

PLANNING AHEAD

*A Guide to Protecting Your Clients in the
Event of Your Disability or Death*

Published by
Allegheny County
Bar Association

*Raising the Bar
on Legal and Community Service*

to assist Pennsylvania lawyers

Published by
Allegheny County Bar Association
436 Seventh Avenue
400 Koppers Building
Pittsburgh, PA 15219

© Allegheny County Bar Association November 2015

INTRODUCTION

The ACBA Planning Ahead Subcommittee of Senior Lawyers Committee and Sole & Small Firm Practitioners Section began its work by reviewing guides published by the Oregon State Bar Liability Fund and the Indianapolis Bar Association. Much of the enclosed material is borrowed from these guides with the knowledge and authority of both organizations.

The Subcommittee is of the opinion that the materials presented in this publication are applicable to members of the Allegheny County Bar Association and is of the utmost importance to small offices and solo practitioners. The materials will be updated periodically.

Members of Planning Ahead Subcommittee June 2015

Kim A. Bodnar, Esq.
Amy J. Coco, Esq.
James W. Creenan, Esq.
Zelda G. Curtiss, Esq.
William R. Friedman, Esq.
Stuart C. Gaul, Jr., Esq.
Maureen P. Gluntz, Esq.
Marsha H. Grayson, Esq.
Barbara Griffin, Esq.
Ryan H. James, Esq.
Juli Marhefka, Esq.
Jeffrey L. Pollock, Esq.
Nancy L. Heilman, Esq.

CONTENTS

PART 1: Planning Ahead

The Duty to Plan Ahead
Terminology
Office Management
Start Now

PART 2: The Assisting Attorney

Assisting Attorney Arrangement
Client Notification
Conflicts of Interest
Who Does the Assisting Attorney Represent?
Discovery of Legal Malpractice or Ethical Violations
Future Representation of Planning Attorney's Clients

PART 3: Special Issues

Access to the Trust Account
File Retention Policy
Malpractice Coverage
Death of a Sole Practitioner
Sale of a Law Practice

PART 4: Forms and Checklists

Checklist—Checklist for Planning Ahead
Checklist—Checklist for Closing Your Own Office
Form—Letter Advising that Lawyer is Closing Law Office
Form—Agreement to Close Law Practice
Form—Limited Power of Attorney
Form—Letter of Understanding
Checklist—Checklist for Closing Another Attorney's Office
Form—Will Provisions

PART 1: PLANNING AHEAD

THE DUTY TO PLAN AHEAD

It is difficult to think about events that could render you unable to continue practicing law. Unfortunately, if you are disabled as a result of a freak accident, suffer from a serious, unexpected illness, or die while you maintain a law practice, your clients' interests may be unprotected.

For this reason, a lawyer's duty of diligence includes arranging to safeguard the clients' interests in the event of the lawyer's death, disability, impairment, or incapacity. Pennsylvania Rules of Professional Conduct ("RPC") 1.3. More particularly, comment 5 to RPC 1.3 provides that "[t]o 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 Pennsylvania Rules of Disciplinary Enforcement ("RDE") require the reporting of the incapacity or severe mental disability of an attorney to the Pennsylvania Disciplinary Board and outline the procedures which must be followed when determining a lawyer's ability to practice law. RDE 301. A conservator must be appointed when an attorney abandons his or her practice, dies or is transferred to inactive status and no person has been designated by the attorney to close the attorney's legal practice. RDE 321(a).

In addition, you should also consult with your professional liability insurance malpractice carrier to determine whether the provisions of your policy require that you make similar arrangements.

TERMINOLOGY

The term "Planning Attorney" as used in these materials refers to you, your estate, or your personal representative. The term "Assisting Attorney" refers to the lawyer with whom you have made arrangements to close your practice.

OFFICE MANAGEMENT

You can take a number of steps while you are still practicing to make the process of closing your law practice smooth and inexpensive. These steps include:

- making sure that the office procedures manual explains how to produce a list of client names and addresses for open cases
- maintaining information regarding leasing, office equipment, and vendors
- documenting employment, wage, and income tax payments
- keeping all deadlines and follow-up dates on your calendaring system
- thoroughly documenting client files
- keeping your time and billing records up-to-date

- familiarizing your Assisting Attorney with your office systems
- renewing your written agreement with the Assisting Attorney each year, and
- making sure that you do not keep clients' original documents, such as wills or other estate planning documents

The ACBA has prepared a Law Office Management Guide that has useful information for maintaining an organized law practice.

If your office is in good order, the Assisting Attorney will not have to charge more than a minimum of fees for closing your practice. Your law office will then be an asset that can be sold and the proceeds remitted to you or your estate. An organized law practice is a valuable asset. In contrast, a disorganized practice requires a large investment of time and money and is less marketable.

You may use the sample *Checklist for Planning Ahead* provided in this handbook, tailored to your particular practice, as a guide for organizing your legal practice and planning for your death, disability, impairment or incapacity.

You may use the sample *Checklist for Closing Your Own Office* provided in this handbook, tailored to your particular practice, as a guide for closing your legal practice prior to your death, disability, impairment or incapacity. The sample *Letter Advising that Lawyer is Closing Law Office* provided in this handbook can also be used to inform your clients and provide them with information about their files and further representation.

START NOW

We encourage you to select an Assisting Attorney; to follow the procedures outlined in this material; and to forward the name, address, and phone number of your Assisting Attorney to your professional liability insurance carrier, your spouse and children, or anyone else that you predict might be involved in closing or managing your practice in the event of your disability or death.

This is something you can do now—at little or no expense—to plan for your future and protect your assets. Do not put it off—start the process today.

PART 2: THE ASSISTING ATTORNEY

ASSISTING ATTORNEY ARRANGEMENT

The first step in the planning process is for the Planning Attorney to find someone, preferably an attorney, to close the Planning Attorney's practice in the event of his or her death, disability, impairment or incapacity. How the Planning Attorney structures the agreement with the Assisting Attorney will determine what the Assisting Attorney must do if he or she finds (1) errors in the files, such as missed time limitations, (2) errors in the Planning Attorney's Trust Accounts or (3) defalcations of client funds.

The arrangement that the Planning Attorney enters into with the Assisting Attorney should include a signed agreement authorizing the Assisting Attorney to:

- contact the Planning Attorney's clients for instructions on transferring their files
- obtain extensions of time in litigation and non-litigation matters where needed, and
- provide all relevant people with notice of closure of the Planning Attorney's law practice.

The agreement could also include provisions that give the Assisting Attorney the authority to:

- wind down the Planning Attorney's financial affairs
- provide the Planning Attorney's clients with a final accounting and statement
- collect fees on the Planning Attorney's behalf, and
- liquidate or sell the Planning Attorney's practice.

Arrangements for payment by the Planning Attorney to the Assisting Attorney for services rendered also can be included in the agreement.

The sample *Agreement to Close Law Practice* form provided in this handbook authorizes the Assisting Attorney to transfer client files, sign checks on the Planning Attorney's general and trust accounts, and close the Planning Attorney's practice. This form also provides for payment to the Assisting Attorney for services rendered, designates the procedure for termination of the Assisting Attorney's services and provides the Assisting Attorney with the option to purchase the Planning Attorney's law practice.

At the beginning of the relationship, it is also crucial for the Planning Attorney and the Assisting Attorney to establish the scope of the Assisting Attorney's duty to the Planning Attorney and the Planning Attorney's clients. Discussing and documenting these issues at the beginning of the relationship will help to avoid misunderstandings later when the Assisting Attorney interacts with the Planning Attorney's clients. If these issues are not discussed and/or in writing, the Planning Attorney and the Assisting Attorney may be surprised to find that the Assisting Attorney 1) has an obligation to inform the Planning Attorney's clients about a potential malpractice claim or 2) may be required to report the Planning Attorney to the Pennsylvania Disciplinary Board in the event of the discovery of unethical violation.

The issue of having sufficient funds to pay an Assisting Attorney and necessary secretarial staff may occur in the event of the Planning Attorney's disability, incapacity, or impairment. To prevent or minimize these problems, the Planning Attorney may want to maintain disability

insurance in an amount sufficient to allow for the expenses incurred in maintaining or closing the law practice.

If the Assisting Attorney must act on the behalf of the Planning Attorney, the sample *Checklist for Closing Another Attorney's Office* provided in this handbook will be a helpful guide.

