**NEW HAMPSHIRE BAR ASSOCIATION**

# DEALING WITH A DECEASED OR INCAPACITATED SOLE PRACTITIONER'S PRACTICE

**Ethics Committee Advisory Opinion #2020-21/03**

## ABSTRACT:

Attorneys may be asked to assist with the wind-up and final disposition of a deceased or incapacitated sole practitioner's law practice. This article provides guidelines for doing so in compliance with applicable Rules of Professional Conduct and Supreme Court Rules.

## ANNOTATIONS:

- Supreme Court Rule 37(17) provides for the appointment of counsel to take charge and dispose of a deceased or incapacitated sole practitioner's practice.
- N.H. R. Prof. Conduct 1.17 permits sale of a law practice.
- N.H. R. Prof. Conduct 1.5(f) permits the division of fees between lawyers who are not in the same firm under certain conditions.
- Required task: secure the law office, client files, and client property.
- Required task: inventory the attorney's clients and client files and run conflict of interest check on each identified client before reviewing any client's file.
- Required task: prioritize contacting clients with active matters at the time of death or incapacity.
- Required task: notify current clients of their lawyer's death or incapacity and that they need to take possession of their files and, if appropriate, retain new counsel (consider posting notice in local newspaper).
- Required task: reconcile IOLTA accounts to extent possible and report any discrepancies to Attorney Discipline Office.
- Required task: identify all client property held by practice and return property to clients or successor attorneys.
- Required task: determine status of fees and expenses owed by clients, invoice fees and disbursements as soon as possible, and manage collection as necessary.
- Required task: if appropriate, work with the personal representative of the deceased or incapacitated attorney to facilitate a sale of the practice under N.H. R. Prof. Conduct 1.17.
- Required task: evaluate closed files and practice's financial records for attempted transfer to former clients, storage, or destruction per Supreme Court Rule 50(2).
- Required task: wind up practice's remaining business affairs and close the practice.

## OPINION:

Attorneys are occasionally asked to wind up a deceased or incapacitated colleague's solo law practice. The attorney may have been a friend or a stranger. The attorney may have been unexpectedly incapacitated or killed as a result of a tort or natural causes. Suppose you are faced

with such a situation and asked to represent the estate's, the family's, or the attorney's interests. Your duties will necessarily include winding up and closing the practice. At least one member of this Committee has faced this situation and found himself sailing in largely uncharted waters.

**Appointment by the Supreme Court**

New Hampshire Supreme Court Rule 37(17) permits an attorney to petition the Court to be appointed to take charge of and, if necessary, dispose of the deceased or incapacitated lawyer's practice. Rule 37(17) states:

> **(17)** ***Appointment of Counsel to Protect Clients' Interests:***
>
> **(a) Whenever an attorney is suspended, disbarred, dies or whose whereabouts are unknown, and no partner, executor, or other responsible party capable of conducting the attorney's affairs is known to exist, the court, upon proper proof of the fact, may appoint an attorney or attorneys to make an inventory of the files of said attorney and to take such action as seems indicated to protect the interests of clients of said attorney as well as the interest of said attorney.**
>
> **(b) Any attorney so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order appointing the attorney to make such inventory.**
>
> (c) **Any attorney so appointed shall be entitled to reasonable compensation and reimbursement for expenses incurred.**

**Issues with Deceased Versus Incapacitated Attorney**

Some planning by a now-deceased or incapacitated attorney would have been advisable – more about that below (yes, we are talking about you if you are a sole practitioner and have not already formulated a contingency plan). However, in the meantime, even if an attorney has done such planning and specifically authorized another attorney in a succession plan to administer his or her practice in the event of death, disability, impairment, or incapacity, that authority terminates upon the attorney's death. Following death, only the estate's personal representative (i.e., the attorney's executor or administrator) has the legal authority to administer the estate's assets, which would necessarily include the attorney's practice. Given the likelihood the personal representative will not be an attorney, the chosen successor attorney has no legal authority to proceed if not representing the estate's administrator or executor. So, if, after reading this opinion, you attempt to formulate and implement a succession plan by choosing an attorney who is willing and able to close down your practice if you are unable to do so (a highly recommended course of action if you are sole practitioner to protect your clients and family), your will or trust should include a provision expressly authorizing and directing your personal representative to hire your chosen attorney to

close your practice. Suggested provisions are found in the Bousquet article referenced below.

