

PICKING UP THE PIECES AFTER THE DEATH OR DISABILITY OF A S O L O LAWYER

by
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In an ideal world every lawyer has planned for the future by creating a will and a plan for the operation or winddown of the practice in case of their death or disability.¹ Unfortunately, there are many lawyers who fail to make a plan that protects their firm and clients in the event of an unforeseen death or disability. When tragedy strikes the unprepared lawyer, friends, family and members of the bar must step in to prevent the hardship and potential loss of legal rights for the lawyer's clients, while also protecting the judicial system and the bar. Fortunately, there is now an excellent resource to for those trying to pick up the pieces. The first step is to contact the Legal Program Manager, Michelle Yu, of the Office of General Counsel, 617-728-8751, to discuss the next steps and ethical obligations. Given the particular circumstances and if appropriate, there is the Board's in-house commissioner program by which a commissioner appointment is made to step into the shoes of a deceased attorney pursuant to [S.J.C. Rule 4:01, § 14.](#)

Normally, the person who takes charge of the practice of a deceased lawyer will be the decedent's personal representative or a lawyer employed by the estate. Similarly, a guardian or conservator or the fiduciary's lawyer may take charge of a disabled lawyer's practice. In circumstances where a representative must act, that person may look at the defined commissioner's duties to establish what should be done. [S.J.C. Rule 4:01, § 14](#) establishes that the commissioner will complete three general tasks: (1) to make an inventory of the files, (2) to take appropriate action to protect the interests of clients, and (3) to take appropriate action to protect the interests of the lawyer. In addition, the rule directs the commissioner not to "disclose any information contained in any files ... without the consent of the client, ... except as necessary to carry out the order of this court." To accomplish these duties the following checklists will help guide the efforts of those entrusted:

- Immediately secure the office, the client files and client property.
- Take such action as necessary to secure as quickly as possible all trust and business financial accounts. A court authorization or letter of appointment of a personal representative will generally be needed to obtain access to the deceased/disabled lawyer's accounts. Many banks also require a certified copy of the death certificate.
- Secure all law firm property
- Assure access to incoming mail
- Assure access to lawyer's computer(s)
 - o Assure access to all email accounts used by lawyer
 - o Assure access to all internet-based services used by the lawyer
 - Look for case management systems and shared client portals
 - Access email
 - Look for cloud storage of client files and firm documents

¹For advice on creating a plan for your law firm if you are incapacitated read J.R. Rabe, "The Best-Laid Plans: Lawyers' Duty Includes Preparing Their Practices For Incapacity," <https://www.massbbo.org/Ethics>).

- Identify and inventory all clients represented at the time of the death or disability
- Run a conflicts of interest check with all clients to ensure a review of the file may take place
 - If conflicts exist with identified clients then files should go directly to client, or, attorney without conflict should review file as needed
- Provide identified clients with notice, either by mail or email, of the death or disability and the need to retain new counsel or to take possession of the file.
- Based on a reasonable review of available information, an analysis should be done of impending deadlines impacting clients' legal rights and action taken to notify clients
 - Where deadlines exist directly contact clients by telephone or in-person, in addition to mailed notice.
 - Where necessary a motion for continuance should be filed on behalf of the client to protect their interests
- Identify all property held in trust for clients and return to the client or the client's new attorney.
- Identify intrinsically valuable documents, such as original wills, held for clients and return to the client or the client's new attorney.
- On behalf of the estate determine outstanding fees that have been billed and where possible determine fees and expenses owed that need to be invoiced.
- Identify all trust accounts holding money in trust for clients and take possession of records for review.
 - For trust account holding funds for one client, determine if client is entitled to funds and disburse funds to the client
 - Review records for pooled IOLTA trust accounts.
 - Each IOLTA account should be reconciled pursuant to Mass. R. Prof. C. 1.15 to extent possible. Based on the available records from the bank and the attorney's own records and reconciliation, a determination of the proper owners of the funds and other property should be made. If there are shortages or other discrepancies in the IOLTA account, it must be reported to OBC.
- Inventory clients who have been represented during the prior six years
 - Provide notice of the right to take possession of their files [Mass. R. Prof. C. 1.15\(b\)](#)
- Evaluate closed files and firm finance records for storage or destruction. See Mass. R. Prof. C. 1.15A; Berman, J. and Vecchione, C., *New Rule on Client Files Will Provide Clear Guidance for Lawyers (Updated)(Sept. 2018)*; Vecchione, C, *Talking Trash Recycled (Again): Guidelines for Retention and Destruction of Client Files (July 2018)*

SAFEGUARDS

- Ensure that no files are removed without permission.
- Control access to the premises.
- Backup electronic files (stored locally and in the cloud)
- Interview employees and independent contractