time spent or responsibilities assumed.[8]

Paying Your Designated Attorney and Others

In some cases, a designated attorney and/or the other individuals who manage or close your practice may do so as volunteers. However, you need to recognize the job of managing or closing a practice may require significant time, and many individuals may not be able to take on the work if they won't be compensated. Often individuals are compensated on an hourly basis as independent contractors. If members of your staff continue, their efforts will be compensated as usual, although circumstances may require retention bonuses to keep key employees needed to assist your designated attorney or others.

Either way, you need to determine how all involved, along with other office expenses, will be paid. Your designated attorney can continue to generate statements for legal fees you've earned, but that may not generate the cash needed to maintain or close your practice. Some type of insurance may be the best option. It could be business continuation insurance, business overhead expense insurance, disability insurance, or life insurance. As you consider how to pay expenses, keep in mind you may need different plans if you are still living versus if you've died. Avoiding making payment arrangements is not a good approach. If payment is required and you haven't planned for it, it's possible the Nebraska Supreme Court may step in and appoint a trustee. Appointment of a trustee could occur if your designated attorney is overburdened or the compensation you've arranged for is inadequate. The trustee's fees and expenses will be paid by the Court, which then may seek reimbursement from you or your estate. Under this scenario, you've lost control of

[8] *See* Nebraska RPC § 3-501.5(e). Fees, setting out the requirements for fees to be shared.

the management or closing of your practice, while potentially still being required to pick up the expenses.

How much will it cost to maintain or close your practice? Obviously, the variables are enormous, but planning on $20,000 to $35,000 may be in line. One Nebraska lawyer with experience closing others' practices reports it takes three times as long as you think it should.

Keep in mind that the better organized your practice is, the less time it will take a designated attorney and others to execute your plans. Your good organization now will hold down the costs of maintaining or closing your practice.

Sale of Your Practice

If you aren't able to return to practice, do you want your designated attorney to attempt to sell your practice? If your designated attorney is interested, do you want him or her to have the first option to purchase the practice? Particularly if your designated attorney is interested in purchasing your practice, do you want to require a neutral third party be involved with valuing the practice? In the event of your death, what role, if any, do you want your personal representative to play in selling your practice?

Nebraska ethics rules allow for the sale of a law practice, including goodwill, providing certain conditions are met. Lawyers contemplating the sale of a practice are strongly encouraged to read Nebraska Rule of Professional Conduct §3-501.17, Sale of law practice, and the comment. It addresses client confidentiality, the requirement to sell an entire practice or practice area rather than only the more lucrative client files, notifying clients of the sale, the seller's obligation to examine a buyer's competence, and other issues.[9]

Nebraska practices are rarely bought and sold by attorneys with no prior affiliation. The more typical purchase/sale situation is the sale to a partner or associate, who may have been brought into a practice with a sale of the practice in mind. Whether you're a planning attorney or designated attorney, if you are contemplating sale of a practice to someone other than a partner or associate, you'll find detailed advice available from reputable sources, such as the American Bar Association.

If you're a planning attorney and intend that your designated attorney would sell your practice, consider the following:

- If you'd like your practice to be sold, perhaps you should bring in a partner or associate with that goal in mind, particularly if you're an older practitioner. Rural practitioners may be able to use the NSBA's Rural Practice Initiative to help identify the right person.

- View your practice from a buyer's perspective. Is your office efficiently run, including having an up-to-date office procedures manual? Are you continuing to build your practice and diversify revenue streams to make your practice as attractive as possible? Are your records—client information, financial records, trust accounts, staff evaluations, etc.—all up to date? Have you implemented a file closing, retention and destruction policy so that a buyer isn't buying a

[9] *See also* Nebraska Ethics Advisory Opinion for Lawyers No. 13-03 regarding sale of practice.

mountain of old files to be dealt with? Is your office free of clutter and clean and the paint fresh? Are equipment and software reasonably current and in good working order? These factors make your practice more attractive to potential partners/associates and to potential buyers.

Termination of Agreement

Your agreement should specify how it can be terminated by any of the parties. Pay particular attention to how the agreement can be terminated if designated attorney is acting pursuant to the agreement because of planning attorney's cognitive impairment. You may wish to specify deadlines for designated attorney to submit a final accounting for his or her time, and to return possession of planning attorney's files, financial records, funds, etc. Recognize that some flexibility may be required to best protect clients' interests.

Review and Update Your Plan

An important part of the plan is making a commitment to review and update it as needed. Do whatever it takes to ensure this gets done—put it in your agreement, schedule a set date each year, make it part of your annual strategic planning, etc. Meet with your designated attorney as part of your review.

Estate Planning

Your practice, or your interest in a practice, will be an asset in your estate if you die. If you're a partner, hopefully your firm has a policy addressing valuation of a partner's interest and protecting client's interests, whether a departure is planned or unexpected.

It's critical that lawyers have wills and informed personal representatives so that clients' interests can be protected immediately upon a lawyer's death. This is particularly important for a sole practitioner whose personal representative is not a lawyer. If you don't have a will nominating a personal representative, and there's a dispute among family and others who should be personal representative, the resulting delay in appointing a personal representative who can protect clients' interests either personally or by authorizing a designated attorney to act could be very detrimental to client interests. The planning lawyer's will should include, as appropriate:

- Instructions regarding how and by whom the lawyer's practice is to be closed. This is particularly important if you haven't done any other advance planning. Of course, advance planning is preferable because you have the agreement of a designated attorney, as well as buy-in and advice from employees and family members. The details that go into an advanced plan could be part of your will.

- Reference to an agreement with a designated attorney and other significant documents.

- Instructions to the personal representative to allow the designated attorney to act or continue to act following planning attorney's death. If it's not clear otherwise, state that the designated attorney will have immediate access to the practice, regardless of whether the designated attorney may or will be buying the practice or otherwise may profit from closing the practice.

- Instructions prohibiting the personal representative, family members and other lay persons (aside from law firm employees) from reviewing client files or other confidential information.

- Instructions that any insurance policies purchased to pay your designated attorney and pay office overhead expenses during closing be used for that purpose since the policy may be payable to your estate.

Keep in mind that the more specific your will is the more likely it is you'll need to revise your will as plans change. A statement of your general intentions with references to more specific instructions and details contained in other documents may accomplish your goals while reducing the need to update your will every time you update plans for your practice.

If a lawyer's practice is organized as a professional corporation, the estate plan will need to be tailored to reflect the planning lawyer's status as a shareholder. One option is to create a trust for planning attorney's corporate shares and make the designated attorney trustee pending closing or selling of the practice.

If you create powers of attorney related to your personal business as part of your estate plan, remember to specifically exclude any power or authority related to your law practice because you have made other arrangements for your law practice.

Military Deployment

Planning ahead is especially important for the lawyer subject to possible military deployment on short notice. Whether you're in a firm or solo, it's important to keep client details (i.e., contact information, calendars, files, etc.) up-to-date. For a sole practitioner, it's especially important to have successor lawyers identified, and to be thoughtful and realistic about the impact months of absence may have on your clients and the business of your practice. More detailed advice for National Guard and reserve members in private practice is beyond the scope of this manual. However, a quick Internet search returns advice from reputable sources.

Nebraska Supreme Court Oversight

If a trustee is appointed by the Court to close another lawyer's practice, the lawyer is required to report to the Court, and the Court pays the lawyer. If a planning lawyer and designated lawyer have an agreement, which the designated lawyer is able to execute, the Court will not be involved in the process. As of the writing of this manual, it is not anticipated that the Court will provide guidance, require reports, etc., when a designated attorney acts. Notifying the Nebraska Counsel for Discipline of the ultimate disposition of client files is advised in the event clients or family members contact the Court looking for files after the designated attorney's work is completed.

D. Step Four: Documentation and Forms

The documentation you need for your plan will depend on who is involved and what roles you expect them to play. Once your plans are made, think through each step to determine what documents will be needed to notify actors, authorize them to act, outline each person's actions, or terminate the plan. Possible documents include:

- Agreement with your designated attorney, whether it's comprehensive with detailed instructions and powers, or a shorter and more general agreement for designated attorney to manage or close your practice. Your agreement may contain or be accompanied by information and guidance that will help your designated attorney carry out your wishes as efficiently as possible.

- Power of attorney for your designated attorney to act. If the power of attorney will be held by a third party until needed, provide written instructions to the third party.

- Additional forms your bank may require making your designated attorney a signatory for your trust and other accounts.

- Authorization for a fiduciary to access, update, use, close or discard digital assets or devices. Federal and state law govern this emerging area, and every service presently requires its own authorization.

- If your practice is a corporation or other entity, any resolutions or other approvals needed to authorize your designated attorney to act.

- Authorization needed to release medical information to your designated attorney or whoever is responsible for determining you are too disabled to act on your own behalf. Be sure it is authorization your physician and other medical professionals will accept.

- Documentation for your personal estate planning, such as provisions in your will, and perhaps additional instructions for your personal representative.

- Instructions for your employees and/or your family.

- An office manual with details about your office policies, procedures, etc. *See* more information, *infra,* regarding what the manual could contain. An especially important policy relates to how you retain, close and destroy files, which is discussed, *infra*.

- Basic forms your designated attorney will find useful, such as a letter to send to your clients, forms to document file transfer instructions, a file receipt form, etc. *See* sample forms in the Appendix, *infra*.

Once you have all documents in place, what do you do with them? Consider who would need the various documents and how they would access them. Your documents need to be secure, both to protect the identity of any confidential or sensitive information, and to protect the physical integrity of the documents in case of disaster. And yet, the documents need to be accessible.

Sample forms, instructions and checklists are included, *infra*.

4. Considerations for the Designated Attorney

A. Pre-Agreement Considerations

Agreeing to manage or close another lawyer's practice may be a significant undertaking requiring careful thought. On the one hand, many lawyers struggle to keep up with their own busy practices. On the other hand, those same lawyers may also be in need of a designated attorney so mutual agreements may be beneficial. In addition, depending on the circumstances, agreeing to assist a planning lawyer could provide an opportunity for a designated lawyer to grow his or her practice. This section of the manual discusses considerations specific to aiding either a planning attorney or another lawyer who failed to do any advance planning. This section will refer to planning attorney as the lawyer needing assistance, whether the lawyer is actually planning, or has failed to plan and now assistance is needed to manage or close a practice for an absent or disabled or cognitively incapacitated or deceased lawyer. Additional information that has broader application for any practice is included *infra*.

Factors to consider and questions to ask before agreeing to assist another lawyer include:

- How will your law practice or other obligations be impacted, and how will you manage those impacts? Even a well-organized practice or small practice takes months to close.

- What specific role(s) will you assume? Inventory attorney? Successor attorney? Both?

- Would it be advisable to have more than one designated attorney?

- Are there jurisdictional or other barriers that would make it more difficult or time-consuming to act? For example, is planning attorney practicing in other states, and if so, are they licensed in Nebraska?

- If you assume the role of successor attorney, and the planning attorney is temporarily absent or disabled, which cases will you assume and when or how will cases be transferred back to the planning attorney?

- If the planning attorney will not be returning to practice, will planning attorney give you the first option to purchase the practice if you're interested? If so, how will terms be negotiated? Or will you agree to a reduced fee for closing the practice in exchange for your expectation that many of planning attorney's clients will choose you as their new attorney? There could be real estate issues to deal with if the attorney owns the building with someone else.

- Does the planning attorney have staff and resources to help you?

- What's the condition of the planning attorney's practice? Is the planning attorney well-organized with policies and procedures in place, good client tracking software, a knowledgeable staff, etc.? Or is the planning attorney's practice more chaotic? At the most basic level, will you be able to sort open files from closed files without reviewing each file? If you're being asked to close a practice, it's especially important to know if the planning attorney followed a

file closing, retention and destruction policy. In situations where it takes an extended time to close a practice, it's often because of the time it takes to review and address old files that the planning attorney failed to properly address.

- How does planning attorney suggest that closed files or client property which must be retained be stored?

- How does the planning attorney suggest that business and financial records which must be retained be stored?

- Is the planning lawyer open about his or her practice and plans in the event of his or her absence, disability or death so you would know what to expect?

- Will the planning lawyer commit to a yearly review and update of his or her plans, including an update conversation with you to confirm your willingness and ability to assist if needed?

- Does the planning lawyer have a funding mechanism so you and the lawyer's employees will be paid for managing or closing the practice, including the staff and resources to help?

- If the other attorney is deceased, will you be able to work with the personal representative and/or family members?

- Have you been asked to serve as personal representative? The obligations of a personal representative and designated attorney are not the same, so consider very carefully whether you should take on both roles. As a practical matter, you may not have the time to do both jobs well.

- Malpractice liability issues for a designated attorney aren't clear. What positions does your professional liability carrier take on liability when acting as a designated attorney? Does it make a difference if you're representing the planning attorney or the planning attorney's clients?

B. Ethical Considerations

As of the date this manual is published, Nebraska Rules of Professional Conduct do not specifically provide guidance for a designated attorney. However, a designated attorney who is not appointed by a court as a trustee of another lawyer's practice may take guidance from Rule § 3-328. Appointment of a trustee, which states a trustee is bound by attorney-client privilege except as necessary to carry out the order of the court. The rule further directs a trustee to notify in writing all present clients, as well as all attorneys involved in pending legal matters. *See* §3-328 in the Appendix.

Clearly the designated attorney has the authority to review client files without their permission for purposes of acting in their best interests, particularly in cases where action is or very soon will be required. However, the designated attorney is advised to contact clients as soon as practicable to protect the clients' rights to select their own attorneys and act with their consent. One of the first things the designated attorney should do when looking at the planning attorney's files for the first time is to identify potential conflicts the designated attorney or the designated attorney's

firm may have so those files can be set aside and assigned to new counsel or returned to the client, if necessary.

ABA Formal Opinion 92-369 on Disposition of Deceased Sole Practitioners' Client Files and Property also provides some guidance. An inventory attorney who will not be representing clients is advised to review client files only to the extent needed to identify clients and determine which files need immediate attention to protect the interests of clients. The inventory lawyer should contact all clients to advise them of their lawyer's status and request instructions from the clients.

The ABA opinion raises, but does not answer, the question of what to do with files for clients the inventory attorney can't locate. The opinion acknowledges the costs and other challenges of keeping files, but also points out potential harm to clients if files or client property are destroyed. Finally, the opinion notes the obligation to make reasonable efforts to contact clients regarding unclaimed funds in the lawyer's trust account. *See* 92-369 in the Appendix.

Discussion of what efforts are required to locate clients, and how long to hold unclaimed files, property and funds is included *infra*.

Lawyer spouses or other lawyer relatives who take on the role of designated attorney, as well as personal representative and attorney for a deceased planning attorney's estate need to pay particular attention to possible ethical conflicts. Generally, a designated attorney's obligation is to clients, while a personal representative and/or attorney for an estate have an obligation to the estate. A designated attorney who is also an estate beneficiary adds another layer of conflict.

Should you be concerned about potential ethical complaints against you if it turns out complaints were or could have been or will be filed against the planning attorney? No, as long as you were not or are not a party to the ethics violation and take appropriate action when you discover it. If you have any question about your course of conduct, the Nebraska Counsel for Discipline can help you evaluate the situation and apply ethics rules.

C. Fulfilling Your Duties

Obviously, your duties will depend on the circumstances. Are you stepping in to temporarily manage a practice for a lawyer who is unable to practice briefly, but who is planning to return and is available to consult in the meantime? Or have you been appointed by a court to close a practice for a deceased lawyer who failed to make any plans? Regardless of where you are on this continuum, there will be commonalties in your responsibilities.

Following are suggested checklists and forms for the designated attorney. The checklists and forms assume the designated attorney will be closing the practice. Obviously all will need to be adapted to a particular situation, including the situation where the practice is being managed until the planning attorney returns.

As you approach your work, remember that complete, prompt communication will take you a long way in protecting client interests, completing your work as quickly and efficiently as possible, and avoiding ethics or malpractice claims against the planning attorney or you.

Checklist for the Designated Attorney

Immediate Priorities:

____ Obtain and review all documents authorizing you to act.

____ Begin as soon as your authority is established. Immediate action will reduce the likelihood an important deadline will be missed.

____ Assume control of planning attorney's office. Be sure you know how you'll access planning attorney's office and software if planning attorney doesn't have employees who could let you in or provide access. For example, keys to the building, passwords to the computer or files, and bank authorization (in a form approved by the bank) for business accounts and trust accounts.

____ Meet with employees. Discussion topics will include their status, their knowledge of immediate priorities to protect client interests, their responsibilities and skill sets, and assignments you have for them moving forward. Consider whether a retention incentive is advisable for key employees. Create a script for everyone to use when answering client questions to avoid confusion and mixed messages. Be particularly thoughtful about messaging if the planning attorney hopes to return to practice.

____ Create an initial plan of action, including specific tasks, who's responsible, and deadlines. Revise this plan as needed.

____ Contact the courts where you know planning attorney practiced. The clerks and judges will likely be very helpful in identifying pending matters, and in ordering continuances, perhaps before you've even had a chance to ask.

____ Assess open files to determine which files need immediate action to protect clients' interests, identify conflicts the designated attorney may have with planning attorney's clients, and take action as needed. Action may include: accessing JUSTICE Case Search and SCCALES Case Search; calling clients; contacting opposing counsel, the courts, or others; requesting continuances; filing for tax extensions; finding new counsel immediately; etc. For matters before a court, and depending on the urgency of the situation, you may need to:

- Request extensions, continuances and resetting of hearing dates. Send written confirmations of these extensions, continuances and resets to opposing counsel, planning attorney's client and new counsel.

- Be sure all cases before a court or administrative body have a substitution of attorney on record.

- Be sure the court's computer system is updated.

____ Notify all current clients in writing of planning lawyer's status, and ask clients how they would like to proceed. Use your office letterhead rather than planning attorney's. Depending on the circumstances, possibilities for the letter to clients may include:

- Planning lawyer's status. It's important to be as open and realistic as possible if the planning attorney hopes or plans to return to practice since clients will make decisions that may have significant impacts on them based on the information you provide. Clients' interests must come before the planning attorney's natural desire to retain clients.

- Who you are and what your role is, as well as others who may be involved with managing or closing the practice, including key employees. You may wish to include a copy of the document that authorizes you to act. If so, a planning attorney may want to execute a power of attorney separate from the more detailed agreement to manage or close a practice.

- Client options for new counsel, being especially clear they may select anyone they wish to represent them. This is particularly important if you're willing to become their attorney. Options may include the client finding new counsel, you assuming the case, or you suggesting other attorneys who may be good choices for the client.

- Whether there are deadlines that will dictate a client moving quickly, such as pending court dates or tax filing deadlines.

- For a file to be transferred to a client or new counsel:

  - Explain how and where to pick up files and give clients a deadline to do so OR set a deadline for clients to notify you of their new counsel and provide written permission to transfer files to the new counsel.

  - Be careful that you're getting permissions from the correct parties. For example, do you need permission from both spouses? An authorizing resolution from a corporate board?

- Include the status of fees owed and/or an accounting of funds held in a trust account. To the extent possible before delivering files to clients or successor attorneys, collect fees owed to planning attorney and/or negotiate contingent fees with a successor attorney that fairly reflects planning attorney's work. If there are fee disputes, consider using the Nebraska State Bar Association's voluntary legal fee arbitration program.

- Regular mail is fine. If no response, use level of service that provides a return receipt.

- The first contact with clients could also be by email if email addresses are current. If a client doesn't respond promptly, the next contact could be by regular mail and then by mail that requires a receipt. Administrative staff may know which clients are good candidates for email communications. Be cautious about email addresses that may be used by more than one person, such as addresses used by couples or families.

____ Review IOLTA/trust/escrow accounts to determine who is an authorized signer, whether funds are due clients, or other immediate action is needed. If neither you nor anyone else is an authorized signer on the trust account, apply to the court for an authorized signer. *See* additional information *infra* on managing or closing the trust account. Be very cautious about distributing funds from the trust account until you're confident the funds in the account reconcile with trust account records.

____ Set up systems as needed to track the status of open and closed files, client contacts, calendar, etc.

____ Assess the business side of the practice to determine what needs immediate attention to manage or begin to close the practice, and act as needed.

____ Contact the planning attorney's professional liability carrier to assess status of coverage and purchase tail insurance if appropriate.

____ Determine which jurisdictions planning attorney is admitted to practice and notify them of planning attorney's status.

____ If the office won't be staffed full-time, put a notice on the office door and add a voicemail message to the office phone letting clients and others know whom to contact. Be thoughtful about notices if burglary or vandalism are a concern.

Additional Tasks to Protect Clients:

____ Open files: If no client or file management system for open files exists, set up a spreadsheet or use software to track the status of all open files. Possible column headings could include:

- File name
- File number
- Client contact information
- Nature of the legal matter
- Reviewed (this could call for a checkmark or a date)

- Consulted with client (probably a date)
- Instructions received from client (complete the matter, transfer the file, etc.)
- Time limitations or deadlines
- File copied
- Status/location of original documents (whether obtained from client or generated by lawyer), and other client property (stock certificates, jewelry, etc.)[10]
- Status of fees and/or funds in trust account
- File delivered to client or new lawyer
- File receipt received from client or new attorney
- Other action required (could be special notes, reminder to make sure court approves substitution of counsel, etc.)

____ If no tracking system for closed files exists, set up a spreadsheet or use software to track the status of closed files. If planning attorney does not have a file closing, retention and destruction policy, *see* discussion of policies *infra*. Possible column headings could include:

- File name
- File number
- Last known client contact information
- Date of initial file review and purging by designated attorney
- Nature of the legal matter
- Date when matter was closed or last work completed
- Contacted client (probably dates and methods, such as phone calls, regular mail, certified mail return receipt, etc.)
- Efforts to find clients beyond office records of contact information (Google, Facebook, whitepages.com, etc.)
- Instructions received (destroy file, mail file to client or deliver to new attorney, etc.)
- File copied

[10] *See* Nebraska Rule of Professional Conduct § 3-501.15. Safekeeping property, *infra*. Note the recordkeeping requirement.

- Status of original documents (will delivered to client, etc.) and other client property

- Status of fees and/or funds in trust account

- File transferred (to client or new lawyer—include date)

- Receipt received

- Destruction or future review date

____ Proceed to complete or transfer all remaining open files.

____ Proceed to transfer, destroy or identify storage for closed files. *See* suggestions for this process, *infra*.

____ If the planning attorney practiced with another firm, determine whether the old firm holds files that the designated attorney needs to address.

____ If client information is stored on the Cloud, secure the information as appropriate and close accounts.

Unresponsive and Missing Clients

How much effort must a designated attorney expend trying to find clients? Similarly, what if you've contacted the client and the client fails to act? Experienced designated lawyers in Nebraska have expressed frustration with clients who are contacted—perhaps multiple times—and fail to act in their own interests, even in open cases. How far must a designated lawyer go to protect an uncooperative client? Factors to consider include:

- Is a file open or closed?

