SUCCESSION PLANNING AND TRANSITIONING INTO RETIREMENT

PLANNING FOR AND NAVIGATING THOSE WATERS

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Planning for and Navigating Those Waters

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Succession Planning Really Isn't Optional

(Particularly for the Solo Attorney)

At ALPS, be it from RISC visits, on applications for insurance, or at CLE events, we continue to find that a significant number of solo practitioners have yet to take the step of creating a succession plan. When working with these attorneys our message is always the same, if no plan is in place, now is the time. You really don't want to leave the headache of having to deal with stacks of closed files to an unsuspecting non-lawyer spouse, and yes, such calls still come in from time to time.

Always remember that someone paid for the production of every file you have in your possession and, in almost all jurisdictions, every one of these folks has some sort of ownership interest in their respective files. In addition, our ethical rules require that client property be properly safeguarded; but of course, non-attorney spouses aren't bound by our rules and sometimes they simply get rid of everything because they don't know what else to do. Heaven forbid post attorney death, and after a grieving spouse has had all the old files destroyed, a certain file is needed to properly defend against a claim of malpractice. Making matters worse, it turns out that there is no malpractice insurance is in place to cover the fallout of the claim because no one knew they had to timely contact the malpractice carrier in order to obtain tail coverage. The end result could easily be that the deceased attorney's estate may now not be what everyone was counting on it being. The failure to plan can end badly; but wait, there's even more.

Rule 1.3 of the Montana Rules of Professional Conduct addresses diligence. The Rule reads, *"A lawyer shall act with reasonable diligence and promptness in representing a client."* Most attorneys, if not all, are aware of this rule. According to the Comments to ABA Model Rule 1.3, we are to act with commitment, dedication, and where appropriate even zealous advocacy. Our workloads are to be reasonable so that all matters can be resolved competently. Procrastination is an enemy to be avoided at all costs; for it has and will continue to lead to malpractice claims if and when clients are ever harmed as a result. In the end we are all to strive to deliver our services in a professional, competent and timely fashion. Yet our obligations do not end here. There is an obligation to prevent neglect of a client matter post attorney death or disability.

Comment 5 to ABA Model Rule 1.3 states, *"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."* Given all that I have seen and experienced over my years with ALPS, I personally have trouble coming up with a set of circumstances where I would feel comfortable saying no such plan would be required for a solo. The only question for me is how to get there.

The most important aspect of planning for your death or disability is in the designation of an attorney who will be responsible for administering the winding down of your practice. This attorney should be competent, experienced, and someone who displays

the utmost professionalism. This person should have the time, or the ability to make the time, to come into the practice. She must be able to make rapid decisions and assume, at least for a short period, something of an additional practice.

It's important to note that the role of the designated attorney is to take on the responsibility of winding down the practice, not to come in and take over running the practice. It's about being expeditious with file review, client notification, protective action, and transitioning files to other attorneys. Perhaps these responsibilities could even be shared among a select group if time constraints are a concern.

Obviously, the designated attorney ought to be someone quite comfortable with your areas of practice and also not likely to have a significant number of conflict concerns arise as a result of having to step into this role. Finally, don't overlook the importance of making certain appropriate employees are aware of who the designated attorney is and how to contact this individual in an emergency. One additional benefit of choosing a designated attorney (and often this is a reciprocal designation) is this individual can also act as your backup attorney, thereby allowing you to take extended absences from your office for work, pleasure, or health reasons.

Beyond designating an attorney, there are a number of other things every solo attorney should do as part of the succession planning process. Consider providing notice of the existence of and reason for a designated attorney in your fee agreements so that clients are aware of the steps you have taken to protect their interests in the event of an emergency. Maintain a current office procedures manual that discusses the calendaring system, conflict system, active file list, open and closed file systems, accounting system, and any other key system as this can be valuable in expeditiously bringing the designated attorney up to speed on how your practice is run.

Of utmost importance is keeping critical systems such as the calendar and conflict systems current at all times and making certain that all files are not only thoroughly documented, but kept current as well. The reason is the designated attorney will need to review all client files in order to make a quick determination as to whether any immediate protective action is necessary. Mistakes can and will be made with poorly documented files.

Finally, write a letter for the designated attorney that details duties for all employees; includes passwords for and instructions on the use of the computer system; provides financial details such as location and account numbers for all bank accounts, particularly client trust accounts; and contact information for all staff and principal vendors such as banks, insurance companies, utility companies, and the landlord. In short, think about what you would need to know if you were the person coming in to wind down your practice and capture that intellectual capital in a way that will be useful to the designated attorney.

If you feel that you need assistance in developing a plan for your death or disability, the Oregon State Bar Professional Liability Fund has published a handbook with related forms that can be of real help. This free handbook, available online, will also provide

significant help to the designated attorney should his or her services ever be needed. In this book entitled ***Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death***, you will find items such as a checklist for closing another attorney's office, a sample notice of designated assisting attorney, sample letters to clients, a sample authorization for the transfer of a client file, and much more. Also, be aware that a number of useful resources based upon the materials in this Oregon guide are available on the websites of a number of other state bars. Finally, the ABA has published a similar resource entitled ***Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events*** that might be of use as well.

Getting from Here to There: The Retirement Plan

When I first graduated from law school, retirement seemed a long way off. Today, it's a lot closer for me as well as for many fellow baby boomers because we all are approaching or have reached retirement age. Currently, approximately 4 million people retire here in the States every year. Will those who are attorneys be happy in retirement? Are they going to be ready for it? Do they have a plan for wrapping up their practice?

While I hope many have taken the appropriate and necessary steps to be financially prepared, I do wonder how many have given any serious consideration to what life will be like post retirement. As with succession planning, attorneys should invest time in retirement planning during the years leading up to retirement. How else can you try to ensure your retirement years will be as fulfilling as your working years were if not more?