Assuming you have gotten past that first hurdle, the next matter to consider is a potential issue under Supreme Court Rule 37(10). If you are dealing with an attorney who is incapacitated, not deceased, pursuant to Rule 37(10) it appears that the incompetent attorney must be suspended before you can be appointed to make an inventory of the attorney's files and take whatever other actions are necessary to protect the attorney's clients' and his or her own interests. Supreme Court Rule 37(10) states:

> **(10)** ***Proceedings Where An Attorney Is Declared To Be Incompetent Or Is Alleged To Be Incapacitated:***
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> **(a) Whenever an attorney has been judicially declared incompetent or voluntarily or involuntarily committed to a mental health facility, the court, upon proper proof of the fact, may enter an order suspending such attorney from the practice of law until the further order of the court. A copy of such order shall be served upon such attorney, the attorney's guardian and such other persons and in such manner as the court may direct.**
>
> **(b) Whenever any committee of the attorney discipline system or the attorney discipline office shall petition the court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental or physical infirmity or illness or because of addiction to drugs or intoxicants, the court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the court shall designate. If, upon due consideration of the matter, the court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending the attorney on the ground of such disability for an indefinite period and until the further order of the court, and any pending disciplinary proceeding against the attorney may be held in abeyance.**

It is questionable whether under 37(10)(a) the incapacitated attorney has to be "judicially declared incompetent," or whether under 37(10)(b) a motion to be appointed to make an inventory of the attorney's files and take appropriate actions to protect the incapacitated attorney's clients and interests must be made by a committee of the attorney discipline system. There is no explicit preclusion in Rule 37(10) preventing an attorney requested by the now incapacitated attorney's family or an attorney who is volunteering to undertake these actions as a friend from seeking such an appointment, and time is of the essence in any such an undertaking. On the other hand, there is nothing in Rule 37(10) specifically allowing such a request. Under Supreme Court Rule 1, the Court or a single justice may intrepret Rule 37(17) to include the power to appoint an attorney to make an inventory of the files of an attorney who is incapacitated. Accordingly, if you are representing the interests of an incapacitated sole practitioner, it would be prudent to discuss all three relevant Supreme Court rules in your petition to the Court: Rules 37(10) ("Proceedings Where An Attorney Is Declared To Be Incompetent Or Is Alleged To Be Incapacitated"); 37(17) ("Appointment of Counsel to Protect Clients'

Interests"), and 37(1) ("Attorney Discipline in General"), and possibly additionally move the Court not to require the extra steps of first obtaining a judicial determination of incapacity under Rule 37(10)(a) or that the request to appoint you be made only by a committee of the Attorney Discipline Office under Rule 37(10)(b).

**Issues Related to Liability Coverage and Business Referral**

Some states' laws and court rules shield appointed attorneys from liability for good faith acts or omissions to act undertaken while serving to wind up another attorney's practice. *See, e.g.,* Illinois R. 776 (D); California Bus. & Prof. Code § 6180.11. New Hampshire does not offer such protections. Before seeking an appointment to administer the wind-up of a deceased or incapacitated attorney's solo practice, the would-be appointee should ensure that the appointee's acts and omissions as an appointed attorney are covered by his or her malpractice insurance.

New Hampshire Rules of Professional Conduct (the "Rules") 1.17 (e) & (f), permit an attorney to sell a law practice. Rule 1.17 (e) establishes specific requirements for the sale of an incapacitated or deceased lawyer's practice, including, among other provisions, that:

> **(d) The seller gives written notice to each of the active and inactive clients of the practice or practice area being sold regarding:**
> **(1) the proposed sale;**
> **(2) the client's right to retain other counsel or take possession of the file;**
> **(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice; and**
>
> **(e) The fees charged clients shall not be increased by reason of the sale[.]**

Therefore, an attorney appointed to liquidate the practice of an incapacitated attorney has a duty to ensure that the terms of the liquidation comply with these requirements. Similarly, while a non-lawyer representative of a deceased attorney's estate is not subject to Rule 1.17, ABA Comment [13] to Rule 1.17 states that "the seller as well as the purchasing lawyer can be expected to see to it that …. [the requirements of the Rule] are met."