- For an open file, how significant is the matter and how critical are the time deadlines?

- For a closed file, how old is the file? Is it a file that should be kept for an extended period or indefinitely or is the file one which could otherwise be destroyed? Does the file contain original or valuable documents a client would want?

Approaches in these situations include:

- Document efforts to find clients. In addition to office records, it's reasonable to use and document an Internet search using resources such as Google, Facebook, whitepages.com, etc. Depending on the situation little or no effort may be required, or hiring a private investigator will be reasonable. Effort commensurate with the significance of the issues seems to be required. *See* Nebraska Ethics Advisory Opinion for Lawyers No. 12-07, *infra*, the Informal Musings of Assistant Counsel for Discipline Kent Frobish, *infra*, and additional discussion of this issue under File Closing, Retention and Destruction Policy *infra*. *See also* Tips for Finding Former Clients, *infra*.

- Make reasonable contact attempts, particularly for clients you've located, including phone calls, regular mail, and certified mail return receipt restricted delivery.

- If a matter is particularly important, placing it before a court may be advisable, perhaps after consulting with the Nebraska Counsel for Discipline.

Managing or Closing a Trust Account

____ Reconcile the trust account to assure funds correlate to specific client files or the nominal funds used to open the account or cover bank charges. Depending on the condition of the trust account records and your other obligations, consider hiring an accountant to help with reconciliation and establishing clear records for all funds related to the account.

____ Disburse funds as appropriate to clients (with documentation such as billing) or to planning attorney's business account (with documentation for fees earned, costs advanced, etc).

____ Make a reasonable attempt to find missing clients. Document your efforts. An attorney holding trust account funds for a missing client is required to act with reasonable diligence in attempting to locate the client. *See* Nebraska Ethics Advisory Opinion for Lawyers No. 09-02, *infra*. If the client can't be located or you can't determine to whom funds belong, the funds should be turned over to the State Treasurer as unclaimed property.

____ Transfer funds to new attorney for work in progress if requested to do so by the client. Document the client's request/ permission to do so and preserve the documentation.

____ Make sure all outstanding checks have cleared before closing the account.

____ When you are ready to close the account, check with the bank to determine whether there will be additional fees to close the account and deposit funds as needed. Close the account.

____ Submit an updated trust account affidavit indicating closure of planning attorney's account to the Attorney Services Division within 30 days as required by Nebraska Supreme Court Rule of Professional Conduct §3-905. Sign the affidavit as "Designated Attorney for_____." The affidavit is submitted online.

____ Shred unused checks and deposit slips.

____ Keep trust account records for five years after termination of the representation pursuant to Nebraska Supreme Court Rule of Professional Conduct §3-501.15(a). Most Nebraska lawyers retain trust account records longer. Generally, it's advisable to keep financial records at least seven years. The records may either be retained by the designated attorney or delivered to the lawyer or other individual who will store client files that must be retained.

Managing or Closing the Business of a Practice

In addition to managing or closing a law practice, you are also managing or closing a business. This is an area where planning attorney's employees, or possibly the personal representative, may be especially helpful. Possible issues to deal with include:

____ Malpractice insurance:

- Cancel/don't renew planning attorney's malpractice insurance.
- Ensure tail insurance coverage is in place.
- Keep all old malpractice insurance policies.
- Notify the Nebraska Supreme Court Attorney Services Division of the change in status of planning attorney's malpractice coverage.

____ Determine which professional organizations planning attorney is a member of. Cancel or don't renew memberships.

____ Assess how business credit cards have been used and determine the best time to cancel cards.

____ Office lease—extend, renegotiate or cancel as needed.

____ Office services, contracts and subscriptions such as electricity, water, cleaning, equipment maintenance, safe deposit box, legal messengers, legal research services, Internet, phones, email, website-hosting services:

- Go through expenses for the last year or two to create a list of services to be extended, renegotiated or cancelled. Be sure to watch for memberships, subscriptions, etc. that are automatically billed to a credit card. If business information is stored on the Cloud, secure the information as appropriate and close accounts.
- Domain name: Check on expiration date and extend if necessary to ensure email delivery, etc.
- Webpage: Update and retain for as long as is advisable for the circumstances. Information could include a general statement of planning attorney's status, whether he or she is expected to return, etc.
- Email: Continue to check planning attorney's email OR create the appropriate autoreply. If you create an autoreply explaining the planning attorney's absence and advising whom to contact, consider creating an email filter or rule that then automatically deletes the incoming email to avoid having confidential email

opened, saved or forwarded. The autoreply should state explicitly that no one will read the incoming email and it will be deleted. If planning attorney won't be returning to practice, a few months of leaving the email account open should be sufficient.

- Phone line: If the office will no longer be staffed or hours will be sharply reduced, leave the office phone in place for a few months with the appropriate recorded message. If the office will continue to be staffed until the practice is closed, the phone line can be disconnected when the practice is closed. Be sure all messages from clients are removed from systems.

- Dedicated business cell phone: For a few months, have the line forwarded to the office phone OR create the appropriate recorded message.

- Personal cell phone: If planning attorney uses one phone for personal and business purposes, consider whether the phone should be retained in the office or by family members. Leaving the phone with family members creates the risk that clients' interests will be unprotected and that confidential information will be revealed.

____ Mail: Continue to pick up mail until the practice is closed, then have it forwarded to you. (The US Postal Service forwards mail for six months.)

____ Equipment and furniture leases and disposal:

- Before returning or selling or donating equipment, be sure all confidential information is removed. This requires knowing which equipment stores information. For example, the photocopier may have a hard drive. An old answering machine may still contain client messages. Computers that are no longer used, old storage devices, etc. must be properly disposed of. The fact that equipment doesn't work doesn't mean confidential information isn't accessible.

- If office equipment or furniture is leased, contact the vendor to see if you can renegotiate or cancel the lease.

- If planning attorney owns equipment or furniture outright, sell or donate it. Office furniture and equipment is usually worth less than you think. If you want to sell, look for another professional (attorney, accountant, financial planner, etc.) who needs furniture or equipment.

____ Insurance, employee benefits:

- Cancel office insurance, such as premises liability insurance.

- Address employee benefit programs as appropriate.

____ Financial records: Work with planning attorney's accountant to assess the status of planning attorney's business, what action needs to be taken, what records need to retained, etc. If planning attorney managed his or her own financial business, hire expertise as needed. Continue to maintain good business records, file tax returns, etc. Determine what financial and tax records must be retained, for how long, and by whom. Consider whether your approach protects client confidentiality.

____ Business entity: Consider whether planning attorney has a business entity that needs to be dissolved or requires notification to the Secretary of State or others.

____ Continue to keep employees in the loop on issues such as the status of their benefits, how long you anticipate the office will be open, etc.

____ Firm advertising: Remember to remove planning attorney's firm name as appropriate. For example, consider business ads or sponsorships.

____ Collecting client fees owed: Continue to bill clients for fees owed planning attorney. Notify clients if the process for paying fees will change. For open matters assumed by you or another attorney, be clear about amounts due to planning attorney and future fees owed to another attorney. The new attorney should treat clients as any other new client, using an engagement letter, fee agreement, etc.

Sale of a Practice

See additional information about sale of a practice under Considerations and Decisions for the Planning Lawyer, *supra*.

If you're a designated attorney considering sale of a practice—whether or not the planning attorney indicated a preference—consider the advice above, as well as the following:

- Hold off setting a price or other sale terms for the practice until you believe you've found the right person. Listen to what they're looking for and will value. Many factors go into valuing a practice, including type of practice, location, the total number of clients, how long the practice has been in existence, staff, etc. Consider what can be transferred to a new owner, such as a favorable lease or services contract. It's possible to transfer the firm's unemployment experience account, and perhaps other items that could be mutually beneficial or improve the sale price. What may be valuable to one buyer may not matter to another. While the valuation and negotiation process can be complex, the primary agreement points are price, how payments will be structured, and transition period.

  The price is whatever can be negotiated. For a buyer, the question is what is the value of the increased amount of business the buyer will have as a result of buying a practice instead of starting from scratch. Price is probably a key factor, but don't assume it will be the deciding factor for a buyer.

Prices are often some calculation of future gross fees plus goodwill (based on planning attorney's expertise and reputation). The gross fees may be estimated based on historical fees or may be actual gross fees for the first years after the sale closes. If based on historical fees, a price can be set early in the transition, which is often preferable to sellers because of its certainty. Actual fees for the first few years after a sale may be preferable to a buyer, who doesn't pay for anything the buyer doesn't receive.

- If planning attorney is deceased, the personal representative will likely be involved in some way in negotiating the sale.

D. If You Can't Fulfill Your Duties

A planning attorney and designated attorney can agree to a great plan one day and have the whole thing fall apart the next day. Circumstances can arise for either party that make the agreement impossible. Or, a designated attorney may get part way into managing or closing a planning attorney's practice and then face circumstances which make it impossible to continue. What to do?

If a designated attorney realizes the original agreement won't work and the need for the designated attorney has not been triggered, it's important to contact the planning attorney as soon as possible. Consider whether you could remain involved if the plan were revised in some way, such as by the addition of one or more other lawyers to share the work.

If a designated attorney has begun work on behalf of the planning attorney and can't continue as originally planned, there may be a variety of options depending on the authority given to the designated attorney by the planning attorney. Options include:

- Bringing in one or more lawyers to assist you.

- Shifting responsibilities to employees or others brought in to assist with the work. This could include a personal representative or family members. Consider how this option can be used while protecting client confidences and otherwise protecting client interests.

- Identifying one or more lawyers to replace you so you can withdraw completely from the work. Depending on the circumstances, it may be required or advisable to get permission from the planning lawyer if possible, personal representative and/or a court.

- Contacting the Nebraska Lawyers Assistance Program and/or the Nebraska Counsel for Discipline. They may have additional suggestions or be able to help recruit replacement lawyers, and the Counsel for Discipline may request that the Supreme Court appoint a trustee if no other options are feasible.

Having a plan that includes more than one designated attorney can help protect all involved when something unexpected prevents a designated attorney from acting as originally planned.

5. Policies, Best Practices, and Forms

There are a number of steps the planning attorney can take that will not only make the designated attorney's work easier, but make the planning attorney's practice more efficient, save costs in the long run, and reduce the likelihood of an ethics or malpractice claim. If the planning attorney has failed to prepare in advance, the designated attorney may find it helpful to implement, at least to some degree, some or all of the policies or best practices outlined below.

A. Office Manual

An office manual includes the policies, procedures, contact information, passwords and similar information needed to keep an office running smoothly. It can be helpful not only if something happens to the planning lawyer, but to other key employees as well. Consider, for example, the impact to a practice if only one administrative assistant knows how to access the firm's billing software—and something unexpected happens to that assistant. A manual can also be very helpful in the event of a disaster. Consider, for example, how useful a manual would be in continuing a practice in the event of a physical disaster, such as a tornado or fire.

A manual will be very specific to a particular practice and will evolve over time. The manual may be electronic or paper or both, and may or may not be collected into one document or binder. Because the manual is most valuable if it is current, it's important to ensure the manual is reviewed and updated periodically, probably by assigning the task to an employee. Some of the information in the manual is sensitive, so appropriate security for the manual is important. Consider who can access it, including how a designated attorney would know of its existence and how to access it. Consider storing a copy in an office safe or off site so it will be safe in the event the office is severely damaged or destroyed.

The suggestions below for information to include in an office manual go beyond that needed to plan for a lawyer's unexpected absence, disability or death, and provide for a manual useful under many circumstances:

- Contact information for everyone closely associated with the practice—attorneys, employees, accountants, IT consultants, etc. For attorneys, include jurisdictions licensed in and attorney numbers. You may want to include emergency contact information for all attorneys and employees. A planning attorney should include contact information for his or her designated attorney(s).

- Contact information for the planning attorney's personal representative and the location of the planning attorney's will and/or trust.

- Information about the practice's business entity. For example, if it's a corporation, the name of the corporation, names of shareholders, location of the corporate minute book, etc. Regardless of the form of entity, include the federal identification number and state tax identification number.

- If the office space is leased, include contact information for the landlord, the location of the lease, and when the lease expires.

- For major equipment leases or maintenance contracts, include the name of the lessor/contractor, the location of the lease or contract, and when lease/contract expires.

- Contact information for significant/frequent business contacts, such as delivery services, process server, cleaning service, maintenance contract holders, equipment lessors, etc.

- Details regarding computers, websites and stored information, such as:

    - Where information is stored (individual hard drives, Cloud, server, etc.) and how it can be accessed, including passwords and who has access.

    - User names and passwords for computers, tablets, phones and other devices, as well as software with additional access security.

    - User names and passwords to websites and social media accounts.

    - Where backups of computer software is located either on disk, remote, or offsite.

- Locations of file cabinets and what's in each cabinet. It's especially important to document where open files are located. Consider similar information for other storage spaces, such as office credenzas or closets or desk drawers.

- Access codes or instructions needed to access voicemail and changing voicemail.

- How mail is received, particularly if it isn't delivered to the office.

- Details of all financial accounts, including IOLTA and trust accounts, business accounts, retirement accounts, business credit cards, etc. Include the names and numbers of the accounts, names of financial institutions, specific contacts at the institutions, and who has access to/signatory authority for the accounts. For credit cards, include who holds cards and when they expire.

- Insurance policy details such as the type of insurance, insurance company name, policy number, contact information for the company agent, etc. Possibilities include:

    - Professional liability coverage

    - Property/liability coverage

    - Business interruption or overhead insurance

    - Health insurance

    - Disability insurance

    - Life insurance

- Safe deposit box(es). Include the location(s), contents, who may access, where keys are stored.

- Off-site storage. Include location, contents, who may access and how access is obtained, location of the rental agreement, contact information for the storage facility, how rent is paid. If files are stored off-site, include the location of the file inventory.

- Office agreements, policies and procedures. Include either reference to or actual major office policies and procedures. If major agreements, policies or procedures are simply listed in the manual, include the location of the documents and who has access. Examples of major agreements, policies and procedures could include:

  - Partnership, office sharing, incorporation documents, or similar documents that establish the business structure for the practice and how it will be dissolved

  - How cases are managed and by whom, from initial contact through conflicts checks, engagement letters, nature and timing of case progress reports, billing, and case closure

  - Client fee structures

  - File closing, retention, and destruction

  - Employee or personnel policies

- How to check for conflicts.

- How to generate a list of current clients with contact information.

- Location of the firm's calendar, both for legal matters and the business of the practice.

- How to access client management software, if used.

- How open client files are organized and where they're located.

- How closed files are organized and where they're located.

- What client documents or property, if any, is retained by the firm and where it's located.

- Details on firm financial records and how they're maintained. For example, billing or accounting software, location of firm business records, client account ledgers, contact information for external accountant or bookkeeper, etc.

- A statement of what you don't have or use so that a designated attorney doesn't waste time looking for something that he or she might reasonably expect to find. For example, state that you don't have a safe deposit box or a post office box or don't store files off-site.

B. Client and Case Management Systems

Even a small practice will benefit from organized systems to track clients, cases and files. Client information will include up-to-date client contact details. Case information will include the status of any open files, including calendaring so court dates, statutes of limitations and deadlines aren't missed. A list of closed files will include details such as the location of the file, and when it can be or was destroyed. Case information may also include status of billings and payments, trust account balances, and work in progress.

Such systems can help an office run smoothly, avoid malpractice and ethics complaints, get an office back on its feet following a disaster, and be of enormous help to a designated attorney. Keys to the system include using it consistently, keeping it up-to-date, being clear who's responsible for various tasks, and having back-ups in the event of computer or other disaster.

The NSBA offers discounts to numerous client and case management systems. Additionally, you can contact the NSBA's Law Practice Management Advisor for recommendations on which system is best suited to your practice.

C. File Closing, Retention and Destruction Policy

In addition to having good systems to track clients and cases, a best practice tool that will benefit both clients and lawyers is a policy directing how files are closed, retained and destroyed. Implementing a policy will benefit a lawyer from day one of practice through retirement. While you're actively in practice a good policy can reduce storage space needs and costs, reduce the likelihood of a malpractice or ethics claim, increase the likelihood someone will be willing to be your designated attorney, allow you to more quickly close your practice if you're appointed to the bench or decide to make a career change, and save you from the overwhelming prospect of dealing with decades of old files when you decide to retire. If you're in practice and don't have a policy, implement one NOW.

Before creating a policy or starting the process of dealing with closed files, lawyers are advised to review five ethics opinions. Nebraska Ethics Advisory Opinion for Lawyers No. 12-09, *infra*, states that, with some exceptions, a file belongs to the client. A general rule of thumb is if the time to generate a document was billed to the client, the document belongs to the client. Lawyers may find useful the more detailed discussion on client files in ABA Committee on Ethics and Professional Responsibility Formal Opinion 471, *infra*, but should be guided by 12-09, which views client ownership as broader than the ABA opinion. Nebraska Ethics Advisory Opinion for Lawyers No. 12-07, *infra*, provides a detailed discussion of when and if client flies should be destroyed. Informal Musings of Assistant Counsel for Discipline Kent Frobish, *infra*, provides practical advice for designing and implementing a policy. Nebraska Ethics Advisory Opinion for Lawyers No. 17-01 provides guidance on when retaining a closed client file in electronic form only may be permissible.

File closing, retention and destruction policies are very practice-specific. The needs of a sole practitioner with an estate planning practice are very different from the needs of a large firm of litigators. The keys to creating a policy are focusing on the files generated by a particular practice and creating a process that protects clients' interests while minimizing the burden of

file maintenance for the firm, both short and long term. The keys to making a policy work are understanding and buy-in by all lawyers and staff, and an enforcement mechanism if needed.

Finally, Nebraska Ethics Advisory Opinion for Lawyers No. 19-01 discusses the ethics of electronic and cloud-based storage.

Below are tips for creating a policy and elements often found in a file closing, retention, and destruction policy. The advice is a blend that will be useful to a planning lawyer who is going to create and implement a policy as well as to a designated attorney who must deal with a planning lawyer's closed files.

- Think through each step that creates a file, from the initial client intake through the point where a file is considered closed. Consider communications and documents, whether they're oral, paper, or electronic.

- Decide when and how a matter is considered closed. It may involve a final letter to the client saying a matter is now completed.

- Strongly consider either offering or providing all file documents to clients as matters progress or at the close of a matter, and then be clear in your closing letter that clients have received or declined the entire file and that you will not contact them again before the file is destroyed after the required period. This eliminates the need to contact clients before files are destroyed in the future or when a practice is closed.[11]

- Include distributing trust account funds, as appropriate, in your file closing process.

- Decide whether you will close a file when fees are still outstanding.

- Decide what will be retained for a closed file and in what media. Will all paper be scanned and stored electronically? Will all electronic records be printed and stored in a paper file? How will electronic communications such as voice mail, email and texts be saved and stored? Note some client management software integrates electronic communications with the rest of the electronic file. Once you've offered or provided a file to a client, you are not ethically required to retain the file; you are required to maintain for five years after a matter is closed a list of files and what you've done with them (delivered/offered to client, storage, destruction). You may choose, for a variety of reasons, to retain the file or your copy of the file for some period of time. Reasons could include that the work was done for an ongoing client so you may need to refer to the file again, the file contains information or templates that could be useful in future work, malpractice concerns, or a moral commitment, such as a promise to a birth mother to

[11] The Nebraska Counsel for Discipline advises: "Recognizing that the lawyer's office file is owned by the client, it is appropriate for a lawyer to provide the "original" file to the client at the conclusion of the representation. If the lawyer wishes to keep a copy of the file the lawyer may do so at the lawyer's expense. If throughout the representation the lawyer provided to the client copies of all correspondence, pleadings, and discovery the lawyer is not obligated to provide a second set of those documents free of charge. A lawyer may require the payment of a reasonable reproduction cost to provide the client with a second set of the documents. Any documents which are part of the client file which were not previously sent to the client must be provided to the client without charge. Those documents must be provided to the client in the format requested by the client, paper or electronic. When the client asks for a second copy of a document the lawyer may provide that copy either in paper or electronically, depending on the client's willingness to pay the respective cost. This protocol is also applicable to closed files requested by the client years after the representation is concluded."

deliver items to a child given up for adoption when the child is older. As you consider what to keep beyond what's ethically required, remember you are not a repository for your client's papers and possessions; if files are important the client has incentive to safeguard them.

Your retained file should probably not include:

- Documents that are readily available elsewhere, such as court filings.
- Original documents provided by the client.
- Original documents generated during representation that should be given to the client, such as wills or corporate record books.

Your retained file should include:

- Original signed fee agreement, particularly when your fee is in dispute or the client has an outstanding balance at the time of file closing.
- Documents that should be retained until any statutes of limitation, including for legal malpractice, have run.
- A date when the file can be destroyed, both on or in the file, and on a separate list of client files.

- Remember to search all electronic files for items that should be considered part of a client's file. Items may be located on network servers, the Cloud, firm PCs, laptops, home computers, zip drives, disks, flash drives, mobile devices, or other media. Examples of electronic files include e-mails, texts, instant messages, electronic faxes, digitized evidence, word processing or other documents. Items to be retained can either be printed for the paper file or stored electronically in a manner that allows for future retrieval and destruction.

- Returning or giving documents to clients:

  - If you are closing a file at the same time representation ends, give the client all original documents and anything else of value that belongs to the client. Firms handle giving clients the rest of their files in a variety of ways. Some firms automatically send the client a complete file; some offer the file and document the client's response; some firms offer the file, giving the client a set deadline to respond (e.g. 30 days) after which it will be assumed the client doesn't want the file and it can be destroyed at the appropriate time without further notice to the client. Some firms send clients documents throughout the representation, so by the time a matter is completed the client has the full file. Note that some ethics discussions suggest that sending documents throughout a representation does not relieve a lawyer of the obligation to provide client with a file, while others suggest that providing documents as a client matter progresses, meets the obligation to provide a client with a complete file.[12] The key is deciding on a process, clearly communicating it to the client in a retainer agreement, and then following through.

[12] The Nebraska Counsel for Discipline's position is that the ethical obligation is met if a lawyer chooses to provide documents as a client matter progresses.

- If you are delayed in closing a file, a variety of factors will contribute to your decision of what to do with the file, as Opinion No. 12-07 and the informal comments from the Assistant Counsel for Discipline indicate. A more recent matter with a statute of limitations yet to run may make it advisable to offer the client the full file while you retain copies of many documents in the file. A long-closed matter beyond further action for a client you can't find after a reasonable search likely means a file can be destroyed (*but see* advice for original wills, *infra*), with appropriate notes to your closed file control sheet or spreadsheet regarding your attempts to find the client and your destruction of the file.