An important first step in retirement planning begins with trying to answer the question of when, which can be very difficult for some. Yes, life happens, and the unexpected can put to rest the best laid plans; but having some type of a plan is better than no plan at all. To help get you there, consider what your responses to the following questions might be as a way to begin the process of trying to set that target retirement date.

- How is your physical health or the health of your significant other? How long can you handle the pace of your current circumstances? Is there anyone you may be called upon to care for in the coming years such as an elderly parent or a grandchild with special needs?

- When will you have the financial wherewithal to retire? If this date seems too far off, are there any financial planning steps that you could take now to shorten the overall timeframe?

- Do you still like what you are doing professionally or are you starting to find that law is a distraction from what you would really like to be doing? Do you find the call of family time, volunteer work, extended travel, personal hobbies, or even just trying your hand at making a little money by doing that one thing you

always wanted to do a strong calling? Do you even have the energy to stay with it or is work feeling like a burden?

- Are you as sharp as you used to be or have colleagues, family members, or trusted friends begun to suggest you slow down or stop practicing out of concern for your wellbeing? Age does have a way of catching up and sometimes what's best for our clients is a decision to stop before a serious misstep occurs, do you agree? If so, when might such a transition feel right?

These questions are meant to begin a thought process that can help establish a timeline. Some of these questions deal with certain realities that may be in play and others focus on desires and hopes for what might come in retirement. This is just the beginning however. There is more to retirement planning than just setting a date.

The next step is to move beyond the "when" question and give thought to the "what will happen next" question. This can help drive the process forward. A number of articles have been written over the years that talk about how life in retirement turned out to not be the panacea that so many attorneys thought it would be. Often the explanation given was these retirees failed to address the significant life style changes that came in retirements discussed. There are stories about attorneys who felt lost or felt a lack of purpose once their structured work day was gone. Others struggled with the loss of social contacts, the majority of which were tied to their past professional life.

In order to avoid these kinds of missteps, you do need to take the time to plan for what will come in retirement. Focus on how to maintain some degree of daily structure and meaningful social contact as you do so. For some, this second step comes naturally and the list of all they hope to accomplish in retirement could easily take another lifetime to work through. For others, the effort may be more difficult; but this is an essential step. Again, by asking yourself a few questions you can jumpstart the process. Just remember to be honest and realistic with your answers.

- What are you looking forward to in retirement? What concerns or fears to have about retirement? Do you view this as an end or a beginning? When thinking about retirement, what are your expectations? Are your expectations compatible or in line with the expectations of your significant other?

- Once you stop practicing, what will you miss? Are there any alternative ways to meet that need?

- Do you know anyone who in your mind successfully retired? This might be a family member, a good friend, or even a fellow colleague. If so, what worked for them? How did they do it? If you don't know, ask them.

- What kinds of things do you enjoy doing in your spare time? What are your passions? Is there something you have always wanted to do? What are all the things you hoped to accomplish in life that still remain undone?

- (Here's a tough one.) How do you want to be remembered? What can you yet do to make sure that happens?

- Are there any aspects of your professional or personal life that were particularly satisfying? Think about things that you continue to be proud of. If so, is there a way to carry those aspects forward with you into retirement and perhaps even build on them?

As you think through the above questions, focus on the specifics. There is a difference between wanting to be remembered as a good person and being remembered for making a difference in the community by being responsible for a successful fund-raising campaign for a local charity. For example, if an attorney wanted to remain connected to the law in some fashion during retirement, the options might include becoming involved in politics; transitioning into an of counsel position; becoming an adjunct professor; acting as a mentor to younger attorneys; doing pro bono work; or working with your bar association perhaps by presenting CLE programs, writing, or serving on a committee. The idea here is to leverage your intellectual capital.

If your desire is to explore options outside of the legal profession, I can assure you that volunteer opportunities in so many segments of your community are going to be bountiful; but why stop there? Retirement doesn't have to mean that you never work again. This can be a time to try your hand at something else and make a little money while you're at it. It just takes time to explore and think through what the options might be. Yes, this process might be hard; but it must be done because there is no plan if there are no specifics on the table.

The Transition

With the date and plan in place, the real work will be in starting to implement the plan as the date for retirement draws near. Regardless of whether you work in a firm or as a solo, the reality is that you do not simply close up shop one day and ride off into the sunset. Many retiring attorneys need to plan for a gradual winding down of their practice. If your specific circumstances will allow for it, a twelve to twenty-four month timeline is what is most often recommended.

Understand this transition doesn't necessarily have to be completed in one single stage. Depending upon the needs of the individual attorney and the law firm, a decision to transition into a part-time role for a few years before finally completely retiring is perfectly acceptable. Often this is accomplished by having the attorney move into an of counsel role whereby the semi-retired attorney can complete the process of reducing his or her workload and transitioning clients. Once the caseload is reduced, the of counsel attorney

will sometimes even switch gears and move into a mentor role in order to help groom younger attorneys at the firm or she may simply represent the firm in the community[1].

Solo attorneys often wind down slowly and work part-time as well before they fully retire. They often choose to stop accepting any new matters and will continue to work until all their active cases are completed. Other solos decide to work until they find someone who is interested in buying their practice or they may take the time to groom someone to take over the practice. Regardless, all these options take time to run their course.

While there are going to be a number of variables in play depending upon the specific circumstances of the transition period, there are also going to be some commonalities. With this in mind, let's look at what is involved with closing a solo practice. The decision to close one's law practice can come as a result of many factors: retirement, merging firms, disability, or an appointment to the bench. The checklist that follows provides some guidance and direction as to the main issues that will need to be addressed. Again, depending upon the nature of the practice and your specific circumstances, plan on starting with these basic steps twelve to twenty-four months prior to your desired retirement date.

1) **Assess the status of all active matters and build out a timeline.** Start by creating a detailed list of all active matters in a spreadsheet. For each of these matters, your answers to two key questions will help clarify next step. What is the current status of each file and what type of fee agreement is in play?