CLIENT NOTIFICATION

Once the Planning Attorney has made arrangements with an Assisting Attorney, the next step is to provide the Planning Attorney's clients with information about the arrangement. The easiest way to do this is to include the information in the Planning Attorney's retainer agreements and engagement letters. This practice provides clients with information about the arrangement and gives them an opportunity to object. A client's signature on a retainer agreement or a countersigned engagement letter provides written authorization for the Assisting Attorney to proceed on the client's behalf if necessary.

Sample Client Consent Clauses

In the event that I, [name of Planning Attorney], die, suffer a serious disability or incapacitation, disappear or otherwise cannot attend to my client matters, attorney [Assisting Attorney's name] may review your client file for the limited purpose of contacting you to inquire about where you prefer the file to be transferred or otherwise handled. [Assisting Attorney's name] will be acting as co-counsel on your matter only in the event of my death, serious disability, or disappearance, and his/her limited review of your file is not intended to waive attorney-client privilege or client confidentiality connected to this representation.

OR

[Name of Planning Attorney] may appoint another attorney to assist with the closure of the law practice in the event of my death, disability, impairment, or incapacity. In such event, Client agrees that the Assisting Attorney can review the Client's file to protect the Client's rights and assist with the closure of the Planning Attorney's law practice.

CONFLICTS OF INTEREST

Whether or not the Assisting Attorney is representing the Planning Attorney, the Assisting Attorney must be aware of conflict of interest issues and must do a conflict of interest check if he or she 1) is providing legal services to a client of the Planning Attorney or 2) reviewing confidential file information to assist with transferring clients' files.

Once again, the best way to avoid these problems is to have a written agreement with the Planning Attorney and, when applicable, with the Planning Attorney's former clients. If there is no written agreement clarifying the obligations and relationships, an Assisting Attorney may find that the Planning Attorney believes the Assisting Attorney is representing the Planning Attorney's interests. At the same time, the former clients of the Planning Attorney may also believe that the Assisting Attorney is representing their interests. It is important to keep in mind

that an attorney-client relationship can be established by the reasonable belief of a would-be client.

WHO DOES THE ASSISTING ATTORNEY REPRESENT?

If the Assisting Attorney represents the Planning Attorney, the Assisting Attorney would owe his or her fiduciary obligations to the Planning Attorney. Therefore, the Assisting Attorney should make clear to the Planning Attorney's clients, preferably in writing, that Assisting Attorney does not represent them and that they should seek independent counsel. If the Assisting Attorney represents the Planning Attorney, the Assisting Attorney would be limited to disclosing only the information that the Planning Attorney wishes to disclose. For example, if the Planning Attorney suffered from a condition of a sensitive nature and did not want the Assisting Attorney to disclose this information to the client, the Assisting Attorney could not do so.

DISCOVERY OF LEGAL MALPRACTICE OR ETHICAL VIOLATIONS

The Assistant Attorney's obligations with respect to the discovery of malpractice or ethical violations will depend on whether the Assisting Attorney is representing the Planning Attorney. If the Assisting Attorney is representing the Planning Attorney, the engagement agreement should include provisions discussing what happens in the event Assisting Attorney discovers errors.

If the Assisting Attorney represents the Planning Attorney, the Assisting Attorney's duties run to the Planning Attorney. Therefore, Assisting Attorney will be subject to RPC 1.6 and must keep information related to the representation of the Planning Attorney confidential unless the Planning Attorney otherwise agrees. RPC 1.4 requires that the Assisting Attorney communicate with the Planning Attorney regarding his or her obligations upon the discovery of a breach of duty to a client or an ethical violation. The Assisting Attorney must then advise the Planning Attorney regarding his or her obligations relative to the discovery of the issues, which will usually mean disclosure of the errors to the clients and notice to the professional liability carrier. Some ethical violations may require self-reporting to the Disciplinary Board, depending on the nature of the violation. The Assisting Attorney should discuss with the Planning Attorney some important maxims when an error is discovered:

1. The Planning Attorney has a duty under RPC 1.4 to keep his client informed regarding the case and upon discovery of an error may have a personal interest conflict under RPC 1.7.
2. The Planning Attorney should not conceal or misrepresent what occurred. To do so would likely be misconduct, compounds the error, and perhaps guarantees a disciplinary proceeding or a civil claim that might otherwise have been avoided.
3. The Planning Attorney should not become defensive and blame the client for the mistake or say things that would antagonize the client.
4. The Planning Attorney should not under any circumstances try to settle the claim directly with the client unless the client is first advised in writing to seek independent legal advice. See RPC 1.8, Comment 15. Transactions with clients are presumptively fraudulent. Also, settling with the client without the permission of your professional liability carrier may result in the loss of coverage.

5. The Planning Attorney should not attempt to condition any settlement of the client's civil claim on the client's agreement not to complain to the disciplinary authority of your jurisdiction or on the client's agreement not to cooperate in any disciplinary investigation or proceeding.

6. The Planning Attorney should not make any unnecessary or inappropriate admissions such as that he or she has committed malpractice, that he or she caused the client's loss or that he or she owes the client a certain amount as the result of the error. These "mea culpa" type admissions can be used in later proceedings as party admissions, and they may not be accurate. In legal malpractice cases there are many defenses that may be asserted to defeat a finding of liability. The claim may be of dubious merit or the lawyer's error may not be the cause of any damage to the client. In addition, such admissions may constitute a failure to cooperate with the carrier in its defense of the case and may result in loss of coverage. Instead the Planning Attorney should be factual in advising the client what happened, and advise that the client has the right to seek independent advice as to what to do. The Planning Attorney should never be the one advising the client on the merits of an action against himself (either for or against!).

The Assisting Attorney should be very careful to make sure the clients understand that the Assisting Attorney represents Planning Attorney's interests so that the clients are not under the impression that the Assisting Attorney is acting as their lawyer. This should be done in writing. The Assisting Attorney must also be careful not to make any misrepresentations to a Planning Attorney's client. See RPC 1.4 and comments. For example, if the Planning Attorney had previously told the client that a complaint had been filed and the complaint had not been filed, the Assisting Attorney should not say or do anything that would lead the client to believe the complaint had been filed.

The Planning Attorney may consent to the Assisting Attorney informing the Planning Attorney's former clients of any malpractice or ethical errors. This would not be permission to represent former clients on malpractice actions against the Planning Attorney. It would only authorize the Assisting Attorney to inform the Planning Attorney's former clients that a potential error exists and that they should seek independent counsel, essentially to give the notice that the Planning Attorney would have been required to give to his or her clients.

If the Assisting Attorney is not the Planning Attorney's attorney, he or she may have an ethical obligation to report the Planning Attorney's errors to the appropriate professional authority. RPC 8.3(a). In addition, the Assisting Attorney may be prohibited from representing the Planning Attorney's clients on some, or possibly all, matters. If Assisting Attorney does not have an attorney-client relationship with the Planning Attorney and is the new lawyer for the Planning Attorney's former clients, Assisting Attorney should inform the client (the Planning Attorney's former client) of the error and advise him or her regarding claims against the Planning Attorney. The Assisting Attorney may wish to limit his or her undertaking to the Planning Attorney's clients with respect to not undertaking any claims against Planning Attorney. In that case, Assisting Attorney must do so in writing in the engagement agreement with the clients. Assisting Attorney should still advise the client of the error and should advise the client to seek independent counsel relative to matter.

Not every ethical violation or error gives rise to a duty to give notice to the client or make a report to the malpractice carrier. Because the issue of whether a report is required can be very factual in nature, it is recommended that Assisting Attorney (or Planning Attorney) contact an ACBA Ethics Duty Officer regarding his or her ethical duties related to the discovery of an error.

Some malpractice carriers have hotlines to assist insureds as to whether a report of a claim or potential claim is necessary. Planning Attorney and/or Assisting Attorney should review the malpractice policy to determine when notice is required. Some policies require notice of all potential claims, and some only of actual claims, such as a demand for money or receipt of suit papers. The definition of actual claim or potential claim may change from policy to policy as well. For example, at least one policy has defined receipt of a request for the client file materials as a potential claim.

If, as Assisting Attorney, you discover errors in trust fund accounting, your duties again may depend on whether you represent Planning Attorney, the Planning Attorney's former clients, or none of the above. This will determine to whom Assisting Attorney's duties run. If Assisting Attorney represents Planning Attorney, the duties run to Planning Attorney and Assisting Attorney should counsel Planning Attorney about the errors and remedying them. If you are the attorney for the Planning Attorney and the Planning Attorney is deceased, you should contact the personal representative of the estate. If the Planning Attorney is alive but unable to function, Assisting Attorney may have to disburse what he or she can and inform the Planning Attorney's former clients that they have the right to independent counsel.