At the same time, however, Rule 1.17 applies to the "*sale*" of a law practice. There is nothing in Rule 1.17 requiring the same steps if there is no consideration for transferring some or all of the clients to another firm as part of closing down the practice. ABA Comment No. 15 to Rule 1.17 provides explicitly: "This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice." Thus, the possibility of garnering some income from the sale of the practice may be outweighed by the cost of the extra steps the appointed attorney (who is entitled to compensation from his or her work) must take.

You may be thinking that closing a sole practitioner's law practice might work to one's advantage because one could cherry pick and keep some of the cases (just asking for a friend, of course). However, such a course may pose difficulties under Rule 7.3. That Rule, entitled "Direct Contact with Prospective Clients," states:

> **(a) A lawyer shall not initiate, by in-person, live voice, recorded, or other real-time means, contact with a prospective client for the purpose of obtaining professional employment, unless the person contacted:**
> **(1) is a lawyer;**
> **(2) has a family, close personal, or prior professional relationship with the lawyer;**
> **(3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or**
> **(3) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.**

It is doubtful many or even any of the deceased or incapacitated attorney's clients will meet these requirements. However, if an attorney has exercised the foresight to execute a succession plan with another attorney and that plan indicates (1) the successor attorney was chosen on the basis he or she has the requisite skill to represent the planning attorney's clients, and (2) it is the planning attorney's desire that the Court appoint the chosen attorney to protect the attorney's clients and potentially share any attorney's fees with the planning attorney's estate or beneficiaries to recognize work performed by the planning attorney prior to his or her incapacity or death, the Committee believes that such wishes expressed in writing would influence the Court in determining whether to appoint the successor attorney and permit that successor attorney to represent some or all of the planning attorney's clients.

Referral fees among attorneys are permitted in New Hampshire so long as the requirements of Rule 1.5(f) are met. That Rule states:

> **(f) A division of fee between lawyers who are not in the same firm may be made only if:**
> **(1) the division is made either:**
> **a. in reasonable proportion to the services performed or responsibility or risks assumed by each, or**
> **b. based on an agreement with the referring lawyer;**
> **(2) in either case above, the client agrees in a writing signed by the client to the division of fees;**
> **(4)in either case, the total fee charged by all lawyers is not increased by the division of fees and is reasonable.**

Therefore, an appointed attorney may negotiate appropriate referral fees to be paid to or for the benefit of an incapacitated attorney or a deceased attorney's estate. On the other hand, the appointed attorney's compensation is determined by the Court's order of appointment.

Therefore, if the appointed attorney will seek to negotiate referral fees to be paid to the appointed attorney or third-party attorneys to whom cases may be transferred in addition to the fees that are to be paid for the benefit of the deceased or incapacitated attorney, the appointed attorney should include a request for authority to do so in his or her petition to the Supreme Court.

As to the appointed attorney seeking referral fees from lawyers to whom the appointed attorney assigns cases, soliciting a referral fee from a receiving attorney may violate Professional Conduct Rule 1.7. That Rule states in pertinent part:

> **[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
>
> **(1) the representation of one client will be directly adverse to another client[.]"**

Choosing a successor attorney to whom you will refer one of the incapacitated or deceased attorney's cases on the basis of whether and how much of a referral fee that attorney will give you for sending the case to him or her could be construed as materially adverse to the interests of the deceased or incapacitated attorney in ensuring that his or her clients obtain the best successor representation regardless of whether it benefits the appointed attorney. There is also an implicit moral conflict of interest. Supreme Court Rule 37(17) permits an appointed attorney to receive reasonable compensation for his or her efforts. However, the project will be time-consuming, and every dollar one pays to oneself will come out of the pocket of an incapacitated attorney or, if the attorney is deceased, from what is left to support the attorney's family. Rather than look at this as a money-making proposition, you might consider looking at it as unsung hero work so that when you reach St. Peter or whatever other gatekeeper you may face and you are asked to discuss any misdeeds, you have something better to bring up.