- Whatever process you choose for giving clients their files, but sure clients understand your policy. Consider including a summarized version of the policy with your client engagement agreement. Tell clients what documents you will be giving or returning to them, and what documents you will keep and for how long. Alternatively, this information could be included in your letter telling the client a matter is completed. A designated attorney could include information in letters to clients with either open or closed files, as appropriate.

- When you deliver materials to a client, have the client sign a detailed receipt. If necessary, files can be mailed to clients using a tracking system (such as certified return receipt) that provides proof of delivery. However, mailing is expensive and less likely to preserve clients' confidences than having clients pick up files in person. The same applies to delivering files directly to a client's new attorney.

- What if you can't locate a client and it's been more than five years since a matter was closed? With the exception of original wills and other important documents, you are not obligated to continue to retain a file. Use your judgment if a file contains original client documents the client may need or value, or other documents it would be difficult for the client to replace. Nebraska instructs lawyers to consider the value or importance of file materials in considering how much effort to put into finding a former client. *See* Nebraska Ethics Advisory Opinion for Lawyers No. 12-07, *infra*, and the informal comments of the Assistant Counsel for Discipline, *infra*. Attempts by the attorney to contact clients or to deliver their files should be well-documented and the documentation preserved.

- What if you have closed files for a client who is deceased? The Nebraska Rules of Professional Conduct and Ethics Advisory Opinions don't provide specific guidance. Generally, if an estate is open at the time you are disposing of files, the personal representative likely has the authority to accept or direct the disposition of the deceased's files. If the estate is closed or there was no probate, files are generally given to the surviving spouse, surviving children or other heirs. Put yourself in the position of the deceased client and consider what he or she would reasonably want done with the files. This could include judgment calls about what to retain and what to deliver. If you are still uncertain, consult the Nebraska Counsel for Discipline or consider whether a court should make the determination to appoint a Trustee under the circumstances presented.

- The best practice is to deliver original documents to clients at the time a matter is completed. This includes wills, corporate record books, deeds—all original documents—whether you created them or they were given to you by the client. Historically lawyers kept original wills and other documents for a variety of reasons, such as hoping to have the probate or other business in the future, or as a service to clients so they didn't have the expense of maintaining a safe deposit box or to protect the integrity of original wills and other documents against clients writing on them or losing them. However, this practice meant lawyers had the expense of safe storage, such as fireproof file cabinets, and eventually meant lawyers were left with original documents long after clients had moved on. Retaining original documents may also raise a question whether a matter is considered closed, even if you've sent a closure letter to a client. If you retain a client's will, are you obliged to review the will and contact the client every time the laws relating to estate planning or probate change? What is the client's expectation?

- If you have original documents, start returning them **NOW**; don't wait until you are actually closing your practice. Tracking down clients, making photocopies if needed, paying for postage, and documenting receipt by clients are all time-consuming and expensive.

- If you are closing a practice and have original wills you haven't been able to deliver to clients despite your best efforts, they should be filed with the county court of the county where a client's last known address is located. This includes wills that will never be probated.[13] All Nebraska county courts accept such wills; there may be a small filing fee. Be sure to keep a list of wills filed with the court, including which court each will was filed with and other filing information. Some lawyers automatically file all wills with the county court unless a client prefers to keep a will in his or her possession.

- Once you've reviewed the file, mark it for immediate destruction, destruction at a future date, or as a file that needs to be retained indefinitely. Even a file to be retained indefinitely should have a future review date since circumstances may change.

- Store the closed file so it can readily be found. Some firms store all inactive files together and pull files to be reviewed again and/or destroyed; some firms store closed files by review/destruction date.

- Storage should protect client confidences and be reasonably likely to protect the physical integrity of the file. Electronic storage must be secure and accessible in the future regardless of changes in computers, software, etc.

- Create a spreadsheet or control sheet for closed files. Include details such as the file location, whether client was offered the file or notified of the destruction policy, the date the file was closed or the date the last work in the file was completed, when the file can be destroyed, or notes on why you're choosing to retain the file beyond the ethically required five years. Examples of files to be retained for extended periods could include:

  - Cases involving a minor who is still a minor, or within the statute of limitations commencing when the minor becomes an adult

[13] *But see* the informal memo from the Assistant Counsel for Discipline, *infra*.

- Estate plans, unless the client is deceased and there is no one who would find the file useful in the future, such as other clients or heirs with linked estates

- Contracts, dissolution settlements or other agreements that are still being paid off or with acts still to be executed

- Cases in which a judgment should be renewed

- Criminal law, if the client is still incarcerated or on parole, or there are other terms to be executed, such as restitution

- Support and custody files in which the children are minors or the support obligation continues

- Files of difficult or dissatisfied clients

- Files of clients who can't be located and that contain original documents

- Adoptions

- Bankruptcies

- Files for which the malpractice statute of limitations has yet to run

• Depending on the client management software used, change the status of the client or matter to inactive.

• Destroy files.

- Do a final review of a file to be certain it doesn't need to be retained longer.

- If client wasn't advised earlier of the client's right to the file and/or your file destruction policy, contact the client.

- Burn, shred, or pulp paper files. If you have files burned or sell the paper to a recycler or pulping facility, verify yourself that files are treated in a manner that ensures client confidentiality until the files are burned or turned into pulp. Depending on how many files you need to destroy and who does the work, you will have costs for file destruction.

- Destroy electronic files. Simply deleting files is inadequate. Destruction of electronic data requires special expertise to make sure information is unrecoverable. If you contract for destruction services, select a company certified by the National Association for Information Destruction (NAID). Casually discarded information is a risk and a liability.

- Create a spreadsheet or control sheet documenting file destruction. It will include information such as the date and method of destruction and how destruction was verified. Update your list of inactive files. Alternatively, make the destruction information part of the inactive files control sheet.

- For a designated attorney who is closing a practice, decide what to do with files that must be retained after closing. Options include:

  - Retaining the files and managing them according to the designated attorney's file closing, retention and destruction policy.

  - Finding another local attorney or attorney with a similar practice to retain the closed files. This will be easier to do if they're properly closed and marked for future destruction. If a client can be located, delivering the files to another attorney requires the client's prior approval in writing. Delivering files to the Nebraska Supreme Court/Counsel for Discipline is not an option. However, because the Court may be contacted by clients looking for files, notifying the Counsel for Discipline of the ultimate disposition of files is advisable.

- Depending on client management software used, delete the matter from the database. Be thoughtful about deleting client information which may be useful for conflicts checks.

- Consider whether your policy will include the firm's business records, calendaring system, etc. If it will, be sure records are maintained and stored so that business could be resumed in the event of a natural disaster, server failure, fire or other major business interruption.

- Consider appointing someone in the firm whose tasks include enforcement of a policy on an ongoing basis and seeing the policy is reviewed by the firm on a periodic basis.

- Be sure all lawyers and staff are familiar with the policy and their responsibilities. Include the policy in new employee orientations and consider periodic refresher training for everyone.

6. Personal Representatives, Staff, and Family Members

A. Can a Lay Person Maintain or Close a Practice?

Particularly for a sole practitioner, if no other plans are in place in the event of a lawyer's unexpected absence, disability or death, a spouse or other family member or possibly staff members are often the first to attempt action to protect clients and the practice. Obviously someone familiar with the practice, such as a staff member, will be better equipped to help than someone coming in cold, but expecting a lay person to maintain or close a practice is a poor idea for a variety of reasons:

- A lay person isn't bound by the ethics rules that protect clients' interests, such as confidentiality.
- Depending on his or her legal knowledge, a lay person may be able to do some assessment of open files to determine what needs immediate attention, but is unlikely to be able to protect clients' interests to the extent required.
- A lay person runs the risk of engaging in the unauthorized practice of law.
- Risks of malpractice claims increase against the lawyer or the lawyer's estate.
- If the lawyer is still living, risks of ethics complaints increase.
- While involving a designated lawyer will involve costs, they may be offset if a practice can be maintained or sold or closed more quickly and efficiently.
- Depending on circumstances and relationships, the lay person may have higher priorities than the lawyer's practice, or may be emotionally unable to fulfill the role.

B. A Word of Caution to the Lawyer Spouse or Family Member

Being a relative with a law license, or perhaps a law degree but no license, is a mixed blessing. You need to be very careful not to run afoul of ethics rules, and need to be careful if your expertise doesn't align with the practice to be maintained or closed. You also need to be thoughtful about your priorities and emotional state.

C. Personal Representatives

A law practice is an asset of an estate, which means a personal representative has the legal authority to dispose of the practice. However, the cautions that apply to lay persons and family members—including lawyer family members—apply to personal representatives. A planning lawyer's agreement with a designated attorney should extend beyond a planning attorney's death, with authorization to act coming from the personal representative and preferably as directed by the deceased attorney in a will or other testamentary instrument. A designated attorney and personal representative can establish a collaborative working relationship that protects all interests involved. A planning attorney can help ensure success by keeping both the proposed personal representative and designated attorney informed of his or her overall plan for closing a practice and administering the planning lawyer's estate as it relates to the law practice.

D. Designated Attorney

A designated attorney must be very clear from the beginning what his or her role is vis-à-vis others. For example, a spouse or other family members, and the personal representative, need to understand whom the designated attorney represents, and is ethically and perhaps contractually obliged to do. In most instances, the designated attorney's valuation of a practice is much less than what a spouse or lay person as personal representative may think. In addition, the expense of closing a practice may be significantly higher than what a spouse or lay person may think. The designated attorney must also be clear with the spouse or other family members about valuation and expense at the outset of their involvement in handling the closing of the practice.

7. Addressing Cognitive Impairment[14]

Lawyers may be cognitively impaired for many reasons, including drug or alcohol use, cognitive decline, depression or other mental health issues, aging, exhaustion, stress, personal or family concerns, etc. It can be tempting to ignore warning signs for a variety of reasons, but there are even more reasons to act if another lawyer's behavior concerns you. Depending on the circumstances, and particularly for lawyers in practice with a cognitively impaired lawyer, you risk the loss of client confidence or even clients, the departures of valued colleagues and employees, malpractice and other liability, ethics violations[15], and your own feelings of guilt if you could have acted but didn't and there are ill consequences.

An extensive discussion of cognitive impairment is beyond the scope of this manual.

There are distinctions between impairment caused by cognitive functions and impairment caused by substance use.

Signs that may be more related to cognitive impairment:

- Forgetting the names of familiar people
- Getting lost in familiar areas
- Difficulty making simple decisions
- Becoming easily confused
- Having difficulty processing new information
- Making errors while performing simple tasks or following instructions
- Reduced standards for grooming or hygiene

[14] Thank you to Max Lydiatt, MD, Resident Physician, UNMC Department of Psychiatry for input about the nuances of cognitive impairment.

[15] Nebraska Rule of Professional Conduct §3-508.3 requires a lawyer to report a lawyer or judge who has committed an ethics rule violation and whose fitness is a concern.

Signs of impairment that may be more related to substance use rather than to cognitive impairment.

- Erratic work hours or unexplained absences.

- Uncharacteristic, unprofessional or unacceptable behavior.

- Dramatic changes in mood, behavior or energy level.

- Personal or professional financial irresponsibility.

- Over or under reaction to events.

- Falling asleep at work.

- Reduced standards for grooming or hygiene.

Depending on the relationships, a lawyer needs to be thoughtful and strategic about addressing concerns. Don't assume you know the underlying cause of behavior you find concerning. Remember that different statuses may require different approaches. For example, a solo practitioner will likely be approached differently than a law partner, who will be approached differently than an employee/associate, who will be approached differently than a judge. If you observe behavior that's concerning, either in others or yourself, you have a variety of options depending on the circumstances, including:

- A human resources professional for workplaces that have one.

- The Nebraska Lawyers Assistance Program, offered by the Nebraska State Bar Association, offers confidential help with any of the cognitive issues that can impair competence or professionalism. Assistance includes assessments, referrals, interventions, and peer assistance. Here is who you contact:

  Nebraska Lawyers Assistance Program (NLAP) - Nebraska State Bar Association (nebar.com)
  Christopher Aupperle, Director
  Nebraska Lawyers Assistance Program
  Nebraska State Bar Association
  635 S 14th St #200
  Lincoln, Nebraska 68508
  (402) 475-7091 (Phone)
  (402) 475-7098 (Fax)

  All communications with the Director or any representative at NLAP are confidential. NLAP can help direct you to professionals who can help identify the underlying problems and direct the person to get help.

• The Nebraska Counsel for Discipline.

• Trusted friends, family members, or health care professionals.

A lawyer who is absent from his/her practice (whether for drug or alcohol treatment or due to health reasons) will face a variety of issues upon returning. Discussion of such issues is beyond the scope of this manual; however, your medical professionals or NLAP can help direct you to resources and other professionals to get help.

A designated attorney assisting a lawyer in treatment or suffering from cognitive impairment should carefully scrutinize the lawyer's files and take steps to ensure the client's interests are safeguarded.

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Appendix

Sample Forms and Checklists

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Sample Provisions: Engagement Letter, Retainer Agreement, Closing Letter

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Sample Letter to Clients: No Pending Matters for Current Clients OR Clients with Closed Files

Sample Form: Instructions Regarding File(s)

Sample Form: Receipt of File(s)

Checklist: Creating a File Closing, Retention and Destruction Policy

Checklist: File Closing, Retention and Destruction

Checklist: Managing or Closing a Trust Account

Tips for Finding Former Clients

Checklist: For the Planning Attorney

____ Decide on one or more designated attorneys. Consider having an inventory attorney and one or more successor attorneys.

____ Decide the following:
- ____ Whom your designated attorney represents
- ____ How absence or disability sufficient to trigger an agreement will be determined
- ____ The scope of authority for your designated attorney
- ____ Roles for others who may be involved, such as an additional authorized signer on bank accounts
- ____ How expenses to manage or close your practice will be covered, including fees to your designated attorney
- ____ Whether you want your practice to be sold if possible, and whether designated attorney may be a buyer
- ____ How your agreement with a designated attorney could be terminated
- ____ How any fee or other disputes with your designated attorney could be resolved

____ Gather and document information about the legal aspects of your practice, including:
- ____ How to access a list of active clients with complete contact information
- ____ How to access case management software
- ____ How to access a list of inactive/former clients for whom you still maintain files, with the most recent contact information you have for the clients
- ____ How to access any lists of closed or inactive files
- ____ How to check for conflicts of interest
- ____ How both active and inactive or closed files are stored, whether files are paper or electronic or both
- ____ Your file closing, retention and destruction policy
- ____ Your office policies or process for client engagement, original client documents, providing clients with copies of documents, and closing/disengagement
- ____ Where original client documents or other client property is kept
- ____ Your case calendar showing all hearings, brief dates, statutes of limitations, etc.
- ____ Your trust and escrow account information, including all ledgers and reconciliations
- ____ List of corporations or similar entities for which you are the registered agent
- ____ List of deeds of trust for which you are the trustee
- ____ Lists of courts in which you typically work and judges before whom you regularly appear
- ____ Details about your professional licenses, memberships, and professional commitments

____ Gather and document information about the process and business aspects of your practice, including:
- ____ All user names and passwords for computers and software

____ Details for every type of account or service, including location (physical or online), user names and passwords, account names and/or numbers, signatories or others with access to the accounts, etc. Include bank accounts, service accounts, research services, employee benefits, safe deposit boxes, utilities, etc. Reviewing monthly and yearly expenses will help generate the list

____ Your office management calendar showing dates such as when various payments are due or services will expire, tax filing deadlines, etc.

____ Your time and billing software, including how to generate bills and collect fees, and access unpaid invoices

____ Details of every type of insurance policy, including the type of insurance, policy numbers, expiration dates, and premium due dates. Include professional liability, property, business liability, business interruption, life, health, disability, etc.

____ How to access voice mail

____ Location of mail or post office box and how to access it

____ Details about the office space, such as building ownership or landlord information and deed or lease location, mortgages, building access codes, parking places, who has keys, whom the designated attorney should contact for access, etc.

____ Details about office furniture and equipment, including ownership, leases, maintenance contracts, etc.

____ Details about the law practice website, including website hosting services and support services, user name and password

____ Firm financial records, including tax returns, and how to pay firm expenses, including payroll

____ Employee information, including personal contact information for all employees

____ Information needed in the event of your unexpected absence, disability or death, including contact information for the inventory and successor attorneys, and the documents or location of documents giving them instructions and authority to act

____ Information related to your estate plan, at least to the extent it relates to protecting your clients' interests

____ Create the documents needed to give your designated attorney the authority and information needed to act, such as:

____ An agreement to manage or close your practice

____ Limited power of attorney

____ Additional documentation required by banks or others to permit designated attorney to act

____ If your practice is a corporation, any corporate resolutions or other approvals needed for your designated attorney to act

____ Authorization to release your medical information to any actors who may need it

____ Documentation for your estate plan, such as an updated will, and perhaps additional instructions for your personal representative

____ Instructions or information for your employees

____ Instructions or information for your family members

____ Any forms your designated attorney will find useful, such as a letter to your clients, forms to document file transfer instructions, etc.

____ Distribute or secure documents, including your office manual, as appropriate

____ Schedule a yearly review and update of all plans and documents, including a meeting with your designated attorney

Agreement to Manage or Close a Practice

Below is sample language for an agreement with your designated attorney. It will give you ideas to consider, but obviously must be tailored to your specific situation. For example, if planning attorney chooses to appoint an inventory attorney and one or more successor attorneys, the responsibilities of the various parties will need to be clear. For purposes of the following, the language refers to one designated attorney serving as both inventory and successor attorney. In addition to the appropriate opening and closing language, you may want to add:

- Whether to specify an alternate in the event the designated attorney is unable to act.

- How and when the plan will be reviewed and updated. One way to "encourage" this review and update would be to have the agreement be for one year only so that a new agreement must be signed each year.

This agreement is entered into between _____, (planning attorney), and _____, (designated attorney).

1. Purpose

The primary purpose of this Agreement to Manage or Close Law Practice is to protect the legal interests of planning attorney's clients in the event planning attorney is unable to continue planning attorney's law practice due to absence, disability, or death. The secondary purpose of this agreement is to protect the interests of the planning attorney or the planning attorney's heirs.

2. Terms and Roles

The term planning attorney refers to the attorney listed above who is planning in advance for an unexpected extended absence, disability or death. The term designated attorney refers to the attorney selected by planning attorney who will step in immediately to see that clients' interests are protected in the event of planning attorney's unexpected extended absence, disability or death. In addition, designated attorney will manage or close the business of planning attorney's practice as required.

3. Effective Date

This agreement shall become effective only upon planning attorney's unexplained absence, disability, or death as established below. The appointment and authority of designated attorney shall remain in full force and effect as long as needed to carry out the terms of this agreement, or unless sooner terminated.

4. Determination of Absence, Disability, Death

To determine whether planning attorney is absent or disabled or dead, and no longer able to act on the planning attorney's own behalf, [designated attorney OR other person(s)] may act upon such evidence as [designated attorney or other person(s)] consider reliable, including, but

not limited to, communications with planning attorney's family members, colleagues, employees, staff, friends, or a written opinion of one or more medical doctors. [Designated attorney OR other person(s)] shall sign an affidavit outlining the facts upon which determination of planning attorney's absence or disability is based. For purposes of this agreement, such affidavit shall be conclusive proof of designated attorney's need to carry out the terms of this agreement.

Evidence similar to that used to determine absence or disability may be used to determine that planning attorney's absence or disability has terminated.

5. [Designated Attorney] [Is/Is Not] Attorney for Planning Attorney
While fulfilling the terms of this agreement, designated attorney is the attorney for planning attorney. Designated attorney has permission to inform planning attorney's clients of any errors or potential errors and instruct them to obtain independent legal advice, and has permission to inform planning attorney's professional liability insurance carrier of any errors or potential errors. Designated attorney has permission to inform clients of any ethics violations committed by planning attorney.

OR:

While fulfilling the terms of this agreement, designated attorney is not the attorney for planning attorney. Designated attorney has permission to inform planning attorney's clients of any errors or potential errors and instruct them to obtain independent legal advice, and has permission to inform planning attorney's professional liability insurance carrier of any errors or potential errors. Designated attorney has permission to inform clients of any ethics violations committed by planning attorney.

6. Scope of Authority
Planning attorney gives permission to designated attorney to manage or close planning attorney's law practice in the event that planning attorney is temporarily or permanently unable to continue in the practice of law and planning attorney is unable to manage or close planning attorney's own practice due to extended absence, disability or death. Designated attorney's authority includes all actions necessary to protect the legal interests of clients, as well as all actions needed to manage or close the business of the law practice. Planning attorney appoints designated attorney as attorney-in-fact, with full power to do and accomplish all the actions contemplated by this agreement as fully and as completely as planning attorney could do personally if planning attorney were able. It is planning attorney's intent that designated attorney act as planning attorney's attorney-in-fact only upon planning attorney's absence, disability or death. The appointment of designated attorney shall not be invalidated because of planning attorney's death, but shall remain in effect so long as it is necessary to carry out the terms of this agreement.

Designated attorney's authority to act includes, but is not limited to, the following activities needed to manage or close planning attorney's practice:
(If necessary or desired, specify actions you do or don't wish designated attorney to take. For examples *see* Scope of Authority, *supra*.)

Designated attorney is specifically authorized to access, review, update, distribute, use, manage, terminate and/or discard all digital assets, services and devices to the extent planning attorney could.

7. Client Confidentiality
Designated attorney agrees to limit review of a client's files to that needed to protect a client's interests, unless and until designated attorney is employed as successor attorney by the client. Designated attorney will preserve confidences and secrets of planning attorney's clients and their attorney/client privilege, and will make only those disclosures needed to carry out this agreement. If designated attorney discovers a conflict of interest, designated attorney will prioritize protecting a client's confidences and secrets while balancing the need to determine if immediate action is needed to protect a client's interests and to act if needed.

8. Legal Services to Clients
Designated attorney may provide legal services to planning attorney's clients provided designated attorney does not have conflicts of interest and clients agree to designated attorney's representation. Fees earned by designated attorney while representing planning attorney's clients will belong to designated attorney. In the event of conflicts of interest or a client's preference for a different attorney, designated attorney will refer clients to another attorney.

9. Client Funds and Fees
Designated attorney is authorized to review client accounts, refund unearned retainers or other client funds held in trust accounts, bill clients for services performed by planning attorney, and distribute trust account funds earned by planning attorney to planning attorney's business account.

10. Trust Account(s)
Planning attorney [authorizes OR does not authorize] designated attorney as an authorized signatory on planning attorney's lawyer trust account(s). (If someone other than designated attorney will be authorized as signatory on the trust account, include the individual's name.) It is planning attorney's intent that designated attorney act as planning attorney's signatory only upon planning attorney's absence, disability or death. The appointment of designated attorney shall not be invalidated because of planning attorney's death, but shall remain in effect so long as it is necessary to carry out the terms of this agreement.