If you are not the attorney for the Planning Attorney and you are not representing any of the former clients of the Planning Attorney, you may still have a fiduciary obligation (for example as an authorized signer on the trust account) to notify the clients of the shortfall, and you may have an obligation under RPC 8.3 to report the Planning Attorney to the Pennsylvania Disciplinary Board.

If you are the attorney for a former client of the Planning Attorney, you have an obligation to inform the client about the shortfall and to advise the client of available remedies such as pursuing the Planning Attorney for the shortfall, filing a claim with the Pennsylvania Fund for Client Security, and filing a complaint with the Disciplinary Board. You may also have an obligation under RPC 8.3 to report the Planning Attorney to the Disciplinary Board.

If you are a friend of the Planning Attorney, this is a particularly important issue. You should determine ahead of time whether you are prepared to assume 1) the obligation to inform the Planning Attorney's former clients of the Planning Attorney's ethical errors and 2) the duty to report the Planning Attorney to the Pennsylvania Disciplinary Board if a reportable violation occurs. If you do not want to inform clients about possible ethics violations, you must explain to your clients (the former clients of Planning Attorney) that you are not providing the clients with any advice on any ethical violations of the Planning Attorney. You should advise the client, in writing, to seek independent representation on these issues. Limiting the scope of your representation, however, does not eliminate your duty to report under RPC 8.3 if the violations discovered rise to that level.

FUTURE REPRESENTATION OF PLANNING ATTORNEY'S CLIENTS

Whether the Assisting Attorney is permitted to represent the former clients of the Planning Attorney depends on 1) if the clients want the Assisting Attorney to represent them and 2) who else the Assisting Attorney represents.

If the Assisting Attorney represents the Planning Attorney, the Assisting Attorney is unable to represent the Planning Attorney's former clients on any matter against the Planning Attorney.

This would include representing the Planning Attorney's former client on a malpractice claim, ethics complaint, or fee claim against the Planning Attorney. If the Assisting Attorney does not represent the Planning Attorney, the Assisting Attorney is limited by conflicts arising from the Assisting Attorney's other cases and clients. The Assisting Attorney must check his or her client list for possible conflicts before undergoing representation or in reviewing confidential information of a former client of the Planning Attorney.

Even if a conflict check reveals that the Assisting Attorney is permitted to represent the client, the Assisting Attorney may prefer to refer the case. A referral is advisable if the matter is outside the Assisting Attorney's area of expertise or if the Assisting Attorney does not have adequate time or staff to handle the case. In addition, if the Assisting Attorney is a friend of the Planning Attorney, bringing a legal malpractice claim or fee claim against him or her may make the Assisting Attorney vulnerable to the allegation that the Assisting Attorney did not zealously advocate on behalf of his or her new client. To avoid this potential exposure, the Assisting Attorney should provide the client with names of other attorneys or refer the client to the Allegheny County Bar Association Lawyer Referral Service.

PART 3: SPECIAL ISSUES

ACCESS TO THE TRUST ACCOUNT

When arranging to have someone take over or wind down your law practice's financial affairs, you should also consider whether you want the person to have access to your trust account. If you do not make arrangements to allow someone access to the trust account, your clients' money will remain in the trust account until a court orders access. For example, if you become physically, mentally or emotionally unable to conduct your law practice and no access arrangements were made, your clients' money will most likely remain in your trust account until the Orphans' Court assumes jurisdiction over your practice and accounts. Therefore, if you suddenly become unable to continue your practice, an Assisting Attorney is able to transfer money from your trust account to pay appropriate fees, to provide your clients with settlement checks, and to refund unearned fees. In many instances, the client needs money that he or she has on deposit in your trust account in order to hire a new lawyer, and a delay puts the client in a difficult position. This is likely to prompt ethics complaints, IOLTA claims, malpractice complaints or other civil suits.

On the other hand, allowing access to your trust account is a serious matter. You must give careful consideration to whom you give access and under what circumstances. If someone has access to your trust account and that person misappropriates money, your clients will suffer damages and you may be held responsible. Therefore, when making these important decisions, you must consider the available options, weigh the relative risks and make the best choice that you can.

If you want to allow access to your trust account, there are several approaches. One approach is to only give your Assisting Attorney access during a specific time period or after a specific event and to allow the Assisting Attorney to determine whether the event has occurred. Another approach is to have someone else (such as a spouse, best friend, colleague or family member) hold your power of attorney until he or she determines that the specific event has occurred. A third approach is to provide the Assisting Attorney with access all of the time.

Depending on the bank where the accounts are maintained, one approach may work better than another. Some banks require only a letter signed by both parties granting authorization to sign on the account. The sample *Agreement to Close Law Practice* form provided in this handbook should be legally sufficient to grant the Assisting Attorney authority to sign on your trust account.

However, you and the Assisting Attorney may also want to sign a limited power of attorney. The sample *Limited Power of Attorney* form provided in this handbook could be used specifically to grant the Assisting Attorney the authority to sign on all of your bank and trust accounts. It also provides you and the Assisting Attorney with a document limited to bank business that can be given to the bank. Therefore, the bank does not know all the terms and conditions of the agreement between you and the Assisting Attorney. If you choose this approach, you should obtain written confirmation that the bank will honor your limited power of attorney or other written agreement. Otherwise, you may think you have taken all the necessary steps to allow access to your trust account, yet when the time comes, the bank may not allow the Assisting Attorney access. Most banks prefer their own power of attorney form. However, be aware that power of attorney forms provided by the bank are generally an unconditional authorization to sign on your account and include an agreement to indemnify the bank.

If you are going to use the form provided by your bank or your own limited power of attorney, you may want to have someone (such as your spouse, family member, personal representative, or best friend) hold the power of attorney until the contingency occurs. This can be documented in a letter of understanding, signed by you and the trusted friend or family member. A sample *Letter of Understanding* is provided in this handbook. When the event occurs, the trusted friend or family member provides the Assisting Attorney with the limited power of attorney.

If you want the Assisting Attorney to have access to your accounts contingent upon a specific event or during a particular time period, you must decide how you are going to document the agreement. The terms of the agreement must be specific and should state how to determine whether the event has occurred. Such events could include the following: 1) after the Assisting Attorney has obtained a letter from a physician that you are disabled or incapacitated; 2) when the Assisting Attorney, based on reasonable belief of necessity, determines; or 3) a specific period of time, for example, a period during which you are on vacation. These same issues apply if you choose to have a family member or friend hold a general power of attorney until the event or contingency occurs. Both parties need to know what to do and when to do it. Likewise, in order to avoid problems with the bank, the terms should be specific, and it must be easy for the bank to determine whether the conditions have been met.

Another approach is to allow access to your trust account all of the time by designating the Assisting Attorney as an authorized signer. When the Assisting Attorney is authorized to sign on your trust account, he or she has complete access to the account. This approach requires that the Assisting Attorney sign the appropriate cards and paperwork at the bank. The Assisting Attorney can then write checks, withdraw money, or close the trust account at any time, even if you are not dead, disabled, impaired, or for some other reason unable to conduct your business affairs. Because you are unable to control the signer's access, if you choose to have an authorized signer, your choice of signer is very important and crucial to the protection of your clients' interests, as well as your own. It is very important to carefully choose the person you authorize as a signer and, when possible, to continue monitoring your accounts.

As an authorized signer on the Planning Attorney's trust account, you would have a duty to properly account for the funds belonging to the former clients of the Planning Attorney. This duty could be in conflict with your duty to the Planning Attorney if (1) you were hired to represent him or her on issues related to the closure of his or her law practice and (2) there were errors or defalcations in the trust account. Because of this potential conflict, it is probably best to choose to be an authorized signer or to represent the Planning Attorney on issues related to the closure of his or her practice, not both.