   Next, try to estimate the amount of time it will take to finish the work on each matter and add this to your spread sheet. The total of these time estimates will help you determine the actual amount of time it will take to close your practice. While you may find you are unable to keep your practice open long enough to finish everything, the goal is to try and close as many active matters as you can.

   Finally, consider if any of the matters you're unable to wrap up require special attention. For example, if you have any pro bono, reduced fee, or other special fee arrangement matters you're unable to finish, you will need to try and find another qualified attorney who might be willing to take one or more of these matters on under the same fee arrangement.

2) **Notify staff.** Let your most trusted staff know what your plan is as you're going to need their help in implementing it. Additionally, key staff deserves to know your intentions once you know the date you hope to have the transition completed. If possible, give them a date certain and advise them if you are willing to be a reference for them. After all, these folks need to be able to plan for their transition as well.

[1]For more information on of counsel relationships see Appendix I.

3) **Close as many active matters as you can and curtail the taking on of new matters.**

4) **Notify your clients.**[2] Write to all clients who have active matters you will be unable to complete to let them know you will not be able to finish their work before leaving the practice. Advise them that you will be unable to continue representing them and that they will need to retain new counsel. Your letter should inform them about time limitations and time frames important to their matter or matters. The letter should explain how and where they can pick up copies of their files and set forth a deadline for doing so.

5) **Notify the court.** On any matter that has pending court dates, depositions, or hearings meet with the client to discuss how to proceed. Where appropriate request extensions, continuances, and the resetting of hearing dates. Send written confirmation of these extensions, continuances, and resets to opposing counsel and to your client.

6) **Submit motions to withdraw.** For matters before administrative bodies and courts, obtain the client's permission to submit a Motion and Order to withdraw as attorney of record.

7) **File Substitutions of Counsel.** With matters where the client has chosen a new attorney, be certain that a Substitution of Counsel is filed.

8) **The double check.** Pick an appropriate date and check to see if all matters have either a signed Motion and Order allowing your withdrawal as counsel or a Substitution of Counsel filed with the court.

9) **Preserve client files.** Provide clients with copies of their files so that you can retain your original files. All clients should either pick up their file (and sign a receipt acknowledging that they have done so) or sign an authorization for you to release their file to their new attorney. If a client is picking up a file, original documents should be returned to the client and copies should be kept in your file. Your files should be retained in accordance with your file retention policy.

10) **Notify clients of file storage arrangements.** All clients should be told where their closed files will be stored and with whom. If not previously taken care of, let all clients know what your file retention policy is and obtain permission to destroy their files in accordance with that policy's provisions.[3] If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number. Retain an index that indicates whether the files were transferred and if so

[2] See Appendix II for a sample client notification letter.
[3] See Appendix III for file retention and destruction policy basics.

to whom, where the closed files are stored, and if and when they are to be destroyed.

11) **Closeout client trust accounts.** Pursuant to RPC 1.15, a critical part of closing a law practice is the need to address all funds held in a client trust account. Start by making sure your trust account is fully reconciled.

    Once the trust account is fully reconciled, prepare and send the final bill to each client. Next, disburse money owed to you for earned fees and reimbursement for costs advanced in accordance with the terms of your fee agreement. You should deposit this money into your general business account. Finally, disburse any remaining funds belonging to your clients directly to them. If any of these clients have retained a new lawyer and their trust account funds are to be transferred to the new firm, make that check payable to both the client and the new firm.

    If you have any unclaimed funds in your trust account once all disbursements have been made, you'll need to determine the source of those funds. For example, funds just sitting due to an uncashed check paid to a witness would revert to that client and should be refunded. Unclaimed funds belonging to clients may be subject to your state's Disposition of Unclaimed Property Act once all reasonable efforts to locate any missing clients have been completed. Finally, let your bar association know that you have closed your trust account.

12) **Preserve your books and records.** In Montana, RPC 1.15 requires that attorneys keep trust account records for at least five full years following the termination of the fiduciary relationship. This information can be preserved in a digital format. Just remember to save multiple copies of the backup, and to try to hang on to a disk copy of the software application the data came from in case it ever becomes necessary to view and print data that was burned onto a disk created years ago.

13) **General account funds**: A firm may continue to operate a general account consisting of firm funds for the purpose of collecting accounts receivable and to continue paying for firm overhead, including lawyers and staff, beyond the date of the firm closing. Once all such transactions are completed, close it out.

14) **Anticipate future contact problems.** If you are a sole practitioner, ask the telephone company to provide a new phone number which can be given out when your old number is called. This eliminates the problem created when clients call your current phone number, get a recording stating that the number has been disconnected, and then have no idea where else to turn for information.

15) **Contact the Bar.** Contact the state bar of every state you are licensed to practice in order to update your membership records as to status and contact information.

16) **Review your malpractice policy and contact your malpractice insurance carrier.** Do this at least several months prior to the actual date of your retirement in

order to understand the costs and options associated with the purchase of an extended reporting endorsement (ERE), commonly referred to as a "tail." It is important you understand that an ERE is not a new policy. It is simply an endorsement that will be added to the policy that is in place on the date of your retirement.[4]

17) **Wind up the business.** There are number of other considerations involving personnel and office matters that will need to be addressed prior to closing your doors if the transition is to be a smooth one. These matters might include cancelling your telephone service, advertising agreements, and equipment leases; determining where to properly store employee files, your business records, and closed files; and notifying all insurance carriers, and any other authority with which you may have a duty to report the closing to. Consider having mail and e-mail redirected to the home of the retiring attorney as a way to help ensure that important client matters that haven't found their way to the successor attorney will receive attention after the firm has officially closed.[5]

[4] For a more detailed discussion of ERE's, see Appendix V.
[5] See Appendix IV for a complete notification check list.