11. Other Bank and Financial Accounts
Planning attorney [authorizes OR does not authorize] designated attorney as an authorized signatory on planning attorney's bank or financial account(s) other than planning attorney's trust account(s). (If someone other than designated attorney will be authorized as signatory on bank or other financial accounts, include the individual's name.) It is planning attorney's intent that designated attorney act as planning attorney's signatory only upon planning attorney's absence, disability or death. The appointment of designated attorney shall not be invalidated because of planning attorney's death, but shall remain in effect so long as it is necessary to carry out the terms of this agreement.

12. Payment for Services and Indemnification
Designated attorney agrees to record the time spent managing or closing planning attorney's practice. Planning attorney agrees to pay designated attorney [___] per hour for services rendered to manage or close planning attorney's law practice. Designated attorney will not be an employee of planning attorney's practice. Planning attorney agrees to indemnify designated

attorney against any claims, loss, or damage arising out of any act or omission by designated attorney provided the actions or omissions by designated attorney were made in good faith, reasonable under the totality of circumstances, and/or were made in a manner reasonably believed to be in planning attorney's best interest, and occurred while the designated attorney was assisting planning attorney by managing or closing planning attorney's practice. Designated attorney is not indemnified for any acts or omissions of willful misconduct or gross negligence. Designated attorney is not indemnified for any acts, errors or omissions that occur after planning attorney's former clients agree to an attorney/client relationship with designated attorney and designated attorney has acted as attorney for the clients.

13. Planning Attorney's Personal Business

Designated attorney is not responsible for managing or finalizing planning attorney's personal or personal financial business.

14. Sale of Practice

In the event planning attorney will not be returning to practice, designated attorney has the option to purchase planning attorney's practice. (Add terms, if they can be agreed to in advance. Or, specify how terms will be set when needed.)

If designated attorney opts not to purchase planning attorney's practice, designated attorney will make a reasonable attempt to sell the practice.

15. Fee Disputes to be Arbitrated

Planning attorney and designated attorney agree that any fee disputes between them will be decided by the Nebraska Legal Fee Arbitration Program.

16. Termination

This Agreement shall terminate upon: (1) delivery of written notice of termination by planning attorney to designated attorney, (2) delivery of written notice of termination by designated attorney to planning attorney or planning attorney's legal representative or personal representative, or (3) delivery of written notice of termination by planning attorney's legal representative or personal representative. If this agreement is terminated, designated attorney shall promptly return all files, records and other aspects of control of the practice to planning attorney or planning attorney's legal representative or personal representative. In addition, designated attorney will provide a final accounting and billing for services as a designated attorney within 30 days of the termination of this agreement.

Limited Power of Attorney

[Planning attorney] appoints [designated attorney] as my attorney-in-fact and agent for the limited purpose of taking any or all actions I could take to manage or close my law practice. This appointment includes, but is not limited to, all actions needed to protect the interests of my clients, and all business transactions related to my practice.

I specifically authorize [designated attorney] to conduct all transactions and take any actions I might with respect to my law practice trust and other bank accounts and safe deposit boxes, including but not limited to signing checks and other financial instruments, withdrawing or transferring funds, and opening my safe deposit boxes to add or remove property or documents.

Designated attorney is specifically authorized to access, review, update, distribute, use, manage, terminate and/or discard all digital assets, services and devices to the extent planning attorney could.

This power of attorney will not be affected by my incapacity or disability. It will continue until it is revoked in writing by me or my attorney-in-fact or other legal representative.

Sample Will Provision

My personal representative is directed to carry out the terms of the Agreement to Manage or Close a Law Practice that I entered into with a designated attorney(s). If designated attorney(s) is not able to complete the agreement, my personal representative is authorized to enter into similar agreements with one or more attorneys. My personal representative is authorized to act as deemed necessary and desirable to protect my clients' interests and also to [assist designated attorney with closing my practice as requested by the designated attorney OR close the business of my practice], and is instructed to follow all ethical rules that safeguard the confidences and other interests of clients. [The proceeds of {insurance policy or other funding device}, which are payable to my estate, are to be used to pay all expenses related to closing my practice.]

Sample Provisions: Engagement Letter, Retainer Agreement, Closing Letter

Engagement Letter:

To protect your interests in the event of my unexpected absence, disability or death, I have an agreement with another attorney to temporarily manage or to close my practice. The attorney will step in only if something unfortunate happens to me, and will act to protect your immediate interests and to assist you in finding a new attorney if needed.

Retainer Agreement:

[Planning attorney] may designate another attorney to manage or to close [planning attorney's] practice in the event of [planning attorney's] unexpected absence, disability or death. The designated attorney has client's permission to review client's file, take immediate action if required to protect client's interests, and to assist client in retaining new counsel if needed.

In the event [planning attorney] is unable to complete this matter due to absence, disability or death and another attorney is needed to complete this matter, fees may be split between the planning lawyer and successor lawyer based on time spent or responsibilities assumed.

[Planning attorney] will return all original documents provided by client, and will deliver to client all original documents created during the course of representation. [Planning attorney] may retain copies of all documents as well as other materials, and may destroy all retained copies and other materials in the future without further notice to client.

Closing Letter:

During the course of this representation, [planning attorney] has returned to client all original documents provided by client, and has delivered to client all original documents created during the representation. Because client has received all documents related to this representation, [planning attorney] may destroy all retained copies and other materials at a future date without further notice to client.

Checklist: For the Designated Attorney

Immediate Priorities:

____ Obtain and review all documents authorizing you to act

____ Begin as soon as your authority is established

____ Assume control of planning attorney's office

____ Meet with employees:
- ____ Discuss: their status, their knowledge of immediate priorities to protect client interests, their responsibilities and skill sets, and assignments moving forward
- ____ Consider whether a retention incentive is advisable for key employees
- ____ Create a script for everyone to use when answering client questions to avoid confusion and mixed messages

____ Create an initial plan of action, including specific tasks, who's responsible, and deadlines. Revise this plan as needed

____ Assess open files to determine which files need immediate action, including as needed:
- ____ Accessing JUSTICE Case Search and SCCALES Case Search
- ____ Calling clients
- ____ Contacting opposing counsel, the courts, or others
- ____ Requesting continuances, filing for tax extensions, finding new counsel immediately, etc.
- ____ Be sure all cases before a court or administrative body have a substitution of attorney on record
- ____ Be sure the court's computer system is updated

____ Email and/or letter to all current clients, including as needed:
- ____ Planning lawyer's status
- ____ Who you are and what your role is, and others who may play key roles
- ____ Copy of the power of attorney or other document authorizing you to act
- ____ Client options for new counsel
- ____ Deadlines requiring prompt action
- ____ Instruction to clients to notify you how they wish to proceed
- ____ For a file to be transferred to a client or new counsel:
  - ____ Explain how and where to pick up files and give clients a deadline to do so OR set a deadline for clients to notify you of their new counsel and provide written permission to transfer files to the new counsel
  - ____ Be careful that you're getting permissions from the correct parties
- ____ Include the status of fees owed and/or an accounting of funds held in a trust account
- ____ Use email (if appropriate) or regular mail. If no response, use restricted delivery with return receipt

____ Review IOLTA/trust/escrow accounts to determine who is an authorized signer, whether funds are due clients, or other immediate action is needed. Reconcile accounts with client records before distributing funds

____ Assess the business of the practice to determine what needs immediate attention and take action

____ Contact the planning attorney's professional liability carrier to assess status of coverage and purchase tail insurance if appropriate

____ Determine which jurisdictions planning attorney is admitted to practice and notify them of planning attorney's status

____ If the office won't be staffed full-time, put a notice on the office door and add a voicemail message to the office phone letting clients and others know whom to contact

____ Set up systems as needed to track:

____ Client contact information

____ Calendar

____ Status of open files. Possible column headings could include:

- File name
- File number
- Client contact information
- Nature of the legal matter
- Reviewed (this could call for a checkmark or a date)
- Consulted with client (probably a date)
- Instructions received from client (this could be whom to transfer the file to, complete the matter, etc.)
- Time limitations or deadlines
- File copied
- Status of original documents (will in file or will delivered to client, etc.)
- Status of fees and/or funds in trust account
- File delivered to client or new lawyer
- File receipt received from client or new attorney
- Other action required (could be special notes, reminder to make sure court approves substitution of counsel, etc.)

____ Closed files. Possible column headings could include:

- File name
- File number
- Last known client contact information
- Reviewed and purged (this could call for a checkmark or a date)
- Nature of the legal matter
- Date when matter was closed or when last action was taken
- Contacted client (probably dates and methods, such as phone calls, regular mail, certified mail return receipt, etc.)
- Efforts to find clients beyond office records of contact information (Google, Facebook, whitepages.com, etc)

- Instructions received (destroy file, mail file to client or deliver to new attorney, etc.)
- File copied
- Status of original documents (will delivered to client, etc.)
- Status of fees and/or funds in trust account
- File transferred (to client or new lawyer—include date)
- Receipt received
- Destruction or future review date

Additional Tasks to Protect Clients:

____ Complete or transfer all remaining open files

____ Return original documents or property to clients. If original wills can't be delivered to clients, file with the county court

____ If planning attorney is a registered agent for corporations or other entities, submit resignations

____ If planning attorney is the trustee on deeds of trust, resign or provide notice to successor trustee

____ Transfer, destroy or store closed files

____ If the planning attorney practiced with another firm, determine whether the old firm holds files that the designated attorney needs to address

____ If client information is stored on the Cloud, secure the information as appropriate and close account

Managing or Closing a Trust Account:

____ Reconcile the trust account

____ Disburse funds to clients or to planning attorney's business account

____ If the client can't be located or you can't determine to whom funds belong despite reasonable efforts, turn over to the State Treasurer as unclaimed property

____ Transfer funds to new attorney for work in progress if requested. Document client's request

____ Make sure all outstanding checks have cleared

____ Check with the bank regarding additional fees to close the account and deposit funds as needed

____ Close the account

____ Submit an updated trust account affidavit indicating closure of planning attorney's account to the Attorney Services Division within 30 days as required by Nebraska Supreme Court Rule of Professional Conduct §3-905. The affidavit is submitted online

____ Shred unused checks and deposit slips

____ Keep trust account records for five years after termination of the representation pursuant to Nebraska Supreme Court Rule of Professional Conduct §3-501.15(a)

Managing or Closing the Business of a Practice:

____ Malpractice insurance:
- ____ Cancel/don't renew planning attorney's malpractice insurance
- ____ Ensure tail insurance coverage is in place
- ____ Keep all old malpractice insurance policies
- ____ Notify the Nebraska Supreme Court Attorney Services Division of the change in status of planning attorney's malpractice coverage

____ Cancel/don't renew professional organization memberships

____ Assess how business credit cards have been used and determine the best time to cancel cards

____ Office lease—extend, renegotiate or cancel

____ Office services, contracts and subscriptions such as electricity, water, cleaning, equipment maintenance, safe deposit box, legal messengers, legal research services, Internet, phones, email, website-hosting services:
- ____ Create a list of services to be extended, renegotiated or cancelled
- ____ Secure business information stored on the Cloud and close accounts
- ____ Webpage: Update or take down as is advisable for the circumstances
- ____ Email: Continue to check planning attorney's email OR create the appropriate autoreply
- ____ Phone line: Continue usage, change recorded message or discontinue as appropriate
- ____ Dedicated business cell phone: For a few months, have the line forwarded to the office phone or update the recorded message or discontinue as appropriate
- ____ Personal cell phone: Determine whether phone holds clients' confidential information and take action as needed

____ Mail: Continue to pick up mail until the practice is closed OR have it forwarded to you

____ Equipment and furniture leases and disposal:
- ____ Be sure all confidential information is removed from computers, photocopiers, etc.
- ____ Contact vendors to renegotiate or cancel leases
- ____ Sell or donate owned equipment or furniture

____ Insurance, employee benefits:
- ____ Cancel office insurance, such as premises liability insurance
- ____ Address employee benefit programs as appropriate

____ Financial records, as needed:
- ____ Work with planning attorney's accountant to assess the status of planning attorney's business, what action needs to be taken, what records need to retained, etc.
- ____ Hire expertise as needed
- ____ Continue to maintain good business records, file tax returns, etc.
- ____ Determine what financial and tax records must be retained, for how long, and by whom
- ____ Consider whether your approach protects client confidentiality

____ Business entity: Dissolve business or corporation, notify Secretary of State, etc.

____ Keep employees informed on issues such as the status of their benefits, how long you anticipate the office will be open, etc.

____ Firm advertising: Remove attorney's or firm's name (business ads, sponsorships, etc.)

____ Collecting client fees owed:
- ____ Continue to bill clients for fees owed planning attorney
- ____ Notify clients if the process for paying fees will change
- ____ For open matters assumed by you or another attorney, be clear about amounts due to planning attorney and future fees owed to another attorney

____ Sale of practice, as needed:
- ____ Exercise your option to purchase the practice
- ____ Have practice appraised
- ____ Advertise, negotiate with buyers

Sample Letter to Clients: New Counsel Needed for Open Files*

Dear [Client Name]:

I'm sorry to inform you [of {planning attorney's} death OR that due to ill health {planning attorney} will be away from his/her law practice for {estimated period of time} OR due to ill health {planning attorney} will no longer be practicing law].

My name is _____, and I'm an attorney [add pertinent information about you or your practice]. [Planning attorney] arranged with me in advance to protect his/her clients' interests in the event he/she would unexpectedly be unable to practice law. My role is [provide details of your role and any other key individuals].

You will need to act immediately to retain a new attorney to complete [brief description of pending matter and any upcoming deadlines]. [I OR successor attorney] would be pleased to represent you going forward. I can also suggest other attorneys who could represent you. You have the right to select any attorney you wish to represent you.

Please let me know whom you've chosen to represent you. If you would like to discuss your case with me, please contact me immediately at [provide contact info]. If you would like me to transfer your file to another attorney, or pick up your file yourself, please complete and return the enclosed form confirming your instructions to me.

[Within the next [fill in number] weeks, I will be providing you with a full accounting of your funds in {planning lawyer's} trust account and fees you currently owe {planning attorney}] OR [include the information here]

Again, it is important that you retain a new attorney immediately.

On behalf of [planning attorney], thank you for allowing him/her to provide you with legal services. Please call me if you have any questions.

Sincerely,

**An email may be used for the first contact with clients. If a client fails to respond promptly, send a letter. Administrative staff may know which clients can likely be contacted by email. Be cautious about email addresses that appear to be used by more than one person, such as a couple or family.*

Sample Letter to Clients: No Pending Matters for Current Clients OR Clients with Closed Files*

Dear [Client Name]:

I'm sorry to inform you [of {planning attorney's} death OR that due to ill health {planning attorney} will be away from his/her law practice for {estimated period of time} OR due to ill health {planning attorney} will no longer be practicing law].

My name is _____, and I'm an attorney [add pertinent information about you or your practice]. [Planning attorney] arranged with me in advance to protect his/her clients' interests in the event he/she would unexpectedly be unable to practice law. My role is [provide details of your role and any other key individuals].

It does not appear you currently have any legal matters pending with [planning attorney]. This letter is to advise you [INSERT AS APPROPRIATE when planning attorney is expected to return OR that a new attorney will be needed in the future AND/OR that client will need to pick up files.]

If I don't hear from you, your files will remain [with {planning attorney} OR with me OR other location] for a minimum of 5 years after matters were completed, and in some cases longer, and then will be destroyed. If you wish to pick up your file or have it transferred to another attorney, please complete the enclosed form and contact [my office OR planning attorney's office] to arrange to pick up your file or have it transferred.

[AS APPROPRIATE: Enclosed is a statement showing the balance of fees owed to {planning attorney} OR {planning attorney's} office will continue to send monthly statements as it has in the past.]

[AS APPROPRIATE: On behalf of {planning attorney}, thank you for allowing him/her to provide you with legal services and for your patience and cooperation during this difficult time. Please call me if you have any questions.

Sincerely,

**An email may be used for the first contact with clients. If a client fails to respond promptly, send a letter. Administrative staff may know which clients can likely be contacted by email. Be cautious about email addresses that appear to be used by more than one person, such as a couple or family.*

Sample Form: Instructions Regarding File(s)

I, _____, request that [designated attorney]:
(Print client name)

(Select one option)

____ Provide me with my file(s), which I will pick up in person. (Please call in advance so your files will be ready for your pickup.)

____ Provide me with my file(s), which will be picked up on my behalf by:
_____

____ Mail my file(s), return receipt requested, to this address:
_____
_____

____ Deliver my file(s) to my current attorney: (Include current attorney's name, address, phone)
_____
_____

____ Retain and/or destroy my files according to the terms of [designated attorney's] file retention and destruction policy.

_____ _____
Client Signature Date

Sample Form: Receipt of File(s)

I acknowledge that I have received my file(s) from [designated attorney], including:

[Client name]
[File number(s)]
[List of matters, original/important documents, etc.]

_____ _____

Client Signature Date

(Note: Adapt this form for receipt of file by another attorney.)

Checklist: Creating a File Closing, Retention and Destruction Policy

File Closing, Retention and Destruction Policies are very practice-specific. Obviously, the needs of a sole practitioner with an estate planning practice are very different from the needs of a large firm of litigators. The keys to creating a policy are focusing on the files generated by a particular practice and creating a process that protects clients' interests while minimizing the burden of file maintenance for the firm, both short and long term. The keys to making a policy work are buy-in by all lawyers and staff, and an enforcement mechanism if needed.

Below are tips for creating a policy, and elements often found in a File Closing, Retention and Destruction Policy. Some details such as what to retain in a closed file are included in discussion of file closing, retention and destruction elsewhere in this manual.

____ Think through each step that creates a file, from the initial client intake through the point where a file is considered closed. Consider communications and documents, whether they're oral, paper or electronic

____ Decide when and how a file is considered closed. It may involve a final letter to the client saying the matter is now completed

____ Include distributing trust account funds in your file closing process

____ Decide whether you will close a file when fees are still outstanding

____ Decide what will be retained for a closed file and in what media. Will all paper be scanned and stored electronically? Will all electronic records be printed and stored in a paper file? How will electronic communications such as voice mail, email and texts be saved and stored? Note some client management software integrates electronic communications with the rest of the electronic file

____Create a process for delivering materials to clients

- ____ Deliver all original documents to the client immediately upon closing the file. Original documents include those created by you and those shared by the client. This includes original wills, deeds, tax returns, corporate record books, etc.
- ____ Decide how to offer a complete file to the client. Some firms automatically send the client a complete file; some offer the file and document the client's response; some firms offer the file, giving the client a set deadline to respond (e.g. 30 days) after which it will be assumed the client doesn't want the file and it can be destroyed at the appropriate time without further notice to the client. The goal is to have all client file issues settled when the file is closed so you never have to locate and ask a client if they want a file in the future
- ____ Have clients sign a detailed receipt for materials delivered to them if you deliver a file at the close of a matter rather than sending clients copies of everything as a matter progresses

____ Mark the closed file for future destruction or further review

____ Store the closed file so it can readily be found. Some firms store all inactive files together and pull files to be reviewed again and/or destroyed; some firms store closed files by review/destruction date

____ Storage should protect client confidences and be reasonably likely to protect the physical integrity of the file. Electronic storage must be secure and accessible in the future regardless of changes in computers, software, etc.

____ Create a spreadsheet or control sheet for closed files. Include details such as the file location, whether client was offered the file or notified of the destruction policy, the date the file was closed or the last work completed, when the file can be destroyed, or notes on why it needs to be retained beyond the ethically required 5 years

____ Depending on the client management software used, change the status of the client or matter to inactive

____Destroy files

- ____ Do a final review of a file to be certain it doesn't need to be retained longer
- ____ If client wasn't advised earlier of the client's right to the file and/or your file destruction policy, contact the client
- ____ Shred or pulp paper files. Verify yourself that this is done properly to protect confidences
- ____ Destroy electronic files. This may require using a professional service. Simply deleting files is inadequate

____ Create a spreadsheet or control sheet documenting file destruction. It will include information such as the date and method of destruction and how destruction was verified. Update your list of inactive files. Alternatively, make the destruction information part of the inactive files control sheet

____ Depending on client management software used, consider deleting the client or the matter from the database

____ Consider whether your policy will include your firm's business records, calendaring system, etc. If it will, be sure records are maintained and stored so that business could be resumed in the event of a natural disaster, server failure, fire or other major business interruption

____ Consider appointing someone in the firm whose tasks include enforcement of a policy on an ongoing basis and seeing the policy is reviewed by the firm on a periodic basis

____ Be sure all lawyers and staff are familiar with the policy and their responsibilities. Include the policy in new employee orientations and consider periodic refresher training for everyone

____ Communicate your policy to clients. Consider how, when and what you will communicate

- ____ Policy elements to communicate:
  - ____ How long you will retain files
  - ____ You will deliver or return original documents provided by client or created by you
  - ____ The fact that files may be electronic, in whole or part
  - ____ Depending on the policy you adopt for your practice: How long a client has to request the file or documents after an engagement ends, or that the complete file is being delivered to the client at the close of a matter
  - ____ That you may retain or destroy files at your discretion without further notice to the client
  - ____ That you have the right to make and retain copies of all documents involved in the representation
- ____ Inform clients:
  - ____ Include policy with engagement letter and/or retainer agreement and retain letter and/or agreement in client file
  - ____ Include policy with end-of-engagement letter. Could include specific date you anticipate destroying file

Checklist: File Closing, Retention and Destruction

____ Create a spreadsheet or control sheet to track closed files

____ Close files when a matter is completed

- ____ Keep or copy:
  - ____ Original signed fee agreement, particularly when your fee is in dispute or the client has an outstanding balance at the time of file closing
  - ____ Documents that should be retained until any statutes of limitation have run, including for legal malpractice
- ____ Do NOT keep:
  - ____ Duplicate copies
  - ____ Documents that are readily available, such as court filings
  - ____ Original documents provided by the client (make copies as needed)
  - ____ Original documents that should be given to the client, such as wills or corporate record books
- ____ Remember to search all electronic files for items that should be considered part of a client's file
- ____ After reviewing, mark files with dates for destruction, further review or to be retained indefinitely, and update your file spreadsheet
- ____ For files delivered to clients, get detailed receipts and update your file spreadsheet

____ Original wills:

- ____ Deliver original wills to clients
- ____ For wills that can't be delivered to clients, deliver to county court

____ Other original documents or property

- ____ Deliver to clients
- ____ For documents that can't be delivered to clients, use your judgment whether to retain or destroy the documents based on the age and nature of the document

____ For files closed fewer than 5 years ago, or that otherwise should be retained for an extended period:

- ____ Send the client the complete file, or contact the client to offer the client the file, depending on the policy you've established. If you contact the client to offer a file, it's permissible to tell the client he/she has a deadline for responding (e.g. 30 days) and if no response is received you will assume the client doesn't want the file. If you deliver a file to a client, have the client sign a detailed receipt, which you will retain
- ____ If a client wants the file, copy or retain portions of the file you believe should be retained

____ If you are unable to contact a client, document your contact efforts on your file spreadsheet

____ Destroying files:

- ____ Group files to be reviewed or destroyed in the future by review or destruction date
- ____ Do a final review of files before destroying them
- ____ Destroy paper and electronic files no longer needed
- ____ Note the file status on your closed file spreadsheet

Checklist: Managing or Closing a Trust Account

____ If there are no authorized signatories available, apply for court permission to manage and/or close the trust account

____ Reconcile the trust account to assure funds correlate to specific client files or the nominal funds used to open the account or cover bank charges

____ Disburse funds as appropriate to clients or the practice business account

____ Make a reasonable attempt to find missing clients. Document your efforts

____ If clients can't be found or you can't determine to whom funds belong, turn over funds to the State Treasurer

____ Transfer funds to new attorney for work in progress. Document the client's request/ permission to do so and preserve the documentation

____ Make sure all outstanding checks have cleared

____ Close the account:

- ____ Check with the bank to determine whether there will be additional fees to close the account and deposit funds as needed
- ____ Close the account

____ Submit an updated trust account affidavit online indicating closure of the account to the Attorney Services Division within 30 days

____ Shred unused checks and deposit slips

____ Assure that trust account records will be retained for at least five years

Tips for Finding Former Clients

Whether you need to find a former client, and how much effort you must expend looking, will depend on the age of the client file, the subject matter and your reason for trying to find a particular client. A six-year-old estate planning file, or one containing documents or other property of value to the client, will require more effort than an older file containing no valuable or irreplaceable documents or other property or was for a traffic ticket. Here are some search suggestions:

1. The phone book. (This is becoming more obsolete with the growth of cell phone usage.)

2. Google or other search engines.

3. Social media sites such as Facebook, LinkedIn, Twitter, etc.

4. The County Assessor's website for the county where the client last resided. Found by running a Google search such as: "county assessor saunders county ne"

5. The County Treasurer's website for the county where the client last resided. Even though a deed may have been recorded for 25 years and is not showing on Nebraska Deeds Online, the owner of real estate will still be paying real estate taxes so can be found by going to the following URL: http://www.nebraskataxesonline.us/

6. Sometimes a deed is too old to find on a deed search or the assessor's or treasurer's records are not searchable electronically. Another source found on an assessor's web site may be the GIS link such as is found on the York County Assessor's web site: https://york.gisworkshop.com/?&t=assessor/ By typing in the last name of the person in the search box, you will find your person if they own real estate in the county.