FILE RETENTION POLICY

An effective file retention policy balances a lawyer's obligation to clients to preserve client property, the need to manage risk of future claims, and the need to keep control over all the papers and data that accumulate over time driving up storage costs. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2007-100 and Formal Opinion 99-120 serve as guidance for Pennsylvania lawyers in dealing with client files and records. The committee advises that law firms should adopt a policy on record retention and destruction, with decisions made by lawyers, not staff persons. That policy should be communicated to clients in the initial engagement letter. The first step in the file retention process begins when you are retained by the client. Pennsylvania law provides essentially that unless otherwise agreed, the client owns the file. Accordingly, the best place to "otherwise agree" is in your engagement agreement. Your fee agreement or engagement letter should notify the client of your file retention policy and specifically state that you will be destroying the file and when that will occur. The client's signature on the fee agreement will provide consent to destroy the file. In addition, your engagement letter should remind clients that you will be destroying the file after certain conditions are met.

Formal Opinion 2007-100 sets forth the following suggested minimum retention periods.

- Notification of professional liability insurance—Records of required disclosures must be maintained for 6 years following termination of representation.
- Criminal—Retain until all appeals and post-conviction habeas periods have expired.
- Divorce—Following order of dissolution, retain until time periods for performance of any terms under court order or any settlement agreement have expired.
- Personal injury—Retain until all claims against potential defendants are exhausted.
- Minors—Retain files containing settlements for minors until two years following attainment of age of majority.
- Real estate—Retain five years after closing on sale or foreclosure.
- Estate planning—Retain until client's death plus probate period.
- Probate—Retain until estate is settled and all IRS audit periods expired.
- IRS tax records—Retain for seven years. IRS regulations give six years to pursue any omission of more than 25% of income.
- Contract litigation—Retain five years after satisfaction of judgment or five years after filing if not brought to trial.
- Bankruptcy—Retain five years after discharge or payment or discharge of trustee or receiver.

However, the opinion makes clear that the lawyer must consider their clients' interests, needs and requests, applicable court orders and any other legal standards when developing their firm file retention policy. For example, a file for the preparation of an antenuptial agreement requires significantly different considerations than one for an automobile accident lawsuit that is settled.

The second step in the file retention is when the file is closed. When closing the file, establish a destruction date and diary that date. If you have not already obtained the client's permission to destroy the file (in the fee agreement or engagement letter), you can get written permission when you close the file. Or you can make sure that the client has a complete copy of the file. This includes all pleadings, correspondence, and other papers and documents necessary for

the client to construct a file for personal use. If you choose the latter alternative, be sure to document that the client has a complete file. This means that the file you have in your office is yours (and can be destroyed without permission) and the one the client has is the client's copy.

Whenever possible, do not keep original papers (including estate plans or wills) of clients. When closing the file, return original documents to clients to transfer them to their new attorney. Be sure to get a receipt for the property and keep the receipt in your file.

Closed files should be organized by years or organized into two groups: files that are six years and older (or whatever year you choose for consideration for destruction) and files that are less than six years old. If possible, however, separate closed client files into groups according to the year the work was completed so that each year you know which files to review for destruction.

You should also keep an inventory of the files you destroy and the destruction dates. Before destroying any client file, review it carefully. Some files should be kept longer than the suggested minimum retention periods noted above. Others may contain conflict information that should be added to your conflict database or original documents of the client which should never be destroyed. Always retain proof of the client's consent to destroy the file. This is easily done by including the client's consent in your fee agreement or engagement letter and retaining the letters with your inventory of destroyed files.

For the purpose of risk management, you should consider keeping indefinitely those documents that cannot be reproduced. For example, the correspondence (including electronic) may be the best record of what a lawyer has done in a case and would be difficult to reproduce. However, documents such as pleadings that can be reconstructed from the court files are less important to maintain indefinitely.

Pennsylvania Rule of Civil Procedure 1.15 regarding client trust accounts requires complete records of the receipt, maintenance, and disposition of Rule 1.15 funds and property to be preserved for a period of five years after termination of the client-lawyer or fiduciary relationship or after distribution or disposition of the property, whichever is later.

Client file materials cannot simply be put in the trash can. Lawyers are obligated to protect the confidential information of their clients. Likewise, federal laws such as the Health Insurance Portability and Accountability Act (HIPAA) and the Sarbanes-Oxley Act (SOX) require secure data destruction. Therefore, shredding or incineration are generally the best methods for file destruction.

SAMPLE FILE RETENTION AND DESTRUCTION CLAUSE

File Retention and Destruction

At the conclusion of this matter, we will retain your legal files for a period of ___ years after we close our file. At the expiration of the ___-year period, we will destroy these files unless you notify us in writing that you wish to take possession of them. We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying, and delivering such files.

We regard the file that will be created in our offices for this representation to be property of our firm. We recognize that you will have been sent copies of most everything that we have sent out or received in the course of representation. At the end of this engagement, we will retain such portions of our file as we deem necessary to our purposes. At that time, you will have the following options related to documents or copies of documents that we do not need to retain in our files: 1) Have us return such copies to you, at your expense; 2) Authorize us to destroy the same, at your expense; 3) Request us to continue to store documents and records, at your expense. Unless you advise us to the contrary, we will assume that you elect option (2) and we will destroy or discard such records, at your expense.

MALPRACTICE COVERAGE

Almost all lawyers' professional liability insurance (LPL) is written on a claims-made basis. In order for a claim to be covered, the claim has to be first made against the policyholder (Planning Attorney) and reported to the insurance company during the current policy period (claims-made and reported coverage). If a policy expires, and a claim is then made, the lawyer or firm will not have coverage under that policy. Some policies will provide coverage for claims made during the policy period, provided that the claim is reported within a reasonable time after the policy expiration date, usually 30 to 60 days. Lawyers Professional Liability policies are known as "claims made" policies. Extended Reporting Coverage ("ERC") provides coverage for claims arising from work performed prior to the expiration of the policy period that are made and reported after the time in which to report a claim has expired. It is sometimes call "tail coverage."

The Planning Attorney should review his or her policy to determine what ERC coverage is available to him or her if the attorney becomes disabled, dies, or retire, and provide this information to the Assisting Attorney. Many policies have an automatic extended reporting period at no-cost for a disabled or deceased lawyer. This is known as a "free tail." The current bar-endorsed carrier's policy provides for the "tail" at no charge as long as the lawyer was insured with the bar-endorsed carrier for 3 consecutive years. The carrier requires an original copy of the death certificate to issue the endorsement or a letter from a doctor indicating that the attorney is disabled and unable to perform his or her job duties. The policy must have been paid in full.

Retirement often presents a more difficult analysis. An extended reporting period (ERP) in a claims-made policy allows an insured to report a claim to an insurer after a policy has terminated, provided the claim was the result of an act that took place while the policy was in force. In addition, under some, but not all ERP provisions, the insured is permitted to report "incidents" to the insurer that have the potential to produce claims in the future which would secure coverage for those incidents/potential claims.

If an insured has had professional liability coverage written on a claims-made basis throughout the course of the attorney's career, it will be necessary to continue coverage even after the attorney is no longer practicing. This is because under claims-made policies, for coverage to apply, a policy must be in force on the date when a claim is made against the insured. It is not uncommon for claims to be made against lawyers many years after the allegedly wrongful act took place. For example, a Planning Attorney who practices in estate planning may have a

claim made regarding a will drafted many years earlier. Accordingly, even if the Planning Attorney ceases to practice law, he or she may need to continue to purchase coverage to avoid gaps because claims are often made many years after an act has taken place.

Some LPL policies offer an ERP provision for retiring attorneys at no cost provided they meet certain requirements, such as having been continuously insured by the carrier for a certain period of time, and leaving private practice. The bar-endorsed carrier's policy provides for a non-practicing ERP ("tail") when a lawyer ceases the private practice of law, provided the lawyer was continually insured through the carrier for 3 consecutive years.

If the Planning Attorney is a solo practitioner, the tail is usually issued immediately upon retirement or ceasing the private practice and the lawyer will report any claims under the tail. If the Planning Attorney leaves private practice and his or her law firm remains an ongoing entity, the lawyer is usually covered as a former member or employee of the firm for claims arising from services rendered while she/he was with the firm, assuming the firm retains its coverage. However, if the firm divides or dissolves at some point thereafter, and does not buy ERC for the firm upon its termination, then there may be no coverage for the lawyer for any claim made thereafter.

If a "free tail" is not available, the Planning Attorney may be able to purchase an individual tail endorsement when he or she leaves a firm or retires. The terms of the policy remain the same; only the time period for reporting claims resulting from work done is extended.

A tail may be unavailable, or the insurance company may require separate underwriting before issuing the tail endorsement. An unlimited tail can cost 2.5 times the individual attorney's share of the firm's annual premium.

If the Planning Attorney intends to continue to practice, even on a very limited basis, the Planning Attorney should discuss with his or her agent the availability, cost of coverage, and effect of continuing to practice on any ERC. Planning Attorney will likely need to purchase a new policy to cover that work. The new policy may be assigned a "retroactive date of inception," which means work performed before that date is not covered. Lawyers who retire from private practice but continue to do incidental or volunteer legal representation should be aware that work performed after the date stated on the tail endorsement will not be covered. Coverage may be available for part-time or "semi-retired" lawyers who continue to accept new matters. In either case, the lawyer and the firm would be wise to choose the same insurance company. This reduces the risk of a coverage dispute between carriers if a claim is made.

The Planning Attorney is cautioned to discuss with his or her agent regarding the availability of the ERP when he or she is considering leaving the private practice of law to make certain there are no gaps in coverage.

Some firms carry excess coverage above the carrier's primary limits. If the Planning Attorney is a sole practitioner with excess coverage (or if the firm plans to drop excess coverage when the Planning Attorney leaves private practice), the Planning Attorney should contact the excess carrier before leaving practice to ask about Extended Reporting Coverage ("ERC") at the excess level. In most cases, an extended reporting period for future claims is available for a period of up to five years for an additional premium, but this optional coverage can be purchased only during the first few days after termination or expiration of the existing excess coverage policy. Some firms carry excess coverage above the carrier's primary limits. If the Planning Attorney is

a sole practitioner with excess coverage (or if the firm plans to drop excess coverage when the Planning Attorney leaves private practice), the Planning Attorney should contact the excess carrier before leaving practice to ask about ERC at the excess level. In most cases, an extended reporting period for future claims is available for a period of up to five years for an additional premium, but this optional coverage can be purchased only during the first few days after termination or expiration of the existing excess coverage policy.

DEATH OF A SOLE PRACTITIONER

If you authorize another lawyer to administer your practice in the event of death, disaster, impairment, or incapacity, that authority terminates when you die. The representative of your estate has the legal authority to administer your practice. See 20 Pa.C.S.A. §§301 and 3311(a). Your personal representative should be told about your arrangement with the Assisting Attorney and about your desire to have the Assisting Attorney carry out the duties of your agreement. The personal representative can then authorize the Assisting Attorney to proceed.

It is imperative that you have an up-to-date Will nominating an executor (and an alternate if the first nominee cannot or will not serve) so that probate proceedings can begin promptly and the executor can be appointed without delay. You can also include a specific provision in your Will regarding the closing of your law practice, a sample of which is provided in this handbook. If you do not have a Will, all of your intestate heirs have the right to be appointed as the administrator of your estate and there may be a dispute as to who should be appointed as such. In addition, your Will can provide that the personal representative shall serve without bond. Absent such a provision, a relatively expensive fiduciary bond will have to be obtained before the personal representative is authorized to act.

As a sole practitioner, your law practice may be the only asset subject to probate. Other assets may pass outside probate to a surviving joint tenant or to a designated beneficiary. This means that, unless you keep enough cash in your law practice bank account, there may not be adequate funds to retain the Assisting Attorney or to continue to pay your clerical staff, rent and other expenses during the transition period. It will take some time to generate statements for your legal services and to collect the accounts receivable. Your accounts receivable may not be an adequate source of cash during the time it takes to close your practice. Your Assisting Attorney may be unable to advance expenses or may be unwilling to serve without pay. One solution to this problem is to maintain a small insurance policy and name your estate as the beneficiary, or your surviving spouse or other family members can be named as the beneficiary with instructions to lend the funds to the estate if needed.

Pennsylvania law gives broad powers to a personal representative to continue a decedent's business to preserve its value, sell, or wind down the business and hire professionals to help administer the estate. 20 Pa.C.S.A. §§3311(a) and 3314. However, for the personal representative's protection, you may want to include language in your Will that expressly authorizes that person to arrange for closure of your law practice. The appropriate language will depend on the nature of the practice and the arrangement that you make ahead of time. For an instructive and detailed Will for a sole practitioner, see Thomas G. Bousquet, *Retirement of a Sole Practitioner's Law Practice*, 29 Law Economics & Management 428 (1989).

SALE OF A LAW PRACTICE

The Rules of Professional Conduct provides guidelines for the sale or purchase of a law practice. RPC 1.17.

PART 4: FORMS AND CHECKLISTS

ALL FORMS AND CHECKLISTS CONTAINED IN THIS HANDBOOK ARE SAMPLES AND SHOULD BE MODIFIED AS IS APPROPRIATE FOR YOUR PRACTICE.

CHECKLIST FOR PLANNING AHEAD

- My fee agreements, retainer agreements, and engagement letters state that I have arranged for an Assisting Attorney to close my practice in the event of my death, disability, impairment, or incapacity.
- I have a thorough and up-to-date office procedure manual that includes information on:
 - How to check for a conflict of interest;
 - How to use the calendaring system;
 - How to generate a list of active client files, including client names, addresses, and phone numbers;
 - Where client ledgers are kept;
 - How the open/active files are organized;
 - How the closed files are organized and assigned numbers;
 - Where the closed files are kept and how to access them;
 - The office policy on keeping original documents of clients;
 - Where original client documents are kept;
 - Where the safe deposit box is located and how to access it;
 - The bank name, address, account signers, and account numbers of all law office bank accounts;
 - The location of all law office bank account records (trust and general);
 - Where to find or who knows about the computer passwords;
 - How to access voice mail (or answering machine and email) and the access code numbers.
- My file deadlines, including follow-up deadlines, are on my calendaring system.
- My files are documented.
- My time and billing records are up-to-date.
- I avoid keeping original documents of clients, such as wills and other estate planning documents.
- I have a written agreement that outlines the responsibilities involved in closing my practice with an attorney who will close my practice (my "Assisting Attorney"). My Assisting Attorney is / is not also my personal attorney. My Assisting Attorney is sensitive to conflict of interest issues.
- If my written agreement authorizes the Assisting Attorney to sign trust or general account checks, I have followed the procedures required by my bank. I have decided whether I want to authorize access at all times, at specific times or only upon the happening of a specific event. If necessary, we have signed bank forms authorizing the Assisting Attorney to have access to my accounts.
- I have chosen my Assisting Attorney wisely – he or she may have access to my clients' funds.

- I familiarized my Assisting Attorney with my office systems, and I keep him or her apprised of office changes. I also advise my Assisting Attorney of insurance coverage and any changes in coverage.
- I introduced my Assisting Attorney to my office staff. My staff knows where I keep the written agreement and how to contact the Assisting Attorney if an emergency occurs before or after office hours. If I practice without regular staff, my Assisting Attorney knows whom to contact (the landlord, for example) to gain access to my office.
- I informed my spouse or closest living relative and the personal representative of my estate of the existence of my written agreement and how to contact the Assisting Attorney.
- I renew my written agreement with my Assisting Attorney each year. If I include the name of my Assisting Attorney in my fee agreement, I make sure it is current.
- I maintain a file consisting of current retainer Agreements between clients and attorney.

CHECKLIST FOR CLOSING YOUR OWN OFFICE

- Finalize as many active files as possible.
- Write to clients with active files advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this. (See sample *Letter Advising That Lawyer Is Closing His/Her Law Office.*)
- For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.
- For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.
- In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
- Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as attorney of record or have a Substitution of Attorney filed with the court.
- Make copies of files for clients. Retain your original files. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys. If a client is picking up the file, original documents should be returned to the client and copies should be kept in your file.
- All clients should be told where their closed files will be stored and whom they should contact in order to retrieve them. Obtain all clients' permission to destroy the files after approximately five years. (See File Retention and Destruction provided in Chapter 5.) 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.
- Send the name, address, and phone number of the person who will be retaining your closed files to the central filing place for documents filed with probate court or other place designated by the Allegheny County Bar Association. Also send them your name, current address, and phone number.
- If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.

LETTER ADVISING THAT LAWYER IS CLOSING HIS/HER LAW OFFICE

Re: [Name of Case]

Dear [Name]:

As of [date], I will be closing my law practice due to [provide reason, if possible]. I will be unable to continue representing you on your legal matters.

I recommend that you immediately hire another attorney to handle your case for you. You can select any attorney you wish, or I would be happy to provide you with a list of local attorneys who practice in the area of law relevant to your legal needs. Also, the Allegheny County Bar Association provides a Lawyer Referral Service that can be reached at 412-261-5555.