Appendix I

Counsel for Those Considering Entering into Of Counsel Relationships

Of Counsel is one of those terms that has multiple meanings. The term has been used as an honorary designation for retired partners, as a special designation for firm attorneys who are neither a partner nor an associate, and as a way to describe part-time attorneys who have created an association with a firm. In recent years however, more attorneys seem to want to use the term solely as a way to generate additional business. After all, the public presentation of close ties with another firm can be an effective marketing tool that will drive additional business to your firm, right? Well perhaps, but there are risks that come into play and these risks should not be taken lightly.

What is an Of Counsel Attorney?

The Of Counsel designation as envisioned by the authors of various ethics opinions refers to something altogether different from a traditional attorney within a firm. These opinions generally define an Of Counsel attorney as an attorney who is not a partner, associate, shareholder, or member of a firm, and they further state that an attorney may only be designated Of Counsel to the firm if the attorney will have a close and continuing relationship with the firm. This means that any attorney that works with your firm and has a significant degree of shared liability with your firm or managerial responsibilities to your firm and/or its staff should never be designated as Of Counsel. Related terms such as Special Counsel, Tax Counsel, Senior Counsel, and the like are understood to have the same meaning as Of Counsel and thus the requirement of a close and continuing relationship will apply there as well.

The requirement of a close and continuing relationship has been defined as providing for close, ongoing, regular, and frequent contact for the purpose of consultation and advice. Further, the Of Counsel attorney must be more than an advisor on only one case or just a forwarder or receiver of legal business. Attorneys can get into serious disciplinary trouble by designating someone who is merely a referral attorney as Of Counsel because that is usually considered to be a misleading client communication in violation of the ethical rules. This is why the idea of creating Of Counsel relationships solely for marketing purposes falls flat.

Who Can Properly Be Designated Of Counsel?

Evaluating the appropriateness of the designation in the light of what a disciplinary committee could perceive as misleading can help one avoid some of the common Of

Counsel designation pitfalls. Remember the average person will take the term at face value so come at the decision from the perspective of the average person's expectations. If you are thinking about being listed on another firm's letterhead as Of Counsel, only do so if you are able to be readily available and actually will provide counsel to that firm.

Examples of acceptable relationships for the Of Counsel designation have included, but are not limited to: 1) retired lawyers, 2) withdrawing partner or associate, 3) part-time practitioner, 4) permanent non-partner/non-associate, 5) partner on leave, and 6) probationary partner-to-be. Examples of unacceptable relationships for the Of Counsel designation have included but are not limited to: 1) outside consultants, 2) suspended lawyers, 3) when the affiliation involves only a single case, 4) those who merely share office space and nothing more, and 5) public officials who are not engaged in active practice with their former firm.

Can a law firm be Of Counsel to another firm? Can an attorney be of counsel to more than one firm? Can an attorney be Of Counsel to an out-of-state firm? While the answers to these questions can be yes, the reality is that the answers to these questions and a number of others will differ depending upon the jurisdiction in which you practice. Given the numerous and varying state specific rules regarding this designation, I would recommend that prior to establishing any Of Counsel relationship you review any relevant ethics opinions and/or contact bar counsel in your jurisdiction.

What Are the Risks?

There are a few generally applicable issues that take on special significance in an Of Counsel affiliation. In particular, imputed disqualification, vicarious liability, and insurance coverage disputes warrant special attention.

Imputed Disqualification - For conflict purposes, the Of Counsel affiliation means the affiliated firm and the Of Counsel attorney will often be treated as one entity. This does mean the conflicts the Of Counsel attorney brings to the table may prevent the affiliated firm from continuing to represent current or future clients. Likewise, the Of Counsel attorney has to be concerned about apparent or actual conflicts between his own clients and those of the affiliated firm. The imputed disqualification rule is a two-way street and there is little that can be done to correct the problem once it has arisen. Conflict checks can be burdensome and the potential cost in lost business if a conflict is ever missed can be substantial. Always address the conflict issue prior to establishing Of Counsel relationships so that everyone understands what the additional burden will be and can agree that the benefits will outweigh the costs.

Vicarious Liability - While the affiliated firm is not going to be liable for the independent acts and omissions of the Of Counsel attorney that were outside of the apparent scope of the Of Counsel's involvement with the affiliated firm, this doesn't prevent claims from arising. Problems can and will arise based upon any given client's perspective of the affiliation. Unrestrictive use of letterhead listing the Of Counsel attorney by the affiliated firm or the Of Counsel attorney sends the message that all participants are involved on any and all matters of the firm and/or the Of Counsel attorney even if this isn't the case. To help avoid becoming a named co-defendant in each other's suits, create two versions of letterhead. One will list the Of Counsel attorney and the other will not. Then only use letterhead showing the Of Counsel attorney's name when that attorney is actually working on a firm matter. Likewise, make sure that the Of Counsel attorney abides by the same rule.

Insurance Coverage Disputes - In the unfortunate event of a claim, coverage problems can arise when an affiliated firm has done work on a matter that the Of Counsel attorney had no involvement in or awareness of, but was unfortunately listed as Of Counsel on the letterhead that was in use. Should this Of Counsel attorney not have coverage under the affiliated firm's malpractice policy there may be a significant problem because the Of Counsel attorney's own policy will often not afford coverage either. Why is this? The Of Counsel attorney's own policy will only cover work done on behalf of clients of the named insured which is the Of Counsel's own firm. In this situation the Of Counsel attorney would be facing a claim that arose out of work done for a client of the affiliated firm thus the coverage gap. These sorts of "who is the client," "who is the attorney of record," and "who is the named insured" are common challenges that underscore the necessity of investigating and addressing the insurance coverage issues early on. Appropriate coverage for the exposures of both the affiliated firm and the Of Counsel attorney can usually be obtained, if the issue is addressed at the outset.