7. Searching the name on the Justice case data base found at: https://www.nebraska.gov/apps-subscriber-form/user/index You have to be a subscriber to use this service. You can then search for probate cases using the name of your client. This will produce guardian, conservator and estate cases for the searched name.

8. If you subscribe to Ancestry.com, running a search there using the name and Nebraska when you are searching "Birth, Marriage and Death Records" can find deceased people. The records you find may have the middle initial of your client. Suggestion: Do not enter the middle initial as part of your search.

9. If your file was a corporate or LLC file, do a free "Corporate & Business Search" on the Nebraska Secretary of State's web site. If the business entity is inactive, this helps you decide if you need to do additional searching for the client. If the business entity is active, you now have an address for the client.

Appendix

Ethics Rules and Opinions

Nebraska Rule of Professional Conduct § 3-501.3. Diligence (with comment [5])

Nebraska Rule of Professional Conduct § 3-501.15. Safekeeping property

Nebraska Rule of Professional Conduct § 3-328. Appointment of a trustee

American Bar Association Formal Opinion 92-369

Nebraska Ethics Advisory Opinion for Lawyers No. 12-09

American Bar Association Formal Opinion 471

Nebraska Ethics Advisory Opinion for Lawyers No. 12-07

Informal Musings of Assistant Counsel for Discipline Kent Frobish

Nebraska Ethics Advisory Opinion for Lawyers No. 17-01

Nebraska Ethics Advisory Opinion for Lawyers No. 09-02

Nebraska Ethics Advisory Opinion for Lawyers No. 19-01

Nebraska Rule of Professional Conduct § 3-501.3. Diligence.

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

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. *See* Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. *See* Rule 1.2.

[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. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Nebraska Rule of Professional Conduct § 3-501.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. *See*, *e.g.*, ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

Nebraska Rule of Professional Conduct § 3-328. Appointment of a trustee.

In addition to any of the foregoing procedures within these rules relating to disability inactive status, disbarment, or suspension of an attorney, the following measures may be taken for the protection of client interests:

(A) Appointment of a Trustee. If an attorney (i) has been suspended by an order of the Court placing the member on disability inactive status pursuant to § 3-311; (ii) is shown to be unable to properly discharge his or her responsibilities to clients due to disability, disappearance, death, or abandonment of a law practice and there is no showing that an arrangement has been made for another lawyer to discharge the responsibilities; or (iii) has been disbarred or suspended pursuant to §§ 3-310 or 3-312 or has surrendered his or her license under § 3-315 and there has been a failure to comply with § 3-316 client notification requirements, the Court may appoint a lawyer to serve as trustee to inventory the files, sequester client funds, and take whatever other action seems indicated to protect the interests of the clients and other affected parties.

(1) Trustee Bound by Lawyer-Client Privilege. The trustee should be bound by the lawyer-client privilege with respect to the records of individual clients, except to the extent necessary to carry out the order of the Court.

(2) The trustee shall notify in writing all of the present clients of the disbarred or suspended member of the fact of such disbarment or suspension and shall also notify in writing all members and nonresident attorneys involved in pending legal or other matters being handled by the disbarred or suspended member of his or her altered status.

(3) The trustee shall receive compensation for his or her services as established by the Court and may be reimbursed for travel and other expenses incidental to the performance of his or her duties.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 92-369 **December 7, 1992**

Disposition of Deceased Sole Practitioners' Client Files and Property

To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death.

A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with Rule 1.15.

The Committee has been asked to render an opinion based on the following circumstances. A lawyer who has a large solo practice dies. The lawyer had hundreds of client files, some of which concern probate matters, civil litigation and real estate transactions. Most of the files are inactive, but some involve ongoing matters. The lawyer kept the active files at his office; most of the inactive files he removed from the office and kept in storage at his home.

The questions posed are two:

1) What steps should lawyers take to ensure that their clients' matters will not be neglected in the event of their death?
2) What obligations do lawyers representing the estates of deceased lawyers, or appointed or otherwise responsible for review of the files of a lawyer who dies intestate, have with regard to the deceased lawyer's client files and property?

I. Sole Practitioner's obligations with regard to making plans to ensure that client matters will not be neglected in the event of the sole practitioner's death

The death of a sole practitioner could have serious effects on the sole practitioner's clients. See Program: Preparing for and Dealing with the Consequences of the Death of a Sole Practitioner, prepared by the ABA General Practice Section, Sole Practitioners and Small Law Firms Committee, August 7, 1986.

Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death.

Model Rules of Professional Conduct 1.1 (Competence) and 1.3 (Diligence) are relevant to this issue, and read in pertinent part:

> Rule 1.1 Competence
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> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
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> Rule 1.3 Diligence
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> A lawyer shall act with reasonable diligence and promptness in representing a client.

Furthermore, the Comment to Rule 1.3 states in relevant part:

> A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety....

According to Rule 1.1, competence includes "preparation necessary for the representation," which when read in conjunction with Rule 1.3 would indicate that a lawyer should diligently prepare for the client's representation. Although representation should terminate when the attorney is no longer able to adequately represent the client,[1] the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship.[2]

Lawyers have a fiduciary duty to inform their clients in the event of their partnership's dissolution.[3] A sole practitioner would seem to have a similar

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1. See Model Rule of Professional Conduct 1.16 ("... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if: ... (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client....")

2. See Murphy v. Riggs, 213 N.W. 110 (Mich.1927) (fiduciary obligations of loyalty and confidentiality continue after agency relationship concluded); Eoff v. Irvine, 18 S.W. 907 (Mo.1892) (same.)

3. See Vollgraff v. Block, 458 N.Y.S.2d 437 (Sup.Ct.1982) (breach of fiduciary duty if partnership's clients not advised of dissolution of partnership). A state bar association is considering creating an "archive form"--indicating the location of client files--which lawyers would complete and file with the state bar association in the event they terminate or merge their practice, thus enabling clients to locate their files. See ABA ETHICSearch, September 1992 Report. Such a form would be consistent with the duty discussed in Vollgraff, as simply informing a client of a firm's dissolution without telling the client where the client's files are located would be tantamount to saying "your files are no longer here."

duty to ensure that his or her clients are so informed in the event of the sole practitioner's dissolution caused by the sole practitioner's death. Because a deceased lawyer cannot very well inform anyone of his or her death, preparation of a future plan is the reasonable means to preserve these obligations. Thus, the lawyer ought to have a plan in place which would protect the clients' interests in the event of the lawyer's death.[4]

Some jurisdictions, operating under the Model Code of Professional Responsibility, have found lawyers to have violated DR6-101(A)(3) when the attorneys have neglected client matters by reason of ill-health, attempted retirement, or personal problems.[5] The same problems are clearly presented by the attorney's death, thus suggesting that a lawyer who died without a plan for the maintenance of his or her client files would be guilty of neglect. Such a result is also consistent with two of the three justifications for lawyer discipline.[6] Sanctioning of lawyers who had inadequately prepared to protect their clients in the event of their death would tend to dissuade future acts by other lawyers, and it would help to restore public confidence in the bar.[7]

Although there is no specifically applicable requirement of the rules of ethics, it is fairly to be inferred from the pertinent rules that lawyers should make arrangements for their client files to be maintained in the event of their own death. Such a plan should at a minimum include the designation of another lawyer who would have the authority to look over the sole practitioner's files and make determinations as to which files needed immediate attention, and provide for notification to the sole practitioner's clients of their lawyer's death.[8]

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4. The Fla.Bar, Professional Ethics Comm., Op. 81-8(M) (Undated) discussed the obligations of a lawyer who was terminally ill with regard to client files:

After diligent attempt is made to contact all clients whose files he holds, a lawyer anticipating termination of his practice by death should dispose of all files according to his client's instructions. The files of those clients who do not respond should be individually reviewed by the lawyer and destroyed only if no important papers belonging to the clients are in the files. Important documents should be indexed and placed in storage or turned over to any lawyer who assumes control of his active files. In any event, the files may not be automatically destroyed after 90 days.

5. See In re Jamieson, 658 P.2d 1244 (Wash.1983) (neglect due to ill-health and attempted retirement); In Re Whitlock, 441 A.2d 989 (D.C.App.1982) (neglect due to poor health, marital difficulties and heavy caseload); Committee on Legal Ethics of West Virginia State Bar v. Smith, 194 S.E.2d 665 (W.Va.1973) (neglect due to illness and personal problems).

6. See In Re Moynihan, 643 P.2d 439 (Wash.1982) (three objectives of lawyer disciplinary action are to prevent recurrence, to discourage similar conduct on the part of other lawyers, and to restore public confidence in the bar).

7. Obviously, sanctions would have no deterrent effect on deceased lawyers.

8. Although the designation of another lawyer to assume responsibility for a deceased lawyer's client files would seem to raise issues of client confidentiality, in that a lawyer outside the lawyer-client relationship would have access to confidential client information, it is reasonable to read Rule 1.6 as authorizing such disclosure. Model Rule of Professional Conduct 1.6(a) ("A lawyer shall not reveal information

II. Duties of lawyer who assumes responsibility for deceased lawyer's client files

This brings us to the second question, namely the ethical obligations of the lawyer who assumes responsibility for the client files and property of the deceased lawyer. Issues commonly confronting the lawyer in this situation involve the nature of the lawyer's duty to inspect client files, the need to protect client confidences and the length of time the lawyer should keep the client files in the event that the lawyer is unable to locate certain clients of the deceased lawyer.

At the outset, the Committee notes that several states' rules of civil procedure make provision for court appointment of lawyers to take responsibility for a deceased lawyer's client files and property.[9] Since the lawyer's duties under these statutes constitute questions of law, the Committee cannot offer guidance as to how to interpret them.[10]

A. Duty to inspect files

Many state and local bar associations have explored the issues presented when a lawyer assumes responsibility for a deceased lawyer's client files.[11] The ABA Model Rules for Lawyer Disciplinary Enforcement also address

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relating to representation of a client ... except for disclosures that are impliedly authorized in order to carry out the representation.") Reasonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.

9. See, e.g., Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases:

> Appointment of Receiver. When it comes to the attention of the circuit court in any judicial circuit from any source that a lawyer in the circuit is unable properly to discharge his responsibilities to his clients due to disability, disappearance or death, and that no partner, associate, executor or other responsible party capable of conducting that lawyer's affairs is known to exist, then, upon such showing of the presiding judge in the judicial circuit in which the lawyer maintained his practice, or the supreme court, may appoint an attorney from the same judicial circuit to perform certain duties hereafter enumerated ...
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> Duties of Receiver. As expeditiously as possible, the receiver shall take custody of and make an inventory of the lawyer's files, notify the lawyer's clients in all pending cases as to the lawyer's disability, or inability to continue legal representation, and recommend prompt substitution of attorneys, take appropriate steps to sequester client funds of the lawyer, and to take whatever other action is indicated to protect the interests of the attorney, his clients or other affected parties.

10. Lawyers who act as administrators of estates have fiduciary duties to all those who have an interest in it, such as beneficiaries and creditors. Questions involving the lawyer's fiduciary responsibility to the estate of a deceased lawyer are also questions of law that this Committee cannot address. See, e.g., In Re Estate of Halas, 512 N.E.2d 1276 (Ill.1987); Aksomitas v. Aksomitas, 529 A.2d 1314 (Conn.1987).

11. See, e.g., Md. State Bar Ass'n, Inc., Comm. on Ethics, Op. 89-58 (1989); State Bar of Wis., Comm. on Professional Ethics, Op. E-87-9 (1987); Miss.State Bar, Ethics Comm., Op. 114 (1986); N.C. State Bar Ass'n, Ethics Comm., Op. 16 (1986); Ala. State Bar, Disciplinary Comm'n., Op. 83-155 (1983); Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Ops. 89-43 and 89-23 (1989); Ore.State Bar,

some aspects of the question.[12] A lawyer who assumes such responsibility must review the client files carefully to determine which files need immediate attention; failure to do so would leave the clients in the same position as if their attorney died without any plan to protect their interests. The lawyer should also contact all clients of the deceased lawyer to notify them of the death of their lawyer and to request instructions, in accordance with Rule 1.15.[13] Because the reviewing lawyer does not represent the clients, he or she should review only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention.[14]

B. Duty to maintain client files and property

Questions also arise as to how long the lawyer who assumes responsibility for the deceased lawyer's client files should keep the files for those clients he or she is unable to locate. ABA Informal Opinion 1384 (1977) provides general guidance in this area. We believe that the principles set out in that opinion are applicable to the instant question. Informal Opinion 1384 states as follows:

> A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readi-

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12. ABA Model Rules for Lawyer Disciplinary Enforcement (1989), Rule 28 states in relevant part:

APPOINTMENT OF COUNSEL TO PROTECT CLIENTS' INTERESTS WHEN RESPONDENT IS TRANSFERRED TO DISABILITY INACTIVE STATUS, SUSPENDED, DISBARRED, DISAPPEARS, OR DIES. A. Inventory of Lawyer Files. If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and no partner, executor or other responsible party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon proper proof of fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.

B. Protection for Records Subject to Inventory. Any lawyer so appointed shall not be permitted to disclose and information contained in any files inventories without the consent of the client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

13. Model Rule of Professional Conduct 1.15(b) ("Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.")

14. Again, while issues of client confidentiality would appear to be raised here, a reasonable reading of Rule 1.6 suggests that any disclosure of confidential information to the reviewing attorney would be impliedly authorized in the representation. See note 8, supra.

ly available to the clients, will not be prematurely and carelessly destroyed to the clients' detriment.

Informal Opinion 1384 then lists eight guidelines that lawyers should follow when deciding whether to discard old client files. One of these guidelines states that a lawyer should not "destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, and original documents." Another suggests that a lawyer should not "destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired."

There is no simple answer to this question. Each file must be evaluated separately. Reasonable efforts must be made to contact the clients and inform them that their lawyer has died, such as mailing letters to the last known address of the clients explaining that their lawyer has died and requesting instructions.[15]

Finally, questions arise with regard to unclaimed funds in the deceased lawyer's client trust account. In this situation, reasonable efforts must be made to contact the clients. If this fails, then the lawyer should maintain the funds in the trust account. Whether the lawyer should follow the procedures as outlined in the applicable Disposition of Unclaimed Property Act that is in effect in the lawyer's state jurisdiction is a question of law that this Committee cannot address.[16]

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15. Responding to a recent inquiry, the Committee on Professional Ethics of the Bar Association of Nassau County suggested that an attorney assuming responsibility for a deceased attorney's client files has an ethical obligation to treat the assumed files as his or her own. Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Op. 92-27 (1992).

16. There are at least 27 state and local bar opinions that discuss a lawyer's obligations when the lawyer cannot locate clients who have funds in lawyer trust accounts. See, e.g., State Bar of S.D., Ethics Comm., Op. 91-20 (1991); State Bar of Ariz., Comm. on Rules of Professional Conduct, Op. 90-11 (1990); R.I.Sup.Ct., Ethics Advisory Panel, Op. 90-21 (1990); Alaska Bar Ass'n, Ethics Comm., Op. 90-3 (1990); Md.State Bar Ass'n, Inc., Comm. on Ethics, Op. 90-25 (1990); Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Op. 89 (1990).

Nebraska Ethics Advisory Opinion for Lawyers
No. 12-09

UPON TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A CLIENT'S INTERESTS, INCLUDING SURRENDERING PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED, ALTHOUGH THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY OTHER LAW.

QUESTION PRESENTED

What are the lawyer's ethical duties to release the client's file when the law firm has a written express consent for the firm to acquire a lien on the file to secure the lawyer's fees or expenses?

FACTS

The client signs a retainer agreement with the law firm providing express consent for the law firm to acquire a lien on the file to secure the lawyer's fees or expenses. The attorney/client relationship is then terminated, and there is a balance owing on the client's account. The client requests that the law firm release her file to her so that she can provide it to her new attorney. The law firm refuses to release the client's file, because they claim a balance due and owing on the client's account.

RULES OF PROFESSIONAL CONDUCT

Section 3-501.16(7)(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for the employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law...

Assisting the Client Upon Withdrawal
[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequence to the client. The lawyer may retain papers as a security for a fee only to the extent permitted by law. (*See* Rule 1.15.)

Section 3-501.15(d): "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive, and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

DISCUSSION

Nebraska Ethics Advisory Opinion for Lawyers No. 01-3 provided:

AN ATTORNEY HAS AN ETHICAL OBLIGATION, UPON DEMAND, TO PROMPTLY PROVIDE A CLIENT WITH THE CONTENTS OF THE FILE BELONGING TO THE CLIENT. WHAT THE CLIENT MAY BE ENTITLED TO RECEIVE DEPENDS ON THE NATURE OF THE WORK, THE AGREEMENT BETWEEN THE ATTORNEY AND CLIENT, AND THE PARTICULAR CIRCUMSTANCES OF THE CASE. AS A GENERAL RULE, HOWEVER, A CLIENT IS ENTITLED TO: 1) ALL DOCUMENTS PROVIDED TO THE ATTORNEY; 2) ALL DOCUMENTS OR RESPONSES ACQUIRED BY COUNSEL THROUGH THE DISCOVERY PROCESS; 3) ALL CORRESPONDENCE IN PURSUIT OF THE CLIENT'S INTERESTS; 4) ALL NOTES, MEMORANDA, BRIEFS, MEMOS, AND OTHER MATTERS GENERATED BY COUNSEL BEARING ON THE CLIENT'S BUSINESS AND RESULTING FROM THE EMPLOYMENT OF THE COUNSEL. THE COUNSEL MAY RETAIN COPIES OF THE FILE, ABSENT AN AGREEMENT FROM THE CLIENT. SUCH COPIES MUST BE MADE AT COUNSEL'S EXPENSES.

Nebraska has since adopted the Rules of Professional Conduct. Therefore, the applicability of the above has been questioned, as the prior opinion was decided under the Code of Professional Responsibility. **Neb.Rev.Stat. § 7-108** states, "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client; and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

The **ABA-BNA Lawyers' Manual on Professional Conduct, Practice Guide, Section on Duties at the End of Representation** (45:1201), provides as follows:

> State Rules:
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> Many of the jurisdictions that have substantially modified their ethics rules since the ABA adopted the Model Rules have embraced Model Rule 1.16 with little significant change, although some states have made slight modifications regarding the scope and existence of a lawyer's right to retain the client's file in the event the Client refuses to pay the lawyer's fees.
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> Arizona adds that a lawyer must upon request surrender "all of the client's documents, and all documents reflecting work performed for the client." The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law, the rule adds, but "only if retaining them would not prejudice the client's rights."
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> Connecticut requires that the attorney confirm the termination in writing within a "reasonable time."
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> The District of Columbia provides that the continuing duty to protect the client applies in connection with "any" termination of representation, not just those terminations based on withdrawal. The rule also reminds lawyers that the right to impose a retaining lien is governed by Rule 1.8(i), which allows retaining liens to be applied only to an attorney's work product and, in any event, prohibits a lawyer from retaining property when the client is unable to pay or where there is a significant risk of harm if the property is retained.
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> Georgia omits completely the model rule language that allows a lawyer to retain papers. It also specifies that the "maximum penalty" for violating the rule is a public reprimand.

Louisiana requires a lawyer, upon written request from the client, to promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may keep a copy of the file "but shall not condition release over issues relating to the expense of copying the file or for any other reason," the rule states. Who is ultimately responsible for the cost of the copying "shall be determined in an appropriate proceeding."

Massachusetts adds a list, in paragraph (e), of items that the lawyer must deliver to a former client after the client requests his or her file.

Michigan's rule calls on lawyers to take "reasonable" steps to protect the client's interests when terminating the representation.

Minnesota omits the model rule language that allows a lawyer to retain papers. It incorporates a list, in paragraph (e), of items that the lawyer must deliver to a former client after the client requests his or her file.

Montana sets out a work product exception to the duty to return client property, stating that a lawyer need not surrender "papers or materials personal to the lawyer or created or intended for internal use by the lawyer." Papers that don't fall within that definition must be delivered to the client ; if copies are kept, the rule adds, the lawyer bears the copying costs.

New Hampshire states that the steps to protect a client's interests are a "condition to termination of representation."

New Mexico allows a lawyer to retain property to the extent permitted by law "or the Rules of Professional Conduct."

North Dakota, in Rule 1.19, states that a lawyer shall not assert a retaining lien against a client's files , papers, or property, defines what constitutes a client's papers or property, and makes clear that copying costs may be assessed against the client only when the client agreed to the arrangement up front.

Ohio adds a clause defining client papers and property as including "correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."