## Planning and Executing an Appropriate Course of Action

Considering the above applicable rules and ethical and moral considerations of the undertaking, you are ready to plan a course of action. First, you need to quickly review each of the attorney's case files to prepare contact information for each client the attorney represented and make a client list. After assembling a client list, you need to run a conflict check on each client before reviewing any of the deceased or incapacitated attorney's client files.

You then need to provide notice to all clients of what has transpired and that you are taking steps to protect their interests, including safeguarding any funds held by the attorney, safeguarding their confidential information, and working to find successor counsel while, at the same time, informing each client that the client can obtain the client's file at any time and can obtain new counsel without your help if the client so chooses. As part of this overall file review, you will need to review all pending matters and cases to determine if outstanding deadlines need to be met. It would be prudent to send a letter to each court in which the attorney practiced alerting each court to the situation and inquiring whether the attorney was involved in any case that has pending deadlines or hearings.

The next step is to assist each of the attorney's clients to obtain successor counsel with expertise in the knowledge area required by each case. Be careful that you ask each potential successor attorney to run a conflict check to determine whether the attorney is currently representing or has previously represented the opposing party. This will avoid divulging client confidences to a present or potentially opposing attorney.

You will need to conduct an examination of the attorney's trust fund balances in any account in which the attorney kept client-escrowed funds. It is critical to compare the total balance of bank account trust fund balances to the total of individual client trust fund balances shown in each client's billing records for those clients for whom the client billing records indicate a trust fund balance exist. If there is a disparity between the total bank account trust fund balances and the total of client trust fund balances as shown on individual client billing records you will need to take immediate action. If there is a shortfall, and there is not enough in the bank accounts to cover all of the individual client balances, you will need to report that to the New Hampshire Supreme Court and probably have a professional audit undertaken. The last thing you want to do is start transferring client escrowed funds if you know from your preliminary examination that the trust fund balances in the bank accounts will not cover all of the transfers. If there is sufficient money in the attorney's operating account, it would be prudent to ask the Supreme Court for permission to transfer sufficient money from the firm's operating account to the trust fund accounts so that all client trust fund balances can be covered. This will ensure that client trust fund balances can be transferred to successor counsel without delay. On the other hand, if the total bank trust fund balances exceed the total client trust fund balances, why that has occurred should be examined, but it should not operate to delay transfer of client files with trust fund balances, if applicable.

Keep careful and detailed records of your activities! It would be prudent to scan enough of each client file you transfer so that the current status of the pleadings can be determined from your records. In addition, keep a clear record of when and to whom each case was transferred, whether the transfer was accompanied by the transfer of a client trust fund balance, and, if the matter involves a pending court action, a copy of your letter in which you notified that court of the transfer. If you determine that you want to reimburse yourself for any costs you have incurred or for any of your time, it is strongly suggested you do not do so until you have applied to the New Hampshire Supreme Court for permission to do so. Any such application should be accompanied by a detailed accounting of the time you have spent on the matter, an accounting of the attorney's operating account to indicate that there are adequate funds for you to pay yourself, and an accounting of the total bank account client trust fund balances compared to the total individual client trust fund balances to assure the Court there is no shortfall as to client escrowed funds.

Do not lose sight of the fact that you will need to pay the rent, electricity, telephone, internet, and other utility type expenses to enable you to operate the attorney's office during the period of time it takes you to close the attorney's practice. If the attorney has a legal assistant, you will also probably want to continue to pay the assistant's salary because the assistant will be one of your most valuable sources of information, will be able to undertake all of the ministerial tasks involved in copying and transferring files, paying ongoing bills, and the like, and will probably be grateful for the ongoing employment while he or she looks for a new job. There will

be a myriad of other issues that crop up–the preceding plan is merely an overview to identify some of the more pressing issues. Stay flexible but stay alert.

**Prepare to Avoid Disaster**

So now we get to the moral of this tale. If you are a sole practitioner and would like to shield your family and friends from having to undertake the above tasks with a paucity of information–essentially making them undertake a journey with no map or compass–engage in advance planning. Disregarding the unfairness to your own family by not dealing with these matters that will affect their financial status if you are unexpectedly struck down by incapacity or death, not doing so may also actually constitute a violation of New Hampshire Rule of Professional Conduct 1.3 (Diligence). As ABA comment 5 to that rule states,

> **To prevent neglect of client matters in the event of the 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 attorney 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.**

*Id.* (and citation therein).