When you select your new attorney, please provide me with written authority to transfer your file to the new attorney. If you prefer, you may come to our office and pick up a copy of your file and deliver it to that attorney yourself.

It is imperative that you obtain a new attorney immediately. [Insert appropriate language regarding time limitations or other critical time lines that client should be aware of.] Please let me know the name of your new attorney, or pick up a copy of your file by [date].

I [or: insert name of the attorney who will store files] will continue to store my copy of your closed file for six years. After that time, I [insert name of other attorney if relevant] will destroy my copy of the file unless you notify me in writing immediately that you do not want me to follow this procedure. [If relevant, add: If you object to (insert name of attorney who will be storing files) storing my copy of your closed file, let me know immediately and I will make alternative arrangements.]

If you or your new attorney needs a copy of the closed file, please feel free to contact me. I will be happy to provide you with a copy.

Within the next [fill in number] weeks I will be providing you with a full accounting of your funds in my trust account and fees you currently owe me.

You will be able to reach me at the address and phone number listed on this letter until [date]. After that time, you or your new attorney can reach me at the following phone number and address.

Address: _____

_____ Phone: _____

Remember, it is imperative to retain a new attorney immediately. This will be the only way that time limitations applicable to your case will be protected and your other legal rights preserved.

I appreciate the opportunity of providing you with legal services. Please do not hesitate to give me a call if you have any questions or concerns.

Sincerely,
[Attorney] [Firm]

AGREEMENT TO CLOSE LAW PRACTICE

Between: _____ (“Planning Attorney”) and _____ (“Assisting Attorney”) and _____, (“Alternate Assisting Attorney”) (or in the aggregate as “Assisting Attorneys”).

1. Purpose

This Agreement recognizes the Planning Attorney’s obligations to provide competent representation (Rule 1.1 of the Pennsylvania Rules of Professional Conduct) to protect the client’s interest in the event the Planning Attorney is unable to continue the Planning Attorney’s law practice due to disability, impairment, or incapacity.

2. Parties

The term “Assisting Attorney” refers to the attorney designated in the caption above or the Assisting Attorney’s alternate “Alternate Assisting Attorney.” The term “Planning Attorney” refers to the attorney designated in the caption and the Planning Attorney’s representatives, heirs, or assigns.

3. Reliance

Assisting Attorneys may rely on my use of Engagement Letters with clients designating the Assisting Attorneys to ensure the attorney/client relationship and confidentiality. These Engagement letters will be so labeled in a central file within my office. The Planning Attorney shall add the Assisting Attorneys under the coverage of malpractice for purpose of this Agreement with the right of the Assisting Attorneys to confirm coverage. Planning Attorney’s present professional liability carrier is _____ and if any change is made in the carrier written notice thereof shall be given to the Assisting Attorneys.

4. Establishing Death, Disability, Impairment, or Incapacity

In determining whether Planning Attorney is disabled, impaired or incapacitated, Assisting Attorneys may act upon such evidence as Assisting Attorneys shall deem reasonably reliable, including, but not limited to, communication with Planning Attorney’s family members, representative or a written opinion of one or more medical doctors duly licensed to practice medicine. Assisting Attorneys are relieved from any responsibility and liability for acting in good faith upon such evidence in carrying out the provisions of this Agreement.

5. Consent to Close Practice

Planning Attorney hereby gives consent to Assisting Attorneys to take all actions necessary to close Planning Attorney’s legal practice in the event that Planning Attorney is unable to continue in the private practice of law and Planning Attorney is unable to close Planning Attorney’s own practice due to death, disability, impairment or incapacity. Planning Attorney hereby appoints Assisting Attorneys as attorney-in-fact, with full power to do and accomplish all of 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 specific intent that this appointment of Assisting Attorneys as attorney-in-fact shall become effective only upon Planning Attorney’s death, disability, impairment or incapacity. It is Planning Attorney’s specific intent that this appointment of Assisting Attorney as attorney-in-fact shall become effective only upon Planning Attorney’s death, disability, impairment or incapacity. The appointment of Assisting Attorneys shall not be

invalidated because of Planning Attorney's death, disability, impairment or incapacity, but instead the appointment shall be in full force and effect so long as it is necessary or convenient to carry out the terms of this Agreement. In the event of Planning Attorney's disability, impairment, or incapacity, Planning Attorney designates Assisting Attorneys as signatories or in substitution of Planning Attorney's signature, on all of Planning Attorney's law office accounts with any bank or financial institution, including, but not limited to, checking accounts, savings accounts and trust accounts. Planning Attorney's consent includes but is not limited to:

- Entering Planning Attorney's office and using the Planning Attorney's equipment and supplies as needed to close Planning Attorney's practice;
- Opening Planning Attorney's mail and processing it;
- Taking possession and control of all property comprising Planning Attorney's law office, including client files and records;
- Examining files and records of Planning Attorney's law practice and obtaining information as to any pending matters that may require attention;
- Notifying clients, potential clients, and others who appear to be clients, that Planning Attorney has given this authorization and that it is in their best interest to obtain other legal counsel of their choice;
- Copying Planning Attorney's files;
- Obtaining client's consent to transfer files and client property to new attorneys chosen by clients;
- Transferring client files and property to clients or their new attorneys;
- Obtaining client consent to obtain extensions of time and contracting opposing counsel and courts/administrative agencies to obtain extensions of time;
- Applying for extensions of time pending employment of other counsel by the clients;
- Filing notices, motions and pleadings on behalf of clients where the client's interest must be immediately protected and other legal counsel has not yet been retained;
- Contacting all appropriate persons and entities who may be affected and informing them that Planning Attorney has given this authorization;
- Arranging for transfer and storage of closed files;
- Winding down the financial affairs of Planning Attorney's practice, including providing Planning Attorney's clients with final accounting and statement for services rendered by Assisting Attorneys. Return of client funds, collection of fees on Planning

Attorney's behalf or on behalf of Planning Attorney's estate, payment of business expenses and closure of business accounts when appropriate;

- Advertising Planning Attorney's law practice or any of its assets to find a buyer for the practice;
- Arranging for an appraisal of Planning Attorney's law practice for the purpose of selling Planning Attorney's practice and if Assisting Attorney elects to purchase this practice the Assisting Attorney shall immediately cease being an Assisting Attorney hereunder;
- Planning Attorney's bank or financial institution may rely on the authorizations in the Agreement unless such bank or financial institution has actual knowledge that this Agreement has been terminated or is no longer in effect.

6. Payment for Services

Planning Attorney agrees to pay Assisting Attorney a reasonable sum for services rendered by Assisting Attorney while closing the law practice of Planning Attorney. Assisting Attorney agrees to keep accurate time records for the purpose of determining amounts due for services rendered. Assisting Attorney agrees to provide the services specified herein as an independent contractor.

7. Preserving Attorney-Client Privilege

Assisting Attorney agrees to preserve confidences and secrets of Planning Attorney's clients and their attorney-client privilege and shall only make disclosures of information reasonably necessary to carry out the purpose of this agreement.

8. Providing Legal Services

Planning Attorney authorizes Assisting Attorneys to provide legal services to Planning Attorney's former clients provided Assisting Attorney first advises clients of their right to select a successor attorney including the Assisting Attorney if they have no conflict of interest and obtain the consent of Planning Attorney's former clients to do so. Assisting Attorneys have the right to enter into an attorney-client relationship with Planning Attorney's former clients and to have clients pay Assisting Attorneys for his or her legal services.

9. Informing Allegheny County Bar Association

Assisting Attorney agrees to inform the Allegheny County Bar Association where Planning Attorney's closed files will be stored and the name, address, and phone number of the contact person for retrieving those files.

10. Alternate Assisting Attorney

If Assisting Attorney is unable or unwilling to act on behalf of Planning Attorney, the Alternate Assisting Attorney is authorized to act on behalf of Planning Attorney pursuant to this agreement. Alternate Assisting Attorneys shall comply with the terms of this agreement. Alternate Assisting Attorney consents to this appointment, as shown by the signature of the Alternate Assisting Attorney on this agreement.