Oregon adds "papers" and "personal property" to the list of things that may be retained consistent with other law.

Rhode Island omits completely the model rule language that allows a lawyer to retain papers. A separate rule states that whenever a lawyer cannot locate a client the lawyer must petition the court for instructions.

South Carolina adds a sentence expressly allowing a lawyer to "retain a reasonable nonrefundable retainer."

Tennessee includes in the property that must be returned "work product" prepared for the client and for which the lawyer has been compensated. The rule allows a lawyer to retain work product to the extent permitted by other law "but only if the retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation."

Texas permits a lawyer to retain papers "only if such retention will not prejudice the client in the subject matter of the representation."

Utah allows lawyers to retain papers to the extent permitted by other law but adds that the lawyer must provide, "upon request, the client's file to the client ." It also provides that the lawyer "may reproduce and retain copies of the client file at the lawyer's expense."

Virginia sets out in paragraph (e) a detailed list of the types of documents that must be returned to the client , and specifies the procedure for copying papers the lawyer wishes to retain.

Also, the ABA-BNA Lawyers' Manual on Professional Conduct, Practice Guide, Section on Duties at the End of Representation (45:1205), provides as follows:

Attorneys' Liens.

Many states allow lawyers to assert liens on client property as a means of guaranteeing that the attorneys' fees will be paid. *See* generally Restatement (Second) of Agency §464(b) (1958); Restatement of Security §62(b) (1941); 7 Am. Jur.2d Attorneys at Law §313 (1980); 7 C.J.S. Attorney & Client §358 (1980). Indeed, Model Rule 1.16(d) specifically acknowledges that a lawyer may retain papers "to the extent permitted by law."

Although the ethics rules neither endorse nor condemn attorneys' retaining liens, the majority of states have concluded that such liens are not unethical per se. *See Nat'l Sales & Serv. Co. v. Superior Court*, 667 P.2d 738 (Ariz. 1983); *Marsh, Day & Calhoun v. Solomon*, 529 A.2d 702 (Conn. 1987); *Maryland Attorney Grievance Comm'n v. McIntire*, 405 A.2d 273 (Md. 1979); *Levitas v. Levitas*, 410 N.Y.S.2d 41 (Sup. Ct. N.Y. Cnty. 1978); *Silverstein v. Hornick*, 103 A.2d 734 (Pa. 1954); *In re Anonymous*, 335 S.E.2d 803 (S.C. 1985).

See also Alabama Ethics Op. 86-2 (1988), Alabama Ethics Op. 89-25, and Alabama Ethics Op. 89-58 (1989); Arizona Ethics Op. 86-12 (1986); District of Columbia Ethics Op. 250 (1994); Florida Ethics Op. 88-11 (1993); Indianapolis Ethics Op. 2 of 1990; Maryland Ethics Op. 87-36 (1987) and Maryland Ethics Op. 89-11 (1988); New Mexico Ethics Op. 1986-7; New York State Ethics Op. 567 (1984); Nassau County (N.Y.) Ethics Op. 91-5 (1991); New York City Ethics Op. 82-74; Columbus Ethics Op. 2 (1987); Oregon Ethics Op. 2005-90 (2005); Philadelphia Ethics Op. 87-1; South Carolina Ethics Op. 88-7; Utah Ethics Kp. 91 (1989); Virginia Ethics Op. 871 (1987) and Virginia Ethics Op. 996 (1988).

See generally Annotation, Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct, 69 A.L.R.4th 974 (1989); Thompson, Attorneys' Fees and Liens, 85 Comm. L.J. 136 (1980); Comment, Attorney's Liens: A Practical Overview, 6 U. Bridgeport L. Rev. 77 (1985).

Thus, although the ethics rules neither endorse nor condemn an attorneys' retaining lien, the majority of states have concluded that such liens are not unethical per se, as set out above.

Approaching this problem, Colorado Opinion 104 (4/17/99), provides as follows:

Files of client; Withdrawal from representation; Photocopies.

At the termination of the representation of a client a lawyer must surrender papers and property to which the client is entitled. The fact that the lawyer may have previously provided copies of documents to the client does not relieve the lawyer of this responsibility. A lawyer has the right to withhold documents related to the representation of other clients that the lawyer used as a model for drafting the client's documents, but the product drafted for the client may not be withheld. Similarly, drafts of pleadings left in the file and not destroyed in the

normal course of the representation should be surrendered. In addition, a lawyer may withhold personal attorney work product, including internal memorandums regarding the client's file, conflicts checks, personnel assignments, and a lawyer's notes containing personal impressions and comments that relate to the business of representing the client. If a lawyer's notes contain both factual information and personal impressions, the notes may be redacted or summarized to protect the interests of both the lawyer and the client. Lawyer work product does not include documents belonging to the client or those that are the lawyer's "end product," such as pleadings filed in the case, correspondence with clients, opposing counsel and witnesses, and final versions of contracts, wills, corporate records, and similar documents prepared for the client's use. Preliminary drafts, legal research, and legal research memorandums must also be surrendered. Specific documents that would fall into the category of work product are to be identified on a case by case basis, but the lawyer's duty to protect the interests of the client favors production. In the event of a dispute, a judicial in camera inspection may be necessary. A lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs. But if a lawyer voluntarily surrenders work product to the client, the duplication costs may be charged to the client. In the absence of a valid agreement to the contrary, a lawyer may not refuse to provide papers and property to the client until the client pays duplication costs. Opinion 82; Rule 1.16(d).

CONCLUSION

Regardless of the change from the Code of Professional Responsibility to the Rules of Professional Conduct, "an attorney has an ethical obligation, upon demand, to promptly provide a client with the contents of the file belonging to the client. What the client may be entitled to receive depends upon the nature of the work, the agreement between the attorney and client, and the particular circumstances in the case. **In circumstances where the clients continued representation would be in jeopardy, the lawyer's ethical obligation to the client overrides any lien rights the lawyer may have otherwise obtained by statute or agreement**.

As a general rule, however, a client is still entitled to:
1) ALL DOCUMENTS PROVIDED TO THE ATTORNEY; 2) ALL DOCUMENTS OR RESPONSES ACQUIRED BY COUNSEL THROUGH THE DISCOVERY PROCESS; 3) ALL CORRESPONDENCE IN PURSUIT OF THE CLIENT'S INTERESTS; 4) ALL NOTES, MEMORANDA, BRIEFS, MEMOS, AND OTHER MATTERS GENERATED BY COUNSEL BEARING ON THE CLIENT'S BUSINESS AND RESULTING FROM THE EMPLOYMENT OF COUNSEL. THE COUNSEL MAY RETAIN COPIES OF THE FILE, ABSENT AN AGREEMENT FROM THE CLIENT. SUCH COPIES MUST BE MADE AT COUNSEL'S EXPENSE." Production to the client may consist of scanned or hard copy.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 471 **July 1, 2015**

Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

This opinion addresses the ethical duties of a lawyer pursuant to the ABA Model Rules of Professional Conduct, when responding to a former client's request for papers and property in the lawyer's possession that are related to the representation. The opinion does not address a client's property rights or other legal rights to these materials.

A lawyer has represented a local municipality for 10 years pursuant to a contract for legal services. The contract term expired. After publishing a request for proposals, the municipality chose a different lawyer to provide the municipality with future legal services. The municipality requested that the lawyer provide the municipality's new counsel with all files – open and closed. The lawyer has been paid in full for all of the work.[1] The lawyer asks what materials must be provided to the former client.[2]

The scope of a lawyer's ethical duty pursuant to the Rules of Professional Conduct to provide a former client with papers and property to which the client is entitled at the termination of the representation arises with regularity. Many jurisdictions, through case law on property rights, agency law, or ethics opinions under the jurisdiction's Rules of Professional Conduct, have examined the question and determined which papers and property a lawyer must return, reproduce, and/or provide to a client. There may be other obligations defined in a jurisdiction's case law or court rules.[3] Lawyers are cautioned to review the law in the jurisdiction in which

1. Because the lawyer has been paid in full, this opinion does not address retaining liens.

2. The ABA Model Rules of Professional Conduct do not directly address the length of time a lawyer must preserve client files after the close of the representation. Many jurisdictions provide guidance on this issue through court rule or ethics opinions.

3. *See*, Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92 (Mo. 1992) (client has a conditional right of access to a lawyer's notes, research, and drafts if the client needs the notes, research, and drafts to understand completed documents).

they practice because lawyers have been disciplined for failing to surrender to the client papers and property to which the client is entitled.[4]

ABA Informal Ethics Opinion 1376 (1977) addressed a lawyer's ethical duty to deliver files to a former client. The opinion interpreted Rule 9-102(B)(4) of the Model Code of Professional Responsibility that read, "A lawyer shall: [P]romptly pay or deliver to the client as requested by the client the . . . properties in the possession if the lawyer which the client is entitled to receive." It concluded: "The attorney clearly must return all of the materials supplied by the client to the attorney. . . . He must also deliver the 'end product' . . . On the other hand, in the Committee's view, the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purpose in working on the client's problem."

That opinion was issued prior to the adoption of the Model Rules of Professional Conduct and prior to advances in technology that have affected virtually all aspects of the practice of law, including how lawyers create, communicate, use, and store materials related to client representations. This opinion clarifies and updates a lawyer's ethical duty to provide a former client with papers and property pursuant to Model Rules of Professional Conduct 1.15 and 1.16, and addresses practical considerations attendant to those obligations.

Model Rule 1.15 provides that a lawyer must safeguard a client's property and promptly deliver it to the client upon the client's request.[5] By its terms, Rule 1.15 applies to a client's and third party's money and to "other property" that comes into a lawyer's possession in connection with a representation.[6] Although not specifically defined in the Rule, "other property" may be fairly understood to include, for example, (a) tangible personal property, (b) items with intrinsic value or that affect valuable rights, such as securities, negotiable instruments, wills, or deeds and (c) any documents provided to a lawyer by a client.[7] Therefore, as an initial matter, and in the absence of other law[8] or a valid dispute under Rule 1.15(e), the lawyer must return all property of the municipality that the municipality provided in connection with the representation. *See* ABA Informal Ethics Opinion 1376 (1977). This would necessarily include original documents provided by the client.

4. *See In re* Brussow 286 P.3d 1246 (Utah 2012). In Brussow, the respondent represented a client in post-dissolution matters and was publicly sanctioned for refusing to turn over the file to the client. Brussow argued that the client owed him money for the cost of deposition transcripts which the client's second husband agreed to pay. The Utah Supreme Court noted that Utah's Rule 1.16 "differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses." *Id.* at 1252. Brussow was also admonished for failing to account for fees paid in advance. *See also In re* Thai, 987 A.2d 428 (D.C. 2009). Thai delayed returning a client's file and "actively obstructed the efforts of his former client and the successor attorney to obtain the file." *Id.* at 430. Thai was disciplined for violating Rule 1.16 as well as for violations of Rules 1.1, 1.3, and 1.4 involving the same client matter.

5. ABA MODEL RULE 1.15, Safeguarding Property.

6. ABA MODEL RULE 1.15(a).

7. This obligation exists with respect to all materials whether in paper or electronic form. *See* ABA MODEL RULE 1.0(n) defining writing as "a tangible or electronic record of a communication . . . including audio or video recording, and electronic communications." *See also* N.H. Bar Ass'n Advisory Op. 2005-06/3 (2005).

8. *See* ABA MODEL RULE 1.15, cmt. [4] for a discussion of third party liens. *See* ABA MODEL RULE 1.16(d) and cmt. [9] and ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1520 (1986) for a discussion of lawyer retaining liens.

When a representation ends, ABA Model Rule 1.16(d) mandates that the lawyer take steps that are "reasonably practicable to protect a client's interests . . ."[9] "Reasonable," when used to describe a lawyer's actions "denotes the conduct of a reasonably prudent and competent lawyer."[10] These steps include, but are not limited to, "surrendering papers and property to which the client is entitled."[11]

The Model Rules do not define the "papers and property to which the client is entitled," that the lawyer must surrender pursuant to Rule 1.16(d). Jurisdictions vary in their interpretation of this obligation. A majority of jurisdictions follow what is referred to as the "entire file" approach.[12] In those jurisdictions, at the termination of a representation, a lawyer must surrender papers and property related to the representation in the lawyer's possession unless the lawyer establishes that a specific exception applies and that certain papers or property may be properly withheld.[13] Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person;[14] materials containing a lawyer's assessment of the client;[15] materials containing information, which, if released, could endanger the health, safety, or welfare of the client or others;[16] and documents reflecting only internal firm communications and assignments.[17] The entire file approach assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.

Other jurisdictions follow variations of an end-product approach.[18] These variations distinguish between documents that are the "end-product" of a lawyer's services, which must be surrendered and other material that may have led to the creation of that "end-product," which need not be automatically surrendered. Under these variations of the end-product approach, the lawyer must surrender: correspondence by the lawyer for the benefit of the client;[19] investigative reports and other discovery for which the client has paid;[20] and pleadings and other papers filed with a tribunal. The client is also entitled to copies of contracts, wills, corporate records, and

9. ABA MODEL RULE 1.16, Declining or Terminating Representation.

10. ABA MODEL RULE 1.0(h), Terminology.

11. ABA MODEL RULE 1.16(d). This duty applies even when the lawyer believes the client's discharge is unfair. *See* ABA MODEL RULE 1.16, cmt. [9].

12. *See, e.g.,* Iowa Sup. Ct. Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (2007) (failure to return entire file to client violates disciplinary rules); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); Ariz. Formal Op. 04-01 (2004); Colo. Bar Ass'n. Formal Op. 104 (1999); D.C. Bar Op. 333 (2005); Or. Bar Ass'n Formal Op. 2005-125 (2005); Va. State Bar Op. 1399 (1990).

13. This approach is also advocated by the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. *See* RESTATEMENT (THIRD) LAW GOVERNING LAWYERS (2000) §46 ("On request, a lawyer must 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.")

14. *See, e.g.,* Colo. Bar Ass'n Formal Op. 104 (1999) ("A lawyer has the right to withhold pleadings or other documents relating to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client."); *In re* Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP, 689 N.E.2d 879,883 (N.Y. 1997).

15. *See, e.g., In re* Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP, 689 N.E.2d 879, 883 (N.Y. 1997).

16. RESTATEMENT (THIRD) LAW GOVERNING LAWYERS (2000) §46, cmt. c.

17. *See, e.g.,* Colo. Bar Ass'n Formal Op. 104 (1999); D.C. Bar Op. 333 (2005).

18. Ala. Ethics Comm. Advisory Op. 1986-02 (1986); Ill. State Bar Ass'n Advisory Op. 94-13 (1995); Kan. Bar Ass'n Op. 92-5 (1992); Miss. Bar Formal Op. 144 (1988); Utah State Bar Ass'n Advisory Op. 06-02 (2006).

19. *See, e.g.,* Neb. Lawyer's Advisory Comm. Advisory Op. 12-09 (2012); Ill. State Bar Ass'n Advisory Op. 94-13 (1995).

20. *See, e.g.,* Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92, 98 (Mo. 1992); Neb. Lawyer's Advisory Comm. Advisory Op. 12-09 (2012).

other similar documents prepared by the lawyer for the client. These items are generally considered the lawyer's "end product."

Administrative materials related to the representation, such as memoranda concerning potential conflicts of interest,[21] the client's creditworthiness, time and expense records,[22] or personnel matters,[23] are not considered materials to which the client is entitled under the end-product approach. Additionally, the lawyer's personal notes,[24] drafts of legal instruments or documents to be filed with a tribunal,[25] other internal memoranda, and legal research[26] are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client under the end product approach.

Final documents supersede earlier drafts. Earlier drafts and lawyer notes are part of the process of completing the final draft and, when electronic documents go through a process of continuing changes, it can become difficult or impossible to determine what constitutes a distinct "draft."[27] Thus, drafts and other documents representing work by a lawyer are often of relatively small value to clients and can be burdensome for a lawyer to preserve, catalogue, and maintain.

In ABA Informal Ethics Opinion 1376 (1977), the Committee addressed, under the Code of Professional Responsibility, what properties a lawyer must provide to a client at the conclusion of the representation in a trademark matter. We advised that the lawyer must provide the client with "end product – the certificates or other evidence of registration of the trademark," searches conducted and paid for, "significant correspondence, applications and materials filed in aid thereof, receipts, documents received from third parties, significant documents filed in the administrative and court proceedings, finished briefs whether filed or not if they pertain to the right of the client to the use or registration of the mark in question." The Committee noted that the lawyer "need not deliver" to the client "internal notes and memos."

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21. Ohio Bd. Comm'rs on Grievances and Discipline Advisory Op. 2010-2 (2010); Colo. Bar Ass'n Formal Op. 104 (1999).

22. Saroff v. Cohen, No. E2008-00612-COA-R3-CV, 2009 WL 482498 , 2009 BL 39364 (Tenn. Ct. App. Feb. 25, 2009) (Invoices for legal work performed are a law firm's business records, not prepared for the client's benefit, and need not be turned over upon client request. Proper procedure for securing this information when client is suing firm is to make a discovery request.).

23. Colo. Bar Ass'n Formal Op. 104 (1999); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); D.C. Bar Op. 333 (2005).

24. Womack Newspapers Inc. v. Town of Kitty Hawk, 639 S.E.2d 96, 104 (N.C. 2007).

25. Miss. Bar Formal Op. 144 (1988); Utah State Bar Ass'n Advisory Op. 06-02 (2006).

26. Ill. State Bar Ass'n Advisory Op. 94-13 (1995); San Diego Cnty. Bar Ass'n Op. 1984-3 (1984).

27. This opinion does not address a lawyer's obligations to retain specific material relating to a representation in the first instance (whether in paper or electronic form). However, a lawyer's duty under Rule 1.16(d) to "surrender papers and property to which the client is entitled" at the termination of a representation necessarily requires some consideration of this issue. In general, a lawyer's ethical obligation to retain and safeguard material relating to a representation arises pursuant to a lawyer's duties of competence and diligence and will depend on the facts and circumstances of each representation. *See* ABA MODEL RULE 1.1 and ABA MODEL RULE 1.3. *See also* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2008-1 (2008); S.C. Bar Formal Op. 15 (2013). Further, a lawyer's decision whether to retain specific material related to a representation, in most cases, ultimately rests in the professional judgment of a lawyer consistent with his or her ethical and legal duties to the client. For example, in most instances, a lawyer will not need to retain non-substantive email communication to a client such as an email confirming a meeting or providing driving directions to the lawyer's office. By contrast, the lawyer likely would need to retain an email to the client in which the lawyer communicates and evaluates a settlement offer from an opposing party. Consistent with duties under the Model Rules, lawyers are encouraged to develop good document management policies.

The Committee affirms the position taken in Informal Ethics Opinion 1376 as it states the minimum required by the Rules. However, there may be circumstances in individual representations that require the lawyer to provide additional materials related to the representation. For example, when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose.

As noted above, Model Rule 1.16(d) requires a lawyer to take steps to the extent reasonably practicable to protect a client's interest. Such steps include "surrendering papers and property to which a client is entitled…" Comment [9] to Rule 1.16 further clarifies that the lawyer "must take all reasonable steps to mitigate the consequences [of withdrawal] to the client." Although surrendering papers and property which the client is entitled to receive does not necessarily give rise to a client's entitlement under the Rules of Professional Conduct to *all* materials in the lawyer's custody or control related to the representation, at a minimum a lawyer's obligation under the Rules reasonably gives rise to an entitlement to those materials that would likely harm the client's interest if not provided.[28] We agree with Colorado Ethics Opinion 104 (1999) that in this context, unless the law of the jurisdiction provides otherwise, "the ethical entitlement is based on the client's right to access the document related to the representation to enable continued protection of the client's interest."[29]

Therefore, on the facts presented, at a minimum, Rule 1.16(d) requires that the lawyer must surrender to the municipality:

- any materials provided to the lawyer by the municipality;
- legal documents filed with a tribunal - or those completed, ready to be filed, but not yet filed;[30]
- executed instruments like contracts;[31]
- orders or other records of a tribunal;
- correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy;

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28. The Committee recognizes that while Model Rule 1.16(d) specifies "papers and property," many lawyers have moved or are moving to a paperless practice in which few documents are available in tangible form. The use of the term "paper" in Rule 1.16(d) includes all communications noted above, whether tangible or electronic. *See* ABA MODEL RULE 1.0(e) defining writing as a "tangible or electronic record of a communication." While this opinion does not address whether and in what circumstances a lawyer must convert an electronic document into paper for a client or who will bear the cost of this conversion, the Committee agrees with the reasoning in D.C. Bar Op. 357 (2012) which explained, "Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings."

29. *See also* Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92, 97 (Mo. 1992) ("The purpose of the Rule, however, gives it meaning. The Rule is designed to protect a client's interest. It imposes a duty upon the attorney 'to take steps to protect' a former client's interest. 'Surrendering papers and property to which the client is entitled' is one example of a step an attorney must take to protect that interest. But, this duty 'to surrender papers and property' need not be supported or justified by any property concepts.")

30. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (1977).

31. *Id.*

- discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits;
- legal opinions issued at the request of the municipality; and
- third party assessments, evaluations, or records paid for by the municipality.

In contrast, under these facts, it is unlikely that within the meaning of Rule 1.16(d), the client is entitled to papers or other property in the lawyer's possession that the lawyer generated for internal use primarily for the lawyer's own purpose in working on the municipality's matters.[32] This is particularly true for matters that are concluded.

Therefore, under the facts presented, under Rule 1.16(d) the lawyer need not provide, for example, the following to the municipality:

- drafts or mark-ups of documents to be filed with a tribunal;
- drafts of legal instruments;
- internal legal memoranda and research materials;
- internal conflict checks;
- personal notes;
- hourly billing statements;
- firm assignments;
- notes regarding an ethics consultation;
- a general assessment of the municipality or the municipality's matter; and
- documents that might reveal the confidences of other clients.

The Committee notes that when a lawyer has been representing a client on a matter that is not completed and the representation is terminated, the former client may be entitled to the release of some materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter.[33]

In this fact scenario, if the lawyer has materials that are: (1) internal notes and memos that were generated primarily for the lawyer's own purpose in working on the municipality's matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the municipality's interest, then the lawyer must also provide the municipality with these materials. For example, if in a continuing matter a filing deadline is imminent, and as part of working on the municipality's matter the lawyer has drafted documents to meet this filing deadline, but no final document has emerged, then the most recent draft and relevant supporting research should be provided to the municipality.

32. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (1977).

33. A number of jurisdictions approve lawyer generated "summary of facts" or redacted memorandum that essentially provide the "useful" part of the documents to the client while preserving the internal thoughts/impressions of the lawyer as unnecessary for protecting the clients' interests. *See* Ohio Bd. Comm'rs on Grievances and Discipline Advisory Op. 2010-2 (2010).