Closing Thoughts

Beyond the above, the best risk management advice I can give regarding Of Counsel relationships is to encourage you to always keep in mind joint accountability. Of Counsel relationships can be quite valuable, but clients will rightly respond to these affiliations as if they represent a single "entity." Mutual accountability will be in play, particularly when a client is directly involved with both parties to the Of Counsel affiliation. I do believe that Of Counsel relationships are of significant value as long as these relationships are entered into with client interests in mind as opposed to being a marketing strategy. Overlook this, and problems may lie just around the corner.

Appendix II

NOTE: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will **ALPS** be liable for any direct, indirect, or consequential damages resulting from the use of this material.

SAMPLE LETTER ADVISING THAT ATTORNEY IS LEAVING THE PRACTICE
(Modify as appropriate)

Re: **[*Identify matter*]**

Dear **[*Client Name*]**:

Effective **[*date*]**, I will cease practicing law due to **[*identify the reason, if possible*]** and thus my representation of you will cease at that time.

Because this matter has not yet reached a conclusion, I recommend that you immediately hire another attorney who will be able to step in and see this matter through to completion. You are free to select any attorney you wish. If helpful, I would be happy to provide you with a list of local attorneys who practice in the area of law relevant to your legal matter. Also, our State Bar Association provides a lawyer referral service and their number is XXX-XXX-XXXX.

Be advised that it is imperative that you hire a new attorney immediately in that **[*Insert appropriate reason to include notification of any time limitations or other critical information that the client would need to be aware of.*]** Once hired, please provide me with written authority to transfer your file to your new attorney. If you prefer, you may come to our office to pick up a copy of your file so that you may personally deliver it to your new attorney.

I **[*or insert the name of the attorney or firm who will store your files*]** will continue to store my copy of your closed file for **[*list relevant time period in accordance with your firm's file retention policy*]** years. After that time, I **[*or name listed above*]** will destroy my copy of your file unless you notify me in writing within the next 30 days that you do not want me to follow this procedure and I will try to make alternative arrangements that will better meet your needs. If a copy of your closed file is ever needed you may reach me **[*or name listed above*]** at XXX-XXX-XXXX.

Within the next **[*fill in number*]** weeks I will be providing you with a full accounting of any trust account funds still in my possession as well as a statement of any fees that remain outstanding.

You will be able to reach me at the address and phone number listed on this letter until **[*date*]**. After that time, I may be reached at the following phone number and address.
[*List Name, Address, Phone, and/or Email*]

Again, please don't delay in trying to hire a replacement attorney in order to protect time limitations applicable to your case and make certain that your legal rights are preserved.

It has been a pleasure to be of service to you and please don't hesitate to check with me if you have any additional questions or concerns.

Sincerely,

[*Attorney*]

Appendix III

"How Long Do We Need to Keep Our Closed Files?" The Basics of File Retention & Destruction

As a risk manager, this question is the one question I'm asked more than any other and I get it. Although my wife is a physician, she had to deal with the same issue. We were paying to store her closed files for years after she left private practice and we both breathed a sigh of relief when that last bill finally came. Truth be told, however, the answer to this question isn't a simple one; but it is manageable, and it begins with determining when any given file can be destroyed.

While guidelines and ethical opinions, formal or otherwise, differ and you should always check with the powers that be in the jurisdiction in which you practice, most recommend a retention period of seven to ten years. Speaking as a risk manager for a malpractice insurance company, I lean toward the shorter end of this window and feel comfortable with the seven-year time frame. So, if seven years have not yet passed, keep the file.

I will share that I have worked with a few firms that have far more aggressive destruction practices in place, several of whom destroy all files within several months to one year of being closed. I strongly advise against doing something similar if for no other reason than if a malpractice claim were ever to arise, you would have no file with which to defend yourself. That's not a position you ever want to find yourself in. Trust me on that one.

Unfortunately, once the seven years have passed on any given file, or whatever the number of years you set as your retention period, you still may not be able to destroy it. As with so many rules, there are exceptions that require an additional amount of storage time. These exceptions include but are not necessarily limited to the following:

- Files on which the malpractice statute of limitation has not yet run (and don't forget about the doctrine of continuous representation which can toll these statutes);
- Files involving a client who was and still is a minor even though the end of your general file retention period has been reached;
- Estate plans for clients who still are alive;
- Files that contain agreements that have yet to be executed or have not been fully paid off even though the end of your general file retention period has been reached;
- Files that establish the tax basis of one or more client assets;
- Adoption files;

- Support or custody files with continuing support obligations;
- Files with renewable judgments;
- Corporate books and records of active client entities;
- Files of clients convicted of a capital crime; and
- Files of certain "problem clients."

In a perfect world, and with the above exceptions in mind, every file should have been given a destruction date or a review for destruction date when the file was first closed. If that didn't occur, keep these exceptions in mind as you now seek to determine which files can and which files can't be destroyed.

I would also recommend that as files are pulled for destruction, one final file review occur. This final file review process is intended to prevent a file from being prematurely destroyed and assures that any remaining documents in these files that should not be destroyed are preserved. When any given file was first closed, you should have separated out all the original documents that belonged to the client and returned them at that time. If that didn't happen, make sure it occurs during this final pre-destruction review.

You are trying to identify and preserve the following: documents that clearly or probably belong to the client; all original documents; any other documents that the client may need or reasonably might expect his lawyer to preserve; and every file's letter of closure. The letter of closure is an important document to retain because it can help clarify whether or not a conflict of interest is in play later on. If closure letters are destroyed, you take away your ability to provide documentation that an inactive client is actually a past client under Rule 1.9 of the Rules of Professional Conduct, the "Former Client" Rule.