11. Indemnification

Planning Attorney agrees to indemnify Assisting Attorneys against any claim, loss or damage arising out of any act or omission by Assisting Attorney under this agreement, provided the actions or omissions of Assisting Attorney were made in good faith, were made in a manner reasonably believed to be in Planning Attorney's best interest and occurred while Assisting Attorney was assisting Planning Attorney with the closure of Planning Attorney's office. This indemnification agreement does not extend to any act, errors or omissions of Assisting Attorney while rendering or failing to render professional services in Assisting Attorney's capacity as attorney for the former clients of Planning Attorney. Assisting Attorney shall be responsible of all acts and omissions of gross negligence and willful misconduct. Notwithstanding this indemnification Assisting Attorneys are advised to have their malpractice coverage cover their activities under this agreement.

12. Fee Disputes to be Arbitrated

Planning Attorney and Assisting Attorney agree that all fee disputes between them will be submitted to and bound by the decision of _____.

13. Termination

This Agreement shall terminate upon: (1) delivery or written notice of termination by Planning Attorney to Assisting Attorney during any time that Planning Attorney is not under disability, impairment or incapacity as established under Section 4 of this Agreement; (2) delivery of written notice of termination by Planning Attorney's court appointed representative upon a showing good cause; or (3) delivery of a written notice of termination given by Assisting Attorneys to Planning Attorney, subject to any ethical obligation to continue or complete any matter undertaken by Assisting Attorney pursuant to this Agreement.

If Assisting Attorney or Alternate Assisting Attorney for any reason terminates this Agreement or is terminated, Assisting Attorney or Alternate Attorney acting on his or her behalf shall (1) provide a full and accurate accounting or financial activities undertaken on Planning Attorney's behalf within 30 days of termination or resignation and (2) provide Planning Attorney with Planning Attorney's files, records and funds.

14. Further Authority (OPTIONAL)

(A) In the event of Planning Attorney's Death: Planning Attorney will advise the Planning Attorney's personal representative, if other than Assisting Attorneys, in a specific Will provisions to retain Assisting Attorneys. If Assisting Attorney is my named appointed personal representative and is uncomfortable with the extent to which I secured engagement letters with clients under Section 3 hereof then the Assisting Attorneys shall proceed in like manner as herein described.

(B) In the event of Planning Attorney's Disability, Impairment or Incapacity: Consistent with the Purpose in Section 1 hereof coupled with the protective input detailed in Section 4 hereof and the trust and confidence Planning Attorney has in Assisting Attorneys while honoring that Assisting Attorneys may not be totally comfortable with the reliance under Section 3 hereof, Planning Attorney authorizes Assisting Attorneys as Planning Attorney's attorney in fact to confess Planning Attorney's disability, impairment or incapacity and waive any hearings and time constraints under the Pennsylvania Rules of Disciplinary Enforcement even though such actions will result in Planning Attorney's suspension as an attorney.

Planning Attorney

Date

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY)

Sworn to and subscribed before me this ____ day of _____, 20____.

Notary Public

Assisting Attorney

Date

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY)

Sworn to and subscribed before me this ____ day of _____, 20____.

Notary Public

Alternate Assisting Attorney

Date

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY)

Sworn to and subscribed before me this ____ day of _____, 20____.

Notary Public

LIMITED POWER OF ATTORNEY

I, _____, sometimes referred to as "Planning Attorney" do hereby appoint _____, sometimes referred to as "Assisting Attorney" as my agent and attorney-in-fact in an Agreement To Close Law Practice between me as Planning Attorney and this agent and attorney-in-fact as Assisting Attorney dated _____ day of _____, 20____, is incorporated herein by reference for the limited purpose of conducting all transactions and taking any actions that I might do with respect to my bank account(s) and safe deposit box(es). I do further authorize my banking institutions to transact my account(s) as directed by my attorney-in-fact and to afford the attorney-in-fact all rights and privileges that I would otherwise have with respect to my account(s) and safe deposit box(es). Specifically, I am authorizing my attorney-in-fact to sign my name on checks, notes, drafts, orders, or instruments for deposit, withdraw, or transfer money to or from my account(s), and do anything with respect to the account that I would be able to do. I am also authorizing my named attorney-in-fact to enter and open my safe deposit box(es), place property in the box(es), remove property from the box(es), and otherwise do anything with the box(es) that I would be able to do even if my attorney-in-fact has no legal interest in the property in the box.

OPTIONAL CLAUSE

I further empower this agent and attorney-in-fact to proceed under the terms and conditions detailed under Section ____ of the Agreement To Close Law Practice in the event of my disability, impairment, or incapacity which power will continue until _____.

This Power of Attorney will continue until the banking institution receives my written revocation of this Power of Attorney or written instructions from my attorney-in-fact to stop honoring the signature of my attorney-in-fact.

This Power of Attorney shall not be affected by my subsequent disability or incapacity.

Account Holder

Date

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY)

Sworn to and subscribed before me this ____ day of _____, 20____.

Notary Public

The Attorney-in-Fact acknowledges that the foregoing is his/her signature.

(Attorney-in-Fact)

(Date)

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY)

Sworn to and subscribed before me this ____ day of _____, 20____.

Notary Public

LETTER OF UNDERSTANDING

To: _____

I am enclosing a Limited Power of Attorney in which I have named _____ as my first choice and _____ as my alternate choice attorney-in-fact under an Agreement To Close Law Practice between them and I dated _____ day of _____, _____ which is incorporated herein. You and I have agreed that you will do the following:

1. Upon my written request, you will deliver the Limited Power of Attorney to me or to any person that I designate.

2. You will deliver the Limited Power of Attorney to the person named as my first choice attorney-in-fact and if delivery is refused, to my Alternate Attorney in fact if you determine, using your best judgment, that I am unable to conduct my business affairs due to disability, impairment, incapacity, illness, or absence. In determining whether to deliver the Power of Attorney, you may use any reasonable means you deem adequate, including consultation with my physician(s) and family members. If you act in good faith, you will not be liable for any acts or omissions on your part in reliance upon your belief.

2. If you incur expenses in assessing whether you should deliver this Limited Power of Attorney, I will compensate you for the expenses incurred.

3. You do not have any duty to check with me from time to time to determine if I am able to conduct my business affairs. I expect that if this occurs, you will be notified by a family member, friend, colleague of mine or by the designated attorneys.

Trusted Family Member or Friend

Date

Planning Attorney

Date

CHECKLIST FOR CLOSING ANOTHER ATTORNEY'S OFFICE

The term "Planning Attorney" refers to the attorney whose office is being closed.

- Check the calendar and active files to determine which items are urgent and/or scheduled for hearing, trials, depositions, court appearances, etc.
- Contact clients for matters that are urgent or immediately scheduled for hearing, court appearances, or discovery. Obtain permission to request continuances. (If making these arrangements constitutes a conflict of interest for you and your clients, retain another attorney to take responsibility for obtaining extensions of time and other immediate needs.)
- Contact courts and opposing counsel for files that require discovery or court appearances immediately. Obtain continuances of hearings or extensions where necessary. Confirm extensions and continuances in writing. Keep in mind the attorney-client privilege.
- Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate files.
- Look for an office procedures manual. Determine if there is a way to get a list of clients with active files.
- Send clients who have active files a letter explaining that the law office is being closed and instructing them to retain a new attorney and/or to pick up the open file. Provide clients with a date by which they should pick up copies of their files. Inform clients that new counsel should be chosen immediately.
- For cases before administrative bodies and courts, obtain permission from the clients to submit a Motion and Order to withdraw the Planning Attorney as attorney of record.
- In cases where the client is obtaining a new attorney, be certain that a Substitution of Attorney is filed.
- Pick an appropriate date and check to see if all cases have either a motion and order allowing withdrawal of the Planning Attorney or a Substitution of Attorney filed with the court.
- Make copies of files for clients. Retain the Planning Attorney's original file. All clients should either pick up a copy of their files (and sign a receipt acknowledging that they received it) or sign an authorization for your client to release a copy to a new attorney. If the client is picking up a copy of the file and there are original documents in it that the client needs (such as a title to property), return the original documents to the client and keep copies for the Planning Attorney's file, noting same in retained file.
- All clients should be advised on where their closed files will be stored and who they should contact in order to retrieve a closed file.