Finally, as part of the lawyer's duty pursuant to Rule 1.4 to keep the client "reasonably informed about the status of the matter," a lawyer may already have provided much of this information to a former client during the course of the representation. As Comment [4] to Rule 1.4 explains, "A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation." The Committee encourages lawyers to regularly provide clients with information and copies of documents during the course of the matter and encourages lawyers to advise clients to maintain these documents. The fact that copies of certain materials may have been previously provided to a client is not dispositive of whether the lawyer must also provide such materials at the termination of a representation.[34] This fact may not, however, be dispositive of who – the lawyer or the client – should pay for the time and cost of duplication of such materials upon termination of the representation.[35]

Conclusion

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled such as materials provided to the lawyer, legal documents filed or executed, and such other papers and properties identified in this opinion. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

34. *See generally* Travis v. Comm. on Prof'l Conduct, 306 S.W.3d 3 (Ark. 2009) (the client has no duty to maintain a file on his or her own behalf).

35. Lawyers are encouraged to explain in their retainer letters who is responsible for the costs of copying and under what circumstances.

Nebraska Ethics Advisory Opinion for Lawyers
No. 12-07

COMPLETE RECORDS OF ACCOUNT FUNDS AND OTHER PROPERTY SHALL BE KEPT BY THE LAWYER AND SHALL BE PRESERVED FOR A PERIOD OF FIVE (5) YEARS AFTER TERMINATION OF THE REPRESENTATION.

QUESTION PRESENTED

Are the guidelines provided in Nebraska Ethics Advisory Opinion No. 88-3 still applicable?

What guidelines are applicable to files held by a trustee appointed pursuant to Neb. Ct. R. § 3-328?

What reasonable efforts should be made to contact clients whose files do not obtain updated contact information?

FACTS

An attorney was appointed as a trustee pursuant to Neb. Ct. R. § 3-328 for the protection of client interests for a deceased sole practitioner. Many of the files contained original documentation, such as birth certificates. However, many of the files also did not contain updated contact information. Prior Nebraska Ethics Advisory Opinion No. 88-3 provided that a client should be asked if they wanted delivery of such documents prior to disposal with no specific time guideline. However, due to the substantial number of people that lack updated contact information, that the trustee has been unable to contact, he seeks additional guidance regarding reasonable efforts to contact such individuals and for how long that file information should be kept.

Applicable Rules of Professional Conduct § 3-501.15 (a) states that a lawyer shall hold property of clients or third person that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and **other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation**. (Emphasis added).

SECTION 3-501.16 (7)(d)

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

SECTION § 3-501.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.

DISCUSSION

Nebraska Ethics Advisory Opinion for Lawyers No. 88-3 provided:

IT IS NOT POSSIBLE TO STATE A DEFINITE TIME AS TO WHEN CLOSED CLIENT FILES MAY BE DESTROYED. THE RETENTION OR DESTRUCTION OF CLIENT FILES IS PRIMARILY A MATTER OF GOOD JUDGMENT, WEIGHING THE CLIENTS' INTERESTS AND EXPECTATIONS IN THE RETENTION OF FILE MATERIALS, THE REASONABLY EXPECTED FUTURE USEFULNESS OF THE FILE CONTENTS, THE CAREFUL PRESERVATION OF CONFIDENTIALITY, AND THE AVAILABILITY OF STORAGE SPACE.

Nebraska has since adopted the Rules of Professional Conduct. Therefore, the applicability of the above has been questioned as the prior opinion was decided under the Code of Professional Responsibility. The relevant ethical rule is now as follows: § 3-501.15(a) (O)ther property shall be kept by the lawyer and shall be preserved for a period of five (5) years after termination of the representation.

While previous there was not a specific time period, the above section now presents one. Also, under 3-501.16(d), (U)pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Also of note is § 3-501.1, which provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation."

While not technically a part of the question asked, avoidance of the problem in the first place is most advisable. In "When a Lawyer Dies," June 2006, BIOFOCAL, Peter Geraghty outlines the relevant ethical opinions and obligations particularly of a sole practitioner. ABA Formal Opinion 92-369 (1992) states, "Although representation should terminate when the lawyer is no longer able to adequately represent the client, the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship." The opinion further notes, "The death of a sole practitioner could have serious effects on the sole practitioner's clients. Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the client's discovery that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will insure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death." Although sanctions on a deceased lawyer would certainly have no deterrent effect on that lawyer, it seems advisable to remind lawyers that their duty continues on even after death and to have a plan in place to take care of client interests. In this regard, Arizona State Bar Opinion 04-05 (2005)

suggested that a lawyer should choose a means that is not only legally effective, but also fair to and expeditious for the clients who are entitled to funds in other matters in case of death or disability. The lawyer is ethically obligated to select someone who the lawyer reasonably believes is competent to discharge those duties upon his disability or death. Similarly, Florida Opinion 81-8M (1981) states that a lawyer anticipating termination of his practice by death should dispose of all files according to his clients' instructions. The files of those individuals who do not respond should be individually reviewed by the lawyer and destroyed only if no important papers belonging to the client are in the files... Important documents should be indexed and placed in storage or turned over to another lawyer who assumes control of the active files. 801 ABA-BNA Lawyers' Manual on Professional Conduct 2502. Numerous other ethical opinions stress that any lawyer reviewing client files must take steps to preserve client confidentiality and may not disclose client confidences without the client's consent. The principles in Nebraska Ethics Advisory Opinions for Lawyers 88-3 still should still be strongly considered as well as those contained in ABA Informal Opinion 1384. Opinion No. 88-3 lists the following factors in the decision for retention or destruction of client files:

1. The file may include original documents or other property furnished by or on behalf of the client, the return of which might reasonably be expected by the client. Before destroying such documents or property, the client should be asked whether he wants delivery of them. Alternatively, the lawyer may simply deliver such documents to the client with appropriate advice regarding factors which the client should consider in determining which items to preserve. Where unable to contact the client, the lawyer should be guided by the foreseeable need for the documents in determining whether to destroy them.

2. An attorney must use care not to destroy or discard information that he knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which a statute of limitations has not expired.

3. An attorney must consider the reasonable expectations of the client for the preservation of files.

4. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their relevance and materiality to matters that can be expected to arise in the future.

5. Disposition of client files must be made in such a manner as to protect fully the confidentiality of the contents.

ABA Informal Opinion 1384 (1977) put forth eight basic considerations to keep in mind when considering whether to keep or discard a client file:

1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).

2. A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.

3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.

4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.

5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.

6. In disposing of a file, a lawyer should protect the confidentiality of the contents.

7. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.

8. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

CONTACTING THE CLIENT

If the attorney lacks updated information, it would seem appropriate to do a Google search, a public record search, or a Facebook search. If important or valuable materials are involved, hire a private investigator, and in the case of being unable to contact numerous people, to perhaps publish notice in a legal newspaper for that purpose.

CONCLUSION

Ethics Advisory Opinion No. 88-3 does not still control as the rules have changed, but many of the underlying reasons and conclusions remain sound. Client files may be destroyed after five years, but efforts should be put in place to make reasonable efforts to contact the client should be proportionate with the value or importance of the file materials which remain in the lawyer's possession after the file is closed.

Unofficial Musings of Assistant Counsel for Discipline Kent Frobish

What Must a "Designated Lawyer" Do With Old Client Files?

The issue of what to do with old client files comes up in several contexts. I receive frequent calls from attorneys preparing to retire or just wanting to reduce their file storage costs. I also receive calls from court-appointed trustees and "volunteer" lawyers who are trying to help a surviving spouse close a deceased lawyer's practice. The facts are often the same:

> We have a storage room, (basement, garage, attic, etc.) full of closed files that go back to when the lawyer started practicing law (may be 40 years or more) and may include older files from former partners. Nothing has been done with these files for years. There is no inventory of the files, just boxes and/or file cabinets full of file folders. The file folders may have the name of the client on the tab. The retiring lawyer or trustee/volunteer wants to know if he has to go through each file before the file can be shredded.

Assuming all files have been closed for more than 5 years, I advise the lawyer that each file should be inspected to see if there are any original documents that have intrinsic value, *e.g.*, wills, deeds, contracts, stocks, etc. If any such documents are found, the lawyer should try to locate the client and return the document. However, in the case of a will that is 40 years old I suggest that the lawyer see if he can determine if the client is still alive. If no action had been taken on the file for 40 years (or even 20) it is likely the client went to a different lawyer and had a new will prepared. I suggest doing a JUSTICE search to see if there is a probate case opened for the former client. If so, I think the lawyer can destroy the file, including the original will. If no probate case is located and a review of the file shows that the former client would now be 110 years old, it is fair to assume the client is dead. If the former client can't be found the lawyer should file the will with the County Court of the client's residence at the time the will was signed.

Even though the rules and advisory opinions indicate that all old files should be reviewed to see if there are original documents, I think a Rule of Reason should prevail. If the 20-40 year-old files are identifiable as "DUI," "Personal Injury," "Criminal", etc. it is 99.9% sure that no original documents of any value are in such file. Therefore, I don't think a retiring lawyer or inventory lawyer should have to paw through those files looking for a needle that doesn't exist.

Another issue is whether the retiring lawyer or inventory lawyer must contact the former client before the file can be destroyed. Once again, I think a Rule of Reason should be applied. Other than estate planning files and adoption files, any file older than 20 years has long been forgotten by the former client. The time and expense to inventory every such file and then try to locate the former client to see if the client wants the file is exceedingly onerous. I just don't think it is a reasonable expectation for a client to believe a lawyer will be a perpetual repository of all pieces of paper related to a legal matter. At some point, the cost/benefit analysis must weigh in favor of destroying the files without further investigation.

For files that have been closed for 11 to 20 years, I believe it is reasonable for those files to be inventoried and attempts made to return them to the client. Clearly, the older the file the less likely the client will want it, and it's less likely that the former client can be located. Reasonable

efforts should be made to locate the client, but not extraordinary efforts. If there is a particular file that has significant importance, then extra effort may be warranted, but as a general rule, reasonable efforts to locate the former client should be sufficient.

My biggest concern is for files that have been closed for 6 to 10 years. I think there is a reasonable expectation by the client that the lawyer still has the file. In those cases, the retiring lawyer or inventory lawyer should make a thorough review of the file, safeguard all original documents, make a diligent effort to locate the former client, and maintain a record of all efforts made and all files returned. If, after diligent search, the client can't be located, and if there are no intrinsically important documents, and if there is nothing in the file which suggests it is unique or worthy of continued retention, I would record such information and then shred the file.

For files that have been closed for 5 years or less, every effort should be made to locate the former client and return the file. The trail should not be too cold so there will be few former clients that can't be located. The lawyer should offer to allow the former client to pick up the file or have it mailed. If notice is by mail, the lawyer should set a date certain after which the file will be destroyed unless the client contacts the lawyer. As a practical matter, the lawyer could enclose an extra copy of the contact letter which would include a place for the client to sign and date and check a box regarding the client's desire. A self-addressed return envelope could be included. Whether such return envelope includes pre-paid postage is a matter of costs.

A list of all such files should be maintained for at least the remainder of the 5 year mandatory retention period. If there are some clients that can't be located, then the file should be marked for destruction on a date certain, no less than 5 years after the representation ended.

I'm not terribly concerned from an ethics standpoint regarding closed files 20 years and older. If a lawyer destroyed such files without doing anything, I wouldn't prosecute him unless there was some evidence that he knowingly destroyed a file that should have been returned to the former client. For closed files 10-20 years old, reasonable efforts should be made to locate the client and return the file. However, unless there was intentional wrong doing or gross negligence on the part of the lawyer who destroyed the file, I wouldn't prosecute. Files that have been closed for 10 years or less should be considered as protected client property for which the lawyer has a strict fiduciary duty. It is not asking too much of the lawyer to properly inventory and handle such files.

Best Practices Going Forward

The most important step we can take now is to educate lawyers on the importance of properly closing files going forward. Attorneys should proactively address the issue of file retention at the time they conclude the client's matter. The file should be given to the client at that time, or at least offered to the client. The client should be informed when the file will be destroyed if left with the lawyer. In those circumstances where the client wants the lawyer to retain the file or the lawyer believes it is in the client's interest that the lawyer keep the file because the client is in a nursing home, etc., the lawyer should clearly explain to the client how the lawyer will handle the file in the years to come.

These are my thoughts about file retention and destruction. I believe the rules must be reasonable and not overly burdensome. Education about best practices going forward will be effort well spent.

Current and Active Lawyers

Attorneys who wish to establish a File Closing, Retention and Destruction Policy while they are still active in the practice of law should consider the following:

Recognize that your office file for each client matter belongs to the client.

Nebraska Ethics Advisory Opinion for Lawyers No. 12-09 provides:

> An attorney has an ethical obligation, upon demand, to promptly provide a client with the contents of the file belonging to the client. What the client may be entitled to receive depends on the nature of the work, the agreement between the attorney and client, and the particular circumstances of the case…. As a general rule, however, a client is … entitled to:
>
> 1) All documents provided to the attorney;
> 2) All documents or responses acquired by counsel through the discovery process;
> 3) All correspondence in pursuit of the client's interests;
> 4) All notes, memoranda, briefs, memos, and other matters generated by counsel bearing on the client's business and resulting from the employment of the counsel.
>
> The counsel may retain copies of the file, absent an agreement from the client. Such copies must be made at counsel's expense.

This is a relatively new concept for many attorneys, but it really shouldn't be. Lawyers have historically thought that all documents in the file belong to the lawyer, except perhaps original documents given to the lawyer by the client, and the end product of the engagement such as a will or corporate documents. And, pursuant to the attorney's lien statute, Neb. Rev. Stat. § 7-108, lawyer's often believed they had an ownership interest in the file. However, it must be understood and remembered that the client engaged the lawyer for the purpose of providing a legal service which is often reflected in tangible documents. All documents received by the lawyer and generated by the lawyer related to the engagement for which the lawyer was paid are owned by the client. It is not just the end product that belongs to the client, but all documentation created or received in the course of the representation. The lien statute provides for a possessory lien on client property, but not ownership of the property.

Recognizing that the file belongs to the client, at the end of the representation the lawyer may deliver the entire file to the client, or at least offer the file to the client. If the client accepts the file, the lawyer should get a receipt from the client stating that the entire file was delivered to the client. If the lawyer wants to keep a copy of the client file, the lawyer may do so at the lawyer's expense.

Lawyers may choose to retain a copy of the client file for several reasons, such as protection against malpractice claims or allegations of unethical conduct. Lawyers may also keep copies of client files as a repository of research and pleadings which may be useful in future cases. If the original file was delivered to the client, there is no specific length of time the lawyer must keep the retained copy; the lawyer may destroy the copy whenever the lawyer no longer has a use for it.

Unlike client files, the lawyer's trust account records must be maintained for 5 years after the termination of the client matter. This includes the monthly bank statements for the trust account as well as all records regarding the handling of client funds such as settlement statements and individual client ledgers regarding funds received and disbursed by the lawyer.

Rule § 3-501.15 deals primarily with safekeeping client property, foremost of which are client funds held in a trust account. However, lawyers also may come into possession of other client property such as jewelry, stocks and bonds, and other tangible items. The lawyer's fiduciary duty is to safeguard all such property, deposits in trust accounts and personal property. The last sentence of § 3-501.15 (a) states: "Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation." Thus, it is not the "property" that must be kept for 5 years, but rather "records" of such funds and property shall be kept for 5 years. This is the part of the ethics rule that comes into play in a disciplinary prosecution.

Lawyers must safeguard client funds held in trust and must timely distribute those funds when the client or others are entitled to receive them. However, it is the records of those transactions that the lawyer must keep for 5 years so he/she can prove that the funds were properly handled in the event a grievance is filed alleging misappropriation or mishandling of client funds (or client personal property). The lawyer doesn't need to keep a copy of the client's file for 5 years, but he must keep a record for 5 years showing what he did with the "original" client file. He should have a written record of the date when the "original" file was delivered to the client or the date when the "original" file was destroyed with evidence of the client's consent. It is the lawyer's trust account records which are most critical to our office. If a client complains that a lawyer misappropriated the client's money or failed to timely deliver the client's money, it is the affirmative obligation of the lawyer to present written evidence of how the money was safeguarded and evidence of each transaction related to the client's funds. It is not sufficient for the lawyer to say: "I can always get my trust account records from the bank." The lawyer must keep in his own possession all evidence regarding the handling of client funds. These are the "complete records" referred to in Rule § 3-501.15(a).

This issue of lawyer trust account records may be beyond the scope of this Manual; however, the distinction is important to our office. I have never prosecuted a lawyer for destroying old client files; I have, however, prosecuted a number of lawyers who failed to keep appropriate trust account records.

Recognizing that the file belongs to the client, lawyers should consider how they wish to handle closed client files. Historically, the lawyer would deliver the end product, such as a will, contract, or corporate documents to the client. The lawyer would keep the original file at the lawyer's office. For most clients this is an acceptable practice. They know that if the need arises they can

contact the lawyer to retrieve any needed documents or the entire file. However, this practice led to the belief that the lawyer owned the file and therefore the lawyer would only provide copies to the client and often at the client's expense. With the understanding that the file belongs to the client, the lawyer must deliver the original file to the client. If the lawyer wishes to retain a copy, the lawyer may do so at the lawyer's expense.

Options for Disposition of Client Files at the Termination of the Representation or Matter

1. Lawyer delivers entire original file to client and lawyer does not retain a copy. Client signs a receipt for the entire file and lawyer keeps the receipt for at least 5 years.

Lawyer has no duty to retain any client documentation so there is nothing to destroy at a later date. However, the lawyer will not have any documentation with which to respond to a malpractice claim or allegation of unethical conduct.

2. Lawyer delivers entire original file to client; lawyer keeps a copy (paper or electronic) of entire file at lawyer's expense. Client signs a receipt for the entire file and lawyer retains the receipt for at least 5 years.

There is no requirement that the lawyer keep the file copy for any specific length of time; however, the lawyer will want to keep the file copy until the statute of limitations runs for a malpractice claim. There is no statute of limitations for the filing of ethics charges against a lawyer. The lawyer may wish to keep the file indefinitely as a repository of research or pleadings which may be useful in future cases. Assuming the file copy is in paper format, the lawyer may keep the file for as long as the lawyer is willing to cover the cost of storing the paper file. The paper file should be clearly marked as a copy with documentation of when the original file was delivered to the client. If properly done, the lawyer will not need to review the file before it is destroyed. This is especially helpful when an inventory or successor lawyer is closing a deceased lawyer's practice.

3. Lawyer offers the original file to the client at the termination of the engagement. If the client asks the lawyer to keep the file, the lawyer may do so and must keep the file secure for at least 5 years. The end product such as a will or corporate documents could be given to the client, with the lawyer retaining the remainder of the original file. The lawyer may also keep copies of the end product. *See* Advisory Opinion 12-07: "Client files may be destroyed after five years, but efforts should be put in place to make reasonable efforts to contact the client [and] should be proportionate with the value or importance of the file materials which remain in the lawyer's possession after the file is closed."

The lawyer should inform the client, in writing, that the original file will be maintained for 5 years and may then be destroyed without further contact with the client. The client should sign an acknowledgment regarding this file retention and destruction policy. The lawyer should keep that acknowledgment in a separate file maintained by the lawyer for all such acknowledgments. Assuming a paper file, the lawyer should record on the outside of the file the destruction date and that an acknowledgment was received from the client. If properly done the lawyer will not have to review the file before destroying it. If, however, original documents such as wills were kept, the file should be clearly marked that it must be reviewed before destruction.

The best time to purge a file of duplicate copies or extraneous materials is when the file is closed by the lawyer. There is no need to store unnecessary paper.

Going forward as set forth above will be extremely helpful for all lawyers. However, the above recommendations do not address what the lawyer should do now to minimize the lawyer's file storage. It is in the best interests of each lawyer to begin purging closed files while the lawyer is capable of doing so.

Assuming the lawyer has closed client files going back some 40 years when the lawyer started practice; what should the lawyer do? If the lawyer is fortunate enough to have stored the closed files by date so that recent closed files can be distinguished from very old closed files, then the lawyer should start reviewing the more recently closed files. The relative thickness of dust on the file boxes may be an indicator of the age of the closed file.

Files Closed within the Past 5 Years

Each file should be thoroughly reviewed. Client should be contacted to see if the client wants the file at this time. The lawyer must keep track of the client's response for the remainder of the 5 year requirement. If the client wants the file, make arrangements for delivery and get a signed receipt from the client. The lawyer may keep a copy of the file or portions thereof at the lawyer's expense. The lawyer has no duty to retain the file copy for any specific length of time.

If the client does not want the file, have the client sign an acknowledgment regarding the lawyer's file retention and destruction policy setting forth the date after which the file will be destroyed. The file should be clearly marked on the outside that the file does not need to be reviewed, that an acknowledgment was received from the client, and the date the file may be destroyed. Try to convince the client to take possession of significant original documents such as wills, contracts, corporate records, etc. If the client insists that the lawyer keep the originals of such documents arrangements should be made for future review of the file. It would be wise to keep any such files stored separately from other closed files.

Every effort should be made to locate the client and receive a receipt for the file or an acknowledgment that the client consents to the file's destruction. If the client cannot be located the lawyer must keep the file until the end of the 5-year period. The lawyer should keep in the file evidence of efforts made to contact the client.

Files Closed for 5 to 10 Years

Each file should be thoroughly reviewed. Unless previous arrangements were made regarding the lawyer's file retention and destruction policy, client should be contacted to see if the client wants the file at this time. If there are significant original documents such as wills, contracts or corporate documents, they should be delivered to the client and a receipt for same retained by the lawyer. If the client does not want the file, the lawyer should keep a record of the client's response. The lawyer may then decide whether to keep some or all of the closed file. If the lawyer does not destroy the file at that time the file should be marked with a destruction date without further review.

Reasonable and significant effort should be made to locate the client. If the client cannot be found, the lawyer should keep a record of the efforts made to contact the client. If significant original documents are in the file, the lawyer should determine the relative importance of those original documents. The lawyer may decide to destroy the entire file, including the original documents, or the lawyer may keep the file stored separately with a future review date when one more effort will be made to locate the client before such originals are destroyed. Original wills should be filed with the appropriate County Court.

Files Closed for 10 to 20 Years

Each file should be reviewed for significant original documents. If any such originals are found, reasonable and significant effort should be made to locate the client. If the client cannot be found original wills should be filed with the appropriate County Court. Other significant original documents may be destroyed along with the file without further efforts made to contact the client. The lawyer should keep a record of the efforts made to locate the client.

Unless there is something unique about the file or the client would reasonably expect the lawyer would keep the file indefinitely, the lawyer need make only reasonable efforts to contact the client to see if the client wants the file or if it can be destroyed at that time. If the client cannot be located the lawyer should keep a record of the efforts made to locate the client. The lawyer may then destroy the file.