To varying degrees in most jurisdictions, the file is viewed as client property. This means that client awareness of and permission to destroy their property is necessary. If your clients were not informed of your file retention and destruction policy at the time their file was closed, you should try to contact them now to see if they want their file. While some attorneys try sending letters to the last known addresses of these clients, on older files this approach often proves less than fruitful. In light of the problem of trying to locate clients on files closed years ago, many firms now place in their engagement and/or closure letters a short paragraph that discusses the firm's file retention policy as a way to solve the problem, at least on a going forward basis. If you wish to do something similar, I can offer the following sample file retention language.

> *I have enclosed your original documents as I no longer need to keep them, and I thought you would want them for your records. It is our firm's practice to destroy files [number of] years after we close them. If you would like us to return your file to you [number of] years from now instead of destroying it, please send me a note to that*

effect within the next thirty days so that we can segregate your file from all our other files and accommodate your request. You will need to be responsible for keeping us informed as to how to reach you should your contact information ever change.

If you find yourself needing to send past clients a letter years after closing their files, you might consider designing a letter based upon this sample language.

Our policy is to destroy files [number of] years after they are closed. We have retained your file for that period of time and are now preparing to have it destroyed. If your desire is to have our firm continue to store it or see that it is returned to you, you must send me a letter telling us of your desire and this must be done no later than ten days after the date you receive this letter.

Once you determine which files can be destroyed, please follow through and see that these files are properly destroyed. "Destruction" does not mean tossing all the old files in a dumpster out back and, yes, this does need to be said. Take the necessary steps to have old files incinerated or shredded. You cannot compromise your client's confidences, even during the file destruction process.

The final step in all this is to create and keep an inventory of the final disposition of all files. At a minimum you want to track the client name, file matter, method of disposition (destroyed, returned), and date of disposition.

Now, one side note. I am finding that some firms have decided to keep client files indefinitely because virtual storage is so cheap. They will scan, then destroy the hard copy and keep the digital copy. On the surface this may seem like an easy answer but remember that as computer hardware and related storage devices are replaced over the years, the digital data on these devices must still be reviewed to ensure that certain data isn't prematurely lost. Once that's been accomplished, make certain to follow through on properly destroying your digital files. You can't just give this stuff away or recycle it without wiping the data off the drives. The bottom-line is that the issues remain the same regardless of whether your files are paper or virtual.

Appendix IV

Notifications Checklist

(Provided by South Carolina Bar Practice Management Resources.)

CHECKLIST - NOTIFICATIONS - SOLO LAWYER RETIRES OR QUITS PRACTICING LAW

Accountant:

Discuss dissolution of firm and appropriate tax advice.
Establish schedule for preparation of final financial statements, reconciliation.
Determine schedule for final billing cycle and recording of write-offs.
Discuss notifications to federal and state agencies (retirement of FEIN, final returns).
Discuss firm's retirement plan, if any.
Discuss final payroll and payroll tax preparation, 1099's and W-2's.
Determine who is going to prepare/keep financial records after dissolution and who will review these records.

Advertising:

Cancel or change any existing advertisements and legal industry directory listings when possible.
Notify your State Bar Referral Service of the closing of the office.

Banking - Firm Accounts:

Notify banker of firm closing.
Determine closure date for firm accounts.
Arrange for emergency/wrap-up supply of banking supplies.
Establish who will retain check-writing authority.
Establish who will make deposits, pay bills, and track cash balances.

Banking - Trust Accounts:

Prepare final reconciliation.
If IOLTA account, notify State Bar.
(For disposal of unclaimed monies in trust account, see subsection (f) of MT RPC 1.15 Safekeeping Property.)

Banking - Lenders:

Meet with all lenders as soon as possible after the announcement. Propose a repayment schedule, if possible. May have to offer additional collateral and/or guarantees.
Cancel law firm credit cards effective immediately.

Banking - Safe Deposit Box:

Arrange to retain safe deposit box for storage of important firm documents.
Establish how contents will be handled.

Bar Associations:

Notify local, state, and specialty bars that your practice is being closed and provide new mailing address.

Computer Systems:

Inventory. Make a complete inventory list for the accountant, along with all warranty dates and information, if applicable.
Licensing Agreements. Check all licensing agreements. Determine whether software can be transferred or sold.
Consider sale or charitable contribution or conversion to home use of computer equipment and software.
Backup data, matter related documents and information and software.
Determine storage location and retention period.

Courts/Active Cases:

Contact your state bar association if departing lawyer is going inactive.
Notify client or new lawyer if one has been selected. Attempt to obtain client's permission to withdraw from active cases, if necessary.
Notify Courts. Notify judges and file appropriate documents to withdraw from active cases if necessary.
Notify opposing counsel.

Dues and Licenses:

Notify city and county occupational license offices.

Files:

Implement final disposition of client files and office administration files.
Where and for how long will files and other matter-related information be stored? See RPC 1.15 and 1.16.
Where will the master list of client/matters/files be stored? (Consider safe deposit box.)

Furniture, Fixtures, Accessories, and Artwork:

Establish final disposition of these assets and/or leases (determine buy-out options on leased items, if any).
Consider sale v. charitable contribution and/or conversion to home use by owner, if living.
Consider an independent appraiser to value all of the assets. Determine whether they will be offered to employees first and at market value or discount. If offering at discount, how much?

Government:

Notify state and federal offices and Employment Security Commission that the firm is being closed.
File final tax and payroll returns.

Insurance:

Cancel office liability insurance, workers compensation, etc. Consider conversion options for health, life, and disability insurance. Discuss retirement plans, if any, with accountant. Determine rollover options.

Determine the need for professional liability tail coverage, which must be purchased through your last carrier. Tail coverage is actually an endorsement to your final policy and the terms for the tail coverage remain the same as those in that final policy. This is usually non-negotiable. For example, if you have a million-dollar policy prior to retirement, you cannot purchase tail coverage for a lesser or greater amount. Be aware that there is always a small window of time in which to elect to purchase tail coverage. If this window is allowed to close, you will not be able to get the coverage.