Pick an attorney you trust and discuss whether that attorney would be willing to act on your behalf to close down your practice if you cannot. Then draft a written succession plan. After your friend and you sign it, amend your will or trust to include clear instruction directing your executor or trustee to engage that attorney under the terms of the succession agreement to close down your practice. If you typically have some contingent fee cases pending in your practice, a succession plan with another attorney will give you the ability to garner some benefit from the work you had already put into those cases when struck down by incapacity or death. Draft a provision that splits the fee based on the comparative effort put in by you and that will need to be put it in by the successor attorney to bring the case to fruition.

Think ahead as to the need to provide your successor attorney with some basic information: life insurance policies, other insurance policies, passwords, banks and financial institutions in which you have deposit, either for yourself or for clients, where you may have some cash tucked away (remember the urban myth of the attorney who tucked thousands of dollars into various books within the attorney's library, only to have the entire library given away by the attorney's spouse), which attorney should be contacted to probate the attorney's estate in the event of death, which attorney should be called if the attorney became incapacitated or died as the result of a tortious act, and any other useful details you think of that might not be within a will or trust. And, have a sound record retention policy regarding your clients, including banking and trust account records, with files clearly labeled. Have a discussion with your staff on how best to deal with your unanticipated incapacity or death. Speak with your bank or banks as to any IOLTA accounts that you have, as those banks may require something more than a succession agreement with another attorney before they will transfer IOLTA funds to another attorney. Consider having another attorney who can sign on your IOLTA account in the event of

death or incapacity. As one author reported, "The biggest problems arise with attorneys' trust accounts because an order from the Bar Association disciplinary board for access to the IOLTA does not impress the bank." Susan A. Berson, *Death of a Practice: After Lawyer Dies, Her Friend Is Faced with Closing Down Her Firm*, A.B.A.J., Jan. 1, 2013.

**NH RULES OF PROFESSIONAL CONDUCT**:

Rule 1.3 comment 5

Rule 1.5(f)

Rule 1.17 (e)

Rule 1.17 (f)

Rule 1.7

Rule 7.3

**SUPREME COURT RULES:**

Supreme Court Rule 1

Supreme Court Rule 37(10)

Supreme Court Rule 37(17)

Supreme Court Rule 50(2)

**SOURCES AND ADDITIONAL READING:**

Available sources are legion, and each below source includes further sources.

ABA comment 5 to N.H. Prof. Conduct R. 1.3 (Diligence)

ABA comment 15 to N.H. Prof. Conduct R. 1.17 (Sale of Law Practice)

Thomas K. Byerley, *Protecting the Client When a Lawyer Dies or Becomes Disabled*, Michigan Bar Ass'n, Ethics op. Oct. 1999.

Illinois State Bar Association, *What to do When a Lawyer Dies*, available through Google, date unknown

Gayle Eskridge, *Death of a Sole Practitioner: Planning for the Event and Administering the Aftermath*, available through Google, Aug. 6, 2019.

Susan A. Berson, *Death of a Practice: After Lawyer Dies, Her Friend Is Faced with Closing Down Her Firm*, A.B.A.J., Jan. 1, 2013.

James E. Brill, *Dealing with the Death of a Solo Practitioner*, 24th Annual Advanced Estate Planning and Probate Course, Ch. 8 (available through ABA or Texas Bar College) (date unknown).

Idaho Bar Association, *Death of a Sole Practitioner: Special Considerations*, available through Google, date unknown.

American Bar Association, Professional Responsibility Section, *Succession Planning* (available through ABA) (date unknown) (compendium of resources).

Thomas G. Bousquet, *Retirement of a Sole Practitioner's Law Practice*, 29 Law Economics & Management 428 (1989), updated in 33 The Houston Lawyer 37 (Jan./Feb. 1996).

**NH ETHICS COMMITTEE OPINIONS AND ARTICLES**:

None.

**SUBJECTS**:

Attorney-Client Relationship

Client File

Communications with Prospective Clients

Competence and Diligence

Conflicts of Interest

Document Retention

Fees

IOLTA

Lawyer Advertising

Safekeeping Property

Sale of Law Practice

Successor Counsel

Trust Account

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