Files Closed for More Than 20 Years

Lawyer should make a quick review of each file to see if any original significant documents are in the file. If so, reasonable efforts should be made to locate the client and deliver the documents. If the client cannot be located, the lawyer should keep a record of the efforts made to locate the client. Original wills should be filed with the appropriate County Court. Other original documents can be destroyed along with the file.

A rule of reasonableness regarding old files should prevail. A lawyer should not need to exert extraordinary effort to locate clients with whom there has been no contact for 20 years or more. As recommended above, a proactive file retention and destruction policy, clearly conveyed to the client at the termination of the representation, will alleviate the problem of dealing with old closed files.

Trustees and Inventory Lawyers

The above recommendations are also applicable to trustees or inventory attorneys tasked with the responsibility of closing a deceased or unavailable attorney's practice. The inventory lawyer or trustee should not have to expend extraordinary effort to thoroughly review files that have been closed for more than 20 years. If there are no significant original documents in the closed file, the file should be destroyed without further effort to locate the client.

Nebraska Ethics Advisory Opinion for Lawyers
No. 17-01

QUESTION PRESENTED

When a client file is closed, is it permissible to make an electronic copy of the file and then destroy the physical file immediately?

BRIEF ANSWER

The Nebraska Rules of Professional Conduct do not prohibit an attorney from keeping a closed client file in electronic form and immediately destroying the physical copy. However, several factors should be considered before a file is destroyed, such as whether it would be in the best interest of the client to keep the physical/paper copy and whether physical/paper copies of documents will be needed to satisfy the original document rule.

FACTS

A legal services organization has asked about file retention requirements under the Nebraska Rules of Professional Conduct. The organization currently retains the physical/paper copy of its clients' files for seven years. Physical storage space has become an issue, so it is considering the use of current technology that involves scanning its closed files and digitally storing the scanned images in lieu of physical storage.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

Section 3-501.15(a): "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation."

Section 3-501.16(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."

DISCUSSION

There are no specific rules of professional conduct that address the requirements of lawyers to retain a physical copy of a file instead of an electronic copy. However, some factors should be considered before destroying the physical file and retaining only a digital file. As stated in Opinion 88-3, "the retention or destruction of client files is primarily a matter of good judgment. . ." That

decision is no longer controlling, pursuant to Opinion 12-07, but much of the logic and reason of the opinion still offer sound guidance. Since its drafting, the adoption of the Model Rules of Professional Conduct stated a minimum time which files must be retained. The rule now states that other property shall be preserved for a period of five (5) years. Opinion 12-07 listed several factors to consider with regard to the retention of files:

1. The file may include original documents or other property furnished by or on behalf of the client, the return of which might reasonably be expected by the client. Before destroying such documents or property, the client should be asked whether he wants delivery of them. Alternatively, the lawyer may simply deliver such documents to the client with appropriate advice regarding factors which the client should consider in determining which items to preserve. Where unable to contact the client, the lawyer should be guided by the foreseeable need for the documents in determining whether to destroy them.

2. An attorney must use care not to destroy or discard information that he knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which a statute of limitations has not expired.

3. An attorney must consider the reasonable expectations of the client for the preservation of files.

4. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their relevance and materiality to matters that can be expected to arise in the future.

5. Disposition of client files must be made in such a manner as to protect full the confidentiality of the contents.

The State Bar of Arizona discussed the digital retention of client files in some detail. Arizona Informal Opinion 07-02 (2007) emphasized that a lawyer must make considerations such as the ability of the client to be able to open and access the electronic file format, assuring that the digitized file is complete and accurate, receiving consent from the client to digitize the file, and returning the hard copy to the client after digitizing it. The Arizona committee found that in appropriate cases, with careful consideration of the effects on a client, a lawyer may digitally store client files.

In considering the obligation of an attorney to provide a file to a client, this committee stated in Opinion 12-09 that production of a file to the client may be accomplished by a scanned or hard copy. This necessarily means that retaining a scanned copy of a client file should comply with the Rules of Professional Conduct. However, there might be unique circumstances where maintaining a paper copy of a client file would outweigh the convenience of an electronically stored copy (e.g. large items such as architectural/engineering plans, large photos, items that might be costly to reproduce from digital to paper). The same considerations should be applied when determining whether the physical file should be destroyed with only a digital copy being retained. The reasonable expectations of the client must be considered.

Other considerations may include, but are not limited to, the potential need for a physical copy at trial, the original document rule, or the client's or lawyer's future use of the physical file. The original document rule states, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Neb. Rev. Stat. § 27-1003 (Reissue 2008). Thus, an attorney should consider if an original document will be needed to satisfy the original document rule in future litigation. In addition, it was stated in opinion 12-07 that an attorney should make reasonable efforts to contact the client regarding the importance of the documents in the physical file after the file is closed.

CONCLUSION

Given the impact of technology on how files can be retained, it is not reasonable or practical keep physical/paper copies of every client file. Factors to consider include: availability and cost of physical and electronic storage space, ease of access to documents, potential need for originals in future litigation, and preserving confidentiality. It is reasonable for an organization to digitize its closed files. However, the organization must consider the factors noted above and any other considerations that are pertinent to the contents of a particular file. A written procedure for file retention and ultimate destruction of physical and digital copies of the contents of files should be maintained, followed, and revised as needed.

Editor's Note:
This additional guidance is provided by the Nebraska Counsel for Discipline's Office: The Nebraska Counsel for Discipline's Office recommends getting a client's acknowledgment that the attorney may retain a closed client file electronically, perhaps as part of an engagement letter or a separation letter. If the client has not acknowledged the possibility of an electronic file, or been notified the attorney may retain a closed file electronically, then the attorney could in certain circumstances be required to produce a paper copy at the attorney's cost if the client lacks the ability to access an electronic file.

Nebraska Ethics Advisory Opinion for Lawyers
No. 09-02

AN ATTORNEY HOLDING TRUST ACCOUNT FUNDS FOR A MISSING CLIENT IS REQUIRED TO ACT WITH REASONABLE DILIGENCE IN ATTEMPTING TO LOCATE THE CLIENT. IF THE ATTORNEY IS UNABLE TO LOCATE THE CLIENT, THE ATTORNEY SHOULD DISBURSE THE FUNDS IN ACCORDANCE WITH NEBRASKA'S UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT.

QUESTION PRESENTED

What ethical duties does an attorney have in a situation where the attorney is holding funds in a trust account for a client who cannot be located?

FACTS

An attorney represented a plaintiff in a personal injury case. The case was settled over four years ago and settlement funds were deposited into the firm's trust account. Monies were disbursed from the settlement funds for fees owed to the firm and to the client after payment of several subrogation liens. With the agreement of the client, the attorney retained in his trust account a sum of approximately $7,800 for payment of two remaining liens. The liens were to be paid once the exact amount to be paid each lien holder was determined. The client was to contact each of the lien holders and ask that a letter be sent to the attorney stating the balance owed to the lien holder. The attorney never received notification from the lien holders as to the amount owed them. The funds are still held in the firm's trust account. Over the years, the firm has made numerous attempts to contact the client through telephone calls and correspondence. The client has never responded to the telephone calls or correspondence.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE § 3-501.3 DILIGENCE
A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT:
[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . .

RULE § 3-501.15. SAFEKEEPING PROPERTY.
(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. . . . Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.
. . .

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMENT:
[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

DISCUSSION

I. WHAT EFFORTS MUST AN ATTORNEY MAKE TO LOCATE A MISSING CLIENT WHEN THE ATTORNEY IS HOLDING MONEY FOR THE CLIENT IN HIS TRUST ACCOUNT?

An attorney's obligation to attempt to locate a missing client was recently addressed by this Committee in Formal Opinion 08-03 in a situation where a statute of limitations was soon to run on the client's claim.

> As such, it appears that simply phoning and mailing correspondence to the client may not be enough to comply with the Rules. Instead, it appears that a diligent search must be made to locate the client. As suggested by the Arizona State Bar Opinion, diligence may include phoning the client, sending correspondence to the client's last known address, locating a new address for the client, or even contacting the client's medical providers or known family members and friends. Should the attorney locate the client, the attorney should give the client an express timeframe in which the attorney needs to hear from the client regarding the client's case.

Id. While it is clear under Rule § 3-501.3 that "reasonable diligence" must be exercised by an attorney in representing a client, it is not clear what constitutes reasonable diligence where an attorney is holding client funds in a trust account but is unable to locate the client. Under Nebraska's former Code of Professional Responsibility, this Committee stated that an attorney should take "appropriate measures" to locate the client, citing to a Michigan opinion as follows:

> At a minimum, reasonable steps the lawyer must take to locate the client include checking with the post office to see if the client left a forwarding address and sending a letter to the client's last known address by regular mail and by certified return receipt. Steps reasonably indicated by the facts will vary in the circumstances of each case but, in cases where a great deal of money is involved, the lawyer may have to contact the client's relatives, employers, neighbors, and friends, publish notice in places the client might frequent, use an investigator, or check with the Social Security Administration.

Nebraska Ethics Opinion 93-3.

Other ethics committees have addressed what efforts an attorney should make in locating a missing client where the attorney is holding funds in a trust account for the client. The New Mexico State Bar Ethics Advisory Committee determined that an attorney holding such funds for a missing client "should exercise a high degree of diligence" in attempting to locate the client. New Mexico Ethics Advisory Opinion 1983-3. That committee determined that merely sending letters might not comply with a fiduciary duty owed to the client if the attorney's file showed communication with a relative of the client. *Id*. More particularly, the committee advised that attorneys should "review the client's file and attempt to communicate with the client through whatever addresses or telephone numbers" might reasonably lead to the client. [The attorney] should also follow whatever leads are developed by those letters or phone calls with other letters or phone calls." *Id*. The committee advised that if the attorney was unsuccessful in locating the client after these attempts, the attorney need not take further or more costly measures to locate the client, such as hiring an investigator. *Id*.

The New Hampshire Ethics Committee, citing a rule substantively similar to Nebraska's Rule § 3-501.15(d), concluded that an attorney's efforts at locating the missing client "must be genuine and diligent under the circumstances of the specific case." New Hampshire Ethics Committee Formal Opinion #1988-89/16. While leaving it up to attorneys to determine what measures would constitute genuine and diligent efforts, the committee noted that other states require a lawyer to give notice to the client by publication. *Id*. citing to Alabama Ethics Opinion 83-146 and ABA/BNA Lawyers Manual on Professional Conduct, 801:4327.

The Kansas Bar Association's Professional Ethics Advisory Committee, also citing to Rule 1.15 (substantively the same or very similar to Nebraska's Rule § 3-501.15), concluded that an attorney must make a "reasonable effort" to locate a missing client whose funds the attorney is holding in a trust account. Kansas Bar Association Legal Ethics Opinion No. 00-4. The committee accepted the attorney's statement that he had made attempts to contact the client and the client's family members without success and concluded this satisfied the duty required by Rule 1.15(b) which is identical in all respects to Nebraska Rule § 3-501.15(d).

Connecticut's Committee on Professional Ethics determined that while the Rules of Professional Conduct do not provide an answer to the question of what to do with funds belonging to a missing client, "they do establish the context for that answer." An attorney who holds funds belonging to a client or third person "acts as a fiduciary, and is held to the strict responsibilities and duties which that term connotes. *Hafter v. Farkas*, 498 F.2d 587, 589 (2d Cir. 1974). Rule 1.15 of the rules recognizes and encodes this fiduciary relationship." Informal Ethics Opinion 89-24. The Connecticut committee noted that the disposition of funds in a missing-client situation can be addressed by the attorney and client in a fee agreement. *Id*. This is consistent with Nebraska

Rule § 3-501.15(d) which provides in relevant part: "Except as stated in this rule or otherwise permitted by law *or by agreement with the client*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." (Emphasis supplied.)

The Ethics Committee of the Colorado Bar Association, also citing to Rule 1.15, concluded that an attorney may expend a reasonable amount of the client's trust account funds in an effort to locate the client as long as the retainer agreement allows such a use of unexpended funds. Ethics Opinion 95: Funds of Missing Clients, 11/20/93. In addition, the committee concluded that a client could designate another beneficiary in a retainer agreement in the event the client's whereabouts remain unknown. *Id*.

Pursuant to Rule § 3-501.3, this Committee is of the opinion that an attorney who is holding funds in a trust account for a client who cannot be located must act with "reasonable diligence" in locating the client. We see no reason to deviate from our findings or conclusions in Nebraska Ethics Opinion 93-3. At a minimum, the attorney must check with the post office to see if the client left a forwarding address and send a letter to the client's last known address by regular mail and by certified mail, return receipt. In cases such as this one where a great deal of money is involved, the attorney may have to contact the client's relatives, employers, neighbors, and friends; publish notice to the client; use an investigator; check with the Social Security Administration; or conduct an on-line search for the client. If the fee agreement provides for the expenditure of unused client funds to locate the client, then the attorney may properly expend a reasonable amount of the client's trust account funds to locate the client.

II. IF AN ATTORNEY'S EFFORTS TO LOCATE A MISSING CLIENT ARE UNSUCCESSFUL, WHAT MUST THE ATTORNEY DO WITH THE FUNDS IN HIS TRUST ACCOUNT?

Consistent with our earlier opinion, *see* Nebraska Ethics Opinion 93-3, we conclude that an attorney, who is holding funds in trust for a client who cannot be located, "should distribute those funds according to state law, after waiting the statutorily prescribed amount of time." *See Id*. The Uniform Disposition of Unclaimed Property Act, NEB. REV. STAT. § 69-1301 [et seq.], clearly sets forth the procedure for disposing of unclaimed property. This conclusion is supported by ethics opinions issued by other jurisdictions having addressed this issue. *See e.g.*, Virginia Bar Association Ethics Opinion 87-09 (if diligent efforts to locate client are unsuccessful, attorney should comply with state law regarding unclaimed property); New Mexico Advisory Opinion 1983-3 (if after high degree of diligence client cannot be located, appropriate disposition of funds is as set forth in state's Uniform Disposition of Unclaimed Property Act); New Hampshire Ethics Committee Formal Opinion 1988-89/16 (if diligent efforts to locate client are unsuccessful, attorney must continue to safeguard funds until statutory period set forth in state's abandoned property statute expires and then dispose of funds pursuant to abandoned property statutes); Kansas Bar Association Legal Ethics Opinion No. 00-4 (if reasonable efforts to locate client are unsuccessful, the attorney must dispose of funds in accordance with Kansas Uniform Unclaimed Property Act); Connecticut's Committee on Professional Ethics Informal Opinion 89-24 (abandoned property statutes govern disposition of funds); Colorado Ethics Opinion 95: Funds of Missing Clients, 11/20/93 (nominal amounts may be held indefinitely in attorney's trust account; funds which are not nominal may be disbursed pursuant to state's Unclaimed Property Act); Alaska Ethics Opinion No. 90-3 (if reasonable efforts to locate client are unsuccessful, the attorney must dispose of funds in accordance with state's abandoned property statutes).

This Committee notes that Rule § 3-501.3 requires that attorneys act with reasonable diligence and promptness in representing a client. The Comment to this Rule at Paragraph [4] provides "Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client." In this case, the attorney and the client were in agreement that the funds held in the trust account should be used to pay the remaining liens once the amounts of those liens were determined. Under these facts, Rule § 3-501.3 and Rule § 3-501.15 would allow, but not require, the attorney to contact the lien holders for the purpose of determining the amount owed to each and disbursing the funds owed to the lien holders. Absent any actual disbursements to one or both of the lien holders, the Committee is of the opinion that the funds retain their identity as client funds.

CONCLUSION

The Committee encourages attorneys to anticipate the possibility of a missing-client situation and address the disbursement of unexpended client funds in written fee agreements. In this case, where no such provision is found in the fee agreement, the Committee is of the opinion that reasonable diligence must be used to locate the missing client. If, those efforts are unsuccessful, the attorney must disburse the funds in accordance with state law, and, specifically, the Nebraska Uniform Disposition of Unclaimed Property Act if it is determined to be applicable.

Nebraska Ethics Advisory Opinion for Lawyers
No. 19-01

QUESTION PRESENTED

May an attorney transmit information relating to the representation of a client over the internet and allow for that information to be stored on, and accessed through, third-party, off-site servers (generically referred to as "the Cloud")?

SUMMARY OF OPINION

An attorney may transmit information relating to the representation of a client over the internet and allow for that information to be stored on, and accessed through, third-party, off-site servers (generically referred to as "the Cloud"), if the lawyer has undertaken reasonable efforts to: (1) prevent inadvertent or unauthorized access to that information; (2) maintain the confidentiality of the information; and (3) establish reasonable safeguards to ensure the information is protected from loss, breaches, business interruptions, and other risks created by advancements in technology.

STATEMENT OF FACTS

Advances in various areas of technology—in storing client data, delivering legal services, simultaneously retrieving stored client data from multiple electronic devices, and communicating the legal advice generated from this client data—have changed the way the legal community stores, accesses, retrieves, and disseminates client information. To address these technological advancements, lawyers and law firms must rely on specialized software developed specifically for the legal industry, possibly even individualized for the lawyer or law firm. This software is utilized for case or practice management, time and billing, document assembly and dissemination, and trial preparation and presentation.

Many lawyers and law firms utilizing this specialized legal software follow the traditional software model: lawyers purchase the software by license (individually or in bulk) and install it onto their (or their paralegal's or assistant's) computers via disk or download. Data created and used by the software (often in a proprietary environment) is stored on the user's computer and often backed up to the firm's central file server. Software updates and security patches are applied occasionally, but for the most part, the software's functionality remains static. Every few years the software developer will release a major revision to the software which requires a new license.

In recent years, a new software model has emerged: Software as a Services (or "SaaS"). SaaS, delivered by a third-party services provider, is accessed via a web browser (like Internet Explorer, Google Chrome, or Mozilla Firefox) over the internet, rather than being installed to the lawyer's computer of the firm's server. Client-specific legal information is stored in the service provider's data center rather than on the firm's computers. This third-party data center is commonly referred to as the Cloud and the use of SaaS to access information from the Cloud is commonly referred to as Cloud Computing.

Upgrades and updates to the software, both major and minor, that allow for a lawyer or law firm to access the Cloud in a variety of diverse ways at almost any hour of the day, are rolled out continuously, allowing the SaaS to be constantly refined and/or personalized. SaaS can include long-term storage and accessibility of confidential client matters or short-term storage that enables specific data processing needs. SaaS is usually sold on a subscription model, requiring end-users to pay a monthly fee in exchange for the SaaS provider assuming responsibility for the security of the confidential, client-specific legal information. To maintain its viability, the SaaS provider incorporates new, more innovative technologies into the SaaS, providing updates to the software that allow the end-users to access their SaaS through a multitude of devices, with almost every new technological advancement.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE § 3-501.6. 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).

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

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) 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

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

(c) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for the purposes of the application of Rule 1.6.

RULE § 3-501.1. COMPETENCE.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.

Comment [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant

technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

§ 3-501.1 Comment 6 amended June 28, 2017.

DISCUSSION

At the intersection of a lawyer's confidentiality obligation and competence obligation to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology," is a lawyer's obligation to undertake reasonable efforts to protect client information when using technology.

Neb. Ct. R. of Prof. Cond. § 3-501.1 requires a lawyer to provide competent representation to a client. Comment [6] of Neb. Ct. R. of Prof. Cond. § 3-501.1, amended on June 28, 2017, advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Neb. Ct. R. of Prof. Cond. § 3-501.6 requires a lawyer to not reveal information relating to the representation of a client.

The number of lawyers using the Cloud has attracted significant attention from Bar Association Ethics Committees across the country in recent years, and a consensus position has developed that permits lawyers to store client information in the Cloud if the lawyer undertakes reasonable efforts to protect the information when using the Cloud. This opinion now turns to a summary of recent ethics decisions from across the country addressing SaaS.

A. Iowa State Bar Association Ethics & Practice Committee Opinion 11-01

In September 2011, the Iowa State Bar Ethics and Practice Committee addressed Cloud Computing in Opinion 11-01. The Opinion recognized that: "the degree of protection to be afforded client information varies with the client, matter and information involved. But it places on the lawyer the obligation to perform due diligence to assess the degree of protection that will be needed and to act accordingly."

The Opinion declined to address in detail the specifics of individual SaaS products, because such guidance would quickly prove outdated. Instead, the Opinion suggested a series of matters into which lawyers should inquire before storing client data on remote servers they do not control, including: (1) availability of unrestricted access to the data, and the ability to access the data through alternate means; (2) performance of due diligence about the SaaS vendor, including its operating record, recommendations by other users, the provider's operating location, its end user agreement; (3) financial agreements, including access to date in case of nonpayment or default; (4) arrangements upon termination of relationship with SaaS provider, including access to data; and (5) nature of confidentiality protections, including password protection and availability of different levels of encryption.

B. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2011-200

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility similarly concluded that attorneys can use Cloud Computing if stored materials remain confidential, and reasonable steps are taken to protect stored data from risks including security breaches and loss of data. The Opinion recommends various steps which lawyers should explore with the SaaS vendor, including: (1) the existence of an obligation imposed on the vendor to preserve security; (2) a mechanism for the vendor to notify the lawyer if a third party requests access to the stored information; (3) the existence of systems that are sufficient to protect the data from unauthorized access; (4) an agreement about how confidential client information will be protected; (5) the ability to review the vendor's security systems; and (6) tools to protect he lawyer's ability to access and retrieve data.

C. North Carolina 2011 Formal Ethics Opinion 6

North Carolina similarly concluded that lawyers "may use SaaS if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect client information and to safeguard client files by applying the same diligence and competency to manage the risks of SaaS that the lawyer is required to apply when representing clients."

The Opinion declined to impose specific requirements on lawyers who use Cloud Computing, but identified the following factors for lawyers to take into account, including: (1) understanding and protecting against security risks inherent in the internet; (2) including provisions about protection of client confidences in the agreement between the lawyer and the SaaS vendor; (3) ensuring that there are mechanisms for obtaining access to, retrieving, and protecting data if the lawyer terminates use of the SaaS product, or if the SaaS vendor goes out of business or experiences a break in continuity; (4) carefully reviewing the terms of the user agreement, including its security provisions; (5) evaluating the security measures used by the vendor; and (6) confirming the extent to which the SaaS vendor backs up the data it is storing.

CONCLUSION

The Nebraska State Bar Association Ethics Advisory Committee agrees with the consensus view that has emerged with respect to the use of the Cloud. As new technologies emerge, the meaning of competence may change, and lawyers will be called upon to employ new technological tools to competently represent their clients. Given that technology grows and changes rapidly, this Opinion follows the views of other states and declines to adopt specific requirements before an attorney uses the Cloud. Instead, lawyers must undertake reasonable efforts to: (1) prevent inadvertent or unauthorized access to that information; (2) maintain the confidentiality of the information; and (3) establish reasonable safeguards to ensure the information is protected from loss, breaches, business interruptions, and other risks created by advancements in technology.