Library, Legal Research:

Cancel subscriptions and online accounts.
Determine disposal options for hard copy and CD-ROM resources.
Consider charitable contributions.

Mail and Messengers:

Determine how mail will be handled. Who will forward mail? For how long? [Note: Post Office will not allow individual forwarding addresses.]
Keep post office box open for one year for wrap-up materials and post-dissolution matters.
Dispose of mailing supplies.
Cancel messenger/courier and express accounts.

Marketing:

Consider thank-you letters to current and former clients, especially if taking a public position/job, post-dissolution.
Cancel Web site account.

Office Supplies:

Dispose of excess inventory. Consider charitable contribution to Head Start or a public or private school.

Personnel:

Notice to Employees. All employees should receive a formal notice of dissolution and termination of employment.
COBRA. If there is a continuing underlying health plan so that COBRA can be offered, determine when COBRA notices will be sent and by whom.
Decide who will handle unemployment claims.
Decide who will handle verification of employment requests and requests for references. (They may come for a long time.)
Disability. If any employees are currently on disability, determine whether coverage is convertible.
Personal Life Insurance. Determine whether policies are convertible and whether they will be offered to employees.
Health/Dental Insurance. Provide information to employees regarding continuing coverage on their own. Review and cancel as appropriate.
Review any other insurance and cancel as appropriate.
Determine whether to pay severance and, if so, how much and to whom.
Accrued vacation/time off. Determine whether to pay in cash and when.
Retirement and 401(k) Plans. Determine whether they will be terminated and whether it is necessary or prudent to get a Determination Letter from the IRS prior to a formal dissolution.
Cafeteria Plans: Determine key dates and notify participants: last day to incur expenses, last day to request reimbursement.
Notify employees where personnel files may be obtained. Explain that the files will be destroyed at a specified time in the future if the files have not been picked up by the employee.

Space:

Determine lease termination options or subletting. Contact landlord as soon as possible.
For owned space, consider listing for sale six months before dissolution.
Determine move date and arrange moving service.
Coordinate move information with landlord or buyer.

Telecommunications:

Establish a date for telephone service cut-off.
Cancel telephone calling cards effective immediately.
Provide informational recording for callers past service cut-off date.
Dispose of telephone equipment or establish lease termination options and date
Consider sale or charitable donation of old equipment.
Determine what callers will be told during the dissolution phase.

Vendors:

Review accounts payable list and prepare notification to vendors to close accounts. (The accountant may do this.)

Appendix V

The Ins and Outs of Tail Coverage

To this day I still get the occasional call from an attorney wanting to know how to go about purchasing a tail policy and my response is always the same. I need to make sure that the caller understands there really is no such thing as a tail "policy." Clarification on this point is important because confusion over what a tail is and isn't can have serious repercussions down the road. To make sure you don't end up running with any similar misperceptions, here's what you need to know.

An attorney leaving the practice of law can't purchase a malpractice insurance policy because he or she will no longer be actively practicing law. There simply is no practice to insure. This is why an attorney can't buy a tail "policy." What you are actually purchasing when you buy a tail is an extended reporting endorsement (ERE). This endorsement attaches to the final policy that is in force at the time of your departure from the practice of law. In short, purchasing an ERE, which is commonly referred to as tail coverage, provides an attorney the right to report claims to the insurer after the final policy has expired or been cancelled.

Again, under most ERE provisions, the purchase of this endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. For example, if a claim were to arise several years post retirement out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like never write a will for someone while in retirement. I know it can be tempting, but don't practice a little law on the side in retirement because your tail coverage will not cover any of that work.

Another often misunderstood aspect of tail coverage arises when an attorney semi-retires and makes a decision to purchase a policy with reduced limits in order to save a little money during the last few years of practice. The problem with this decision is insurance companies will not allow attorneys to bump up policy limits on the eve of a full retirement, again, because no new policy will be issued. For many attorneys, this means the premium savings that came with the reduced limits on the final policy or two will turn out not to have been worth it and here's why. All claims reported under the ERE will be subject to the available remaining limits of the final policy that was in force at retirement and this may not be enough coverage.

By way of example, if you were to reduce your coverage limits from one million per occurrence/three million aggregate to five hundred thousand per occurrence/five hundred thousand aggregate during the last year or two of active practice in order to save a little money, you will only have coverage of five hundred thousand per occurrence/five hundred thousand aggregate available to you for all of your retirement years assuming there was no loss payout under that final policy. In terms of peace of mind,

for many that would be an insufficient amount of coverage. Therefore, if you anticipate wanting those higher limits of one million/three million during your retirement years, keep those limits in place heading into retirement.

Unfortunately, while many attorneys hope to obtain an ERE at the end of their career, the availability of tail coverage isn't necessarily a given. For example, most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductible amounts paid on prior claims. An attorney's failure to comply with the terms and conditions of the policy; the suspension, revocation, or surrender of an insured's license to practice law; and an insured's decision to cancel the policy or allow coverage to lapse may also create an availability problem.

An attorney's practice setting is also relevant. Particularly for retiring solo practitioners, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a stated number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one's practice isn't a good idea as the opportunity to obtain a free tail could be lost. Review policy provisions or talk with your carrier well in advance of contemplating retirement in order not to unintentionally lose this valuable benefit.

The situation for an attorney who has been in practice at a multi-member firm is a bit different. Here, when an attorney wishes to retire, leave the profession, or is considering a lateral move and worried about the stability of the about-to-be-departed firm, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm's existing policy will continue to be in force post attorney departure. This isn't as much of a problem at it might seem in that the departing attorney will be able to rely on former attorney language under the definition of insured. However, because the definition of insured varies among insurers, you should discuss this issue with your firm's malpractice insurance representative so options can be identified and reviewed well in advance of any planned departure. That said, I can share that under two ALPS policies and as long as certain conditions are met, we provide some of the most comprehensive tail coverage options in the industry, to include free individual EREs in event of retirement, death, disability or a call to active military service.