- Send the name, address, and phone number of the person who will be retaining the closed files to the central filing place as discussed in meetings to date or filed with private office or other office.
- If the attorney whose practice is being closed was a sole practitioner (the Planning Attorney), try to arrange for his or her phone number to have a forwarding number. This eliminates the problem created when clients call the Planning Attorney's phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.
- Contact the Planning Attorney's excess carrier, if applicable, about extended reporting coverage. Be sure you have coverage for your actions as Assisting Attorney.
- If you have authorization to handle the Planning Attorney's financial matters, look around the office for checks or funds that have not been deposited. Determine if funds should be deposited or returned to clients. (Some of the funds may be for services already rendered.) Get instructions from clients concerning any funds in their trust accounts. Prepare a final billing statement showing any outstanding fees due, and/or any money in trust. (To withdraw money from the Planning Attorney's accounts, you will probably need to be an authorized signer on the accounts, you will need a written agreement or you will need a limited power of attorney. If this has not been done and is not obtainable from the Planning Attorney because of death, disability, impairment, or incapacity, you may have to request access over the practice and the accounts pursuant to the Pennsylvania Rules of Disciplinary Enforcement. If the Planning Attorney is deceased, another alternative is to petition the court to appoint a personal representative under the probate statutes.) Money from clients for services rendered by the Planning Attorney should go to the Planning Attorney or his/her estate.
- If you are authorized to do so, handle financial matters, pay business expenses, and liquidate or sell the practice.
- If your responsibilities include sale of the practice, you may want to advertise in the local bar newsletter and other appropriate places.
- If your arrangement with the Planning Attorney or estate is that you are to be paid for closing the practice, submit your bill.
- If your arrangement is to represent the Planning Attorney's clients on their pending cases, obtain each client's consent to represent the client and check for conflicts of interest.

WILL PROVISIONS

(Sample or Modify as Appropriate)

With respect to my law practice, my personal representative, if an attorney licensed to practice law in the Commonwealth of Pennsylvania, is expressly authorized and directed to carry out the terms of the Agreement to Close Law Practice I have made with the personal representative. If my personal representative is not an attorney licensed to practice law in the Commonwealth of Pennsylvania, my personal representative is authorized and directed to honor an Agreement to Close Law Practice dated _____ day of _____, _____ in which I have designated Assisting Attorneys to protect the interest of my clients and to dispose of my practice.

OR

If I have not entered into an Agreement to Close Law Practice in my lifetime, my personal representative is expressly authorized and directed to take such steps as he or she deems necessary or desirable, in my personal representative's sole discretion, to protect the interests of the clients of my law practice and to wind down or dispose of that practice, including but not limited to: sale of the practice, collection of accounts receivable, payment of expenses relating to the practice, and employing an attorney or attorneys to review my files, complete unfinished work, notify my clients of my death and assist them in finding other attorneys and provide long term storage of and access to my closed files.

PLANNING AHEAD FOR PRACTICING LAWYERS: ATTORNEY WORKBOOK

Published by the Allegheny County Bar Association
to assist Pennsylvania lawyers

Workbook of: _____, Esq.

Address: _____

Phone: _____

This workbook is provided as a member service of the ACBA.

Produced by the **Planning Ahead Subcommittee** composed of members from the Senior Lawyers Committee and the Sole and Small Firm Practitioners Section.

Kim A. Bodnar, Esq.
Amy J. Coco, Esq.
James W. Creenan, Esq.
Zelda G. Curtiss, Esq.
William R. Friedman, Esq.
Stuart C. Gaul, Jr., Esq.
Maureen P. Gluntz, Esq.

Marsha H. Grayson, Esq.
Barbara Griffin, Esq.
Ryan H. James, Esq.
Juli Marhefka, Esq.
Jeffrey L. Pollock, Esq.
Nancy L. Heilman, Esq.

INTRODUCTION

Him that makes shoes go barefoot himself. -Robert Burton: *Anatomy of Melancholy*

Every lawyer has his or her own way of running a law practice. Many of our members selflessly devote their careers to helping clients plan their estates and take other steps to avoid future uncertainty. Like the fabled cobbler without time to make shoes for his own children, many lawyers have left their own planning on the backburner until it is too late. No one can predict reliably the day we might become too ill to practice, suffer a serious accident, or die unexpectedly. In those cases, the lawyer's spouse, children, friends, colleagues, and clients are thrust into damage control mode. Many times, there is no one to provide a roadmap of the attorney's practice, procedures, and individual way of serving clients.

Consequently, there is no right or wrong way to complete this workbook – it is simply a tool for you to assist others in the event of your inability to practice law. Not only do you have certain ethical obligations, but your family or heirs deserve to know that you have planned to avoid leaving them with the burden of sorting out your practice.

The ACBA hopes you do two things:

- Provide as much detail as possible to allow someone else to address urgent client and practice needs.
- Regularly review and update the workbook.

The process of completing this workbook is just one part of "Planning Ahead." As part of your estate plan, every lawyer should consider completing this workbook and referring to all data necessary to enable a measured level continuity to your practice and to your clients.

HOW TO USE THIS BOOK

- ✓ Consider your options and consider how your practice could be affected by an unplanned injury, incapacity, or death.
- ✓ Gather all of your records.
- ✓ Make copies and include them with this workbook.
- ✓ Keep this workbook with your key documents.
- ✓ Consider whether you and another lawyer might act as “Assisting Attorney” for the other. If so, review the completed workbook together and give instruction on where you will store it.
- ✓ Consider consulting with an attorney to review any other agreements you might need.

REFERENCE LIST

Attach each item or describe where it can be located. Check the box or make a note for location.

ITEM	ATTACHED?	LOCATION
Assisting Attorney information		
Power of Attorney – Law Practice		
Client Matters: Calendar		
Client Matters: File Status		
File Management System and Storage		
File Retention Schedule		
Location of Offsite Stored Client Files		
List of Stored Files		
Operating Account		
IOLTA Account		
My CPA		
Professional Liability Carrier and Policy Declaration Page		
Office Procedures Manual		
Fee Agreements		
Billing Records		
Instructions for Access to Office: Keys, Alarms, etc.		
Credit Card – Client Payments		
Accounts Payable – List of Monthly/Quarterly/Annual Bills		
List of Outstanding Matters referred to other attorneys, with referral fee instructions		
Other: _____		
Other: _____		
Other: _____		
Other: _____		

PIECES OF THE PLAN

THE ASSISTING ATTORNEY

A lawyer's duty of diligence includes arranging to safeguard the clients' interests in the event of the lawyer's death, disability, impairment, or incapacity. PA Rules of Professional Conduct 1.3.

One way to address this duty is to appoint an Assisting Attorney. A lawyer should research the full description of that type of arrangement, and this Committee has prepared a Guide outlining the nature of that role.

If you have an arrangement with an attorney to act as Assisting Attorney, please include the following:

Name: _____

Address: _____

Phone: _____

Pa. Atty Id. Number: _____

Is there a written Agreement with the Assisting Attorney? If so, attach.

POWER OF ATTORNEY – LAW PRACTICE

Do you have a properly executed Power of Attorney designating another attorney to act for you? ___ Yes ___ No If yes, attach.

CLIENT MATTERS: CALENDAR

Describe how you keep your calendar of deadlines and important dates. Paper only? Outlook? Software?

CLIENT MATTERS: FILE STATUS

Attach a recent file list. Describe.

FILE MANAGEMENT SYSTEM AND STORAGE

Do you have a document retention policy? Where do you store closed files? How do you organize active files? Describe.

FILE RETENTION SCHEDULE

Attach list of closed files and destruction schedule.

LOCATION OF OFFSITE STORED CLIENT FILES

Attach storage contract/lease. State location of key, lock combination, etc.

LIST OF STORED FILES

Attach list of stored files.

OPERATING ACCOUNT

Identify the bank, branch, contact person, and account numbers for each bank account used to operate the law firm.

Bank	Branch	Contact	Account#

IOLTA ACCOUNT

Identify the bank, branch, contact person, and account numbers for each IOLTA account.

Bank	Branch	Contact	Account#

MY CPA

Identify the CPA or other tax professional that prepares your company and personal tax returns.

PROFESSIONAL LIABILITY CARRIER

Attach declarations page for each of the past 5 policy periods. Identify any open claims or suits.

OFFICE PROCEDURES MANUAL

Attach your procedures manual. Identify current personnel and their roles.

FEE AGREEMENTS

Where do you keep fee agreements?

BILLING RECORDS

Where do you keep billing records?

What methods do you use for billing?

Identify outstanding accounts receivable and invoices.

INSTRUCTIONS FOR ACCESS TO OFFICE:

Describe use of keys, alarms, etc.

CREDIT CARD – CLIENT PAYMENTS

Do you accept credit cards? List and attach contracts. Fees might accrue even if not used.