Be aware that the period in which one can obtain an ERE can be quite limited. Most policies provide a 30-day or shorter window that will start to run on the effective date of the expiration or cancellation of the final policy. There are even a few very restrictive policies in the market that require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Given this, you should review relevant policy language well in advance of contemplating departing the profession as the opportunity to purchase an ERE is one you can't afford to miss.

The duration of tail coverage or more accurately the length of time under which a claim may be reported under an ERE varies depending upon what is purchased.

Coverage is generally available with a fixed or renewable one, two, three, four, or five-year reporting periods or with an unlimited reporting period. If available to you, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice.

The premium charge for an ERE is usually specified in the policy. Often the cost is a fixed percentage of the final policy's premium and can range from 100% to 300% depending on the duration of the purchased ERE.

Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed, now's the time. One final thought, be aware that if the unexpected ever happens such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney's estate if timely pursued in accordance with policy provisions. This is why even attorneys who are not nearing retirement should still have some basic awareness of ERE policy provisions because one just never knows.

Meet Vera.

The ALPS Virtual Ethics Risk Assessment, more affectionately known as Vera, was created to serve as your guide to quickly and effectively help you understand where you fall in terms of risk management within your firm.

Take 20 minutes to get your free risk assessment today.

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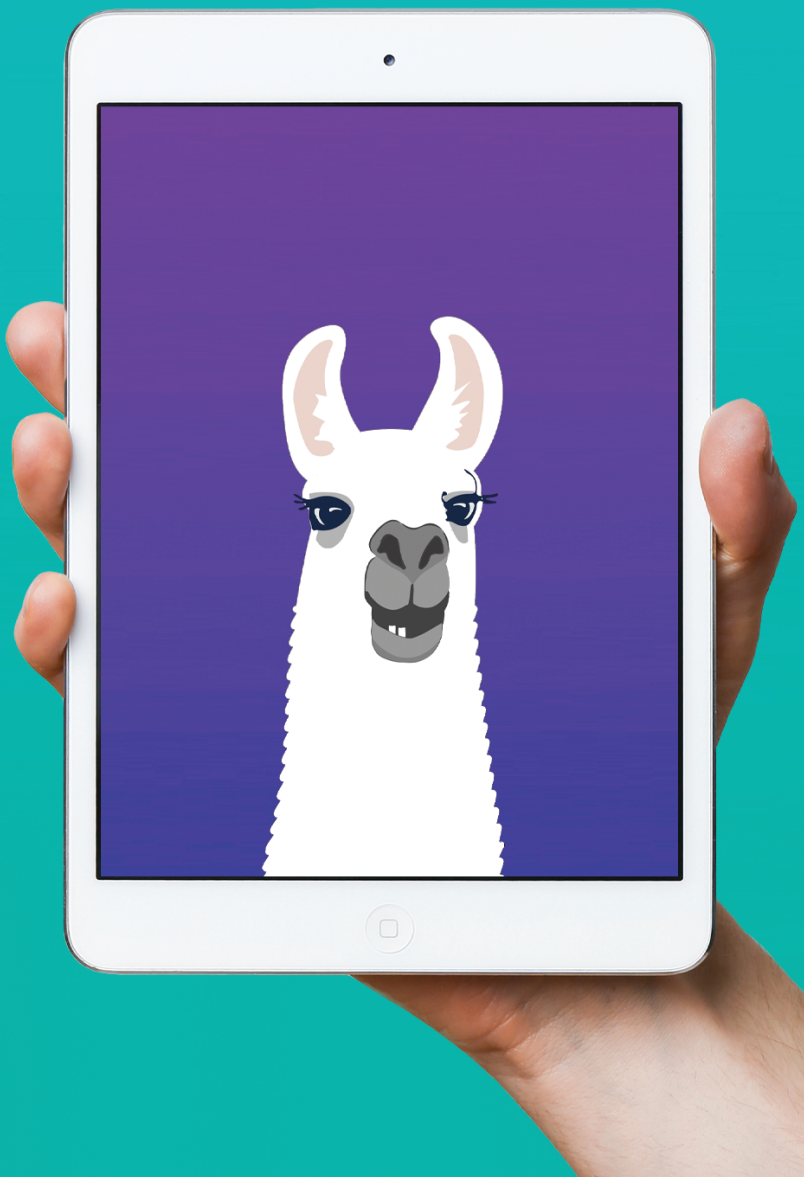

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*Specific policy language does apply. Please review to ensure actual coverage is understood.

COVERAGE FEATURES	ALPS BASIC	ALPS PREFERRED	ALPS PREMIER
All Claims Handled by Licensed Attorneys	✓	✓	✓
Supplementary Payments for Disciplinary Proceedings	$5000	$25,000 per attorney $75,000 in the aggregate	$50,000 per attorney $150,000 in the aggregate
Scope of Professional Services Covered	Includes Mediators, Court-Appointed Family Investigators & Notary Public	Expanded to include Title Insurance Agents, Author/Presenter of Legal Materials, & Lobbyist	Expanded further to include Expert Witness
Professional Services to Related Organization Covered	Must own 5% or less	Must own 10% or less	Must own 15% or less
Claims Expense Allowance Outside the Limit of Liability	✗	50% of the per claim limit (Up to $500,000)	50% of the per claim limit (Up to $1,000,000)
Insured's Consent to Settle Required	✗	✓	✓
Reduced Deductible for Voluntary Formal Mediation	✗	✓	✓
Annual Deductible Cap of Twice the Per Claim Amount	✗	✓	✓
Reduced Deductible if Engagement Letter used	✗	✗	✓
Supplementary Payments for Loss of Earnings	✗	✗	✓
Supplementary Payments for Subpoena Assistance	✗	✗	✓
Supplementary Payments for Public Relations Event	✗	✗	✓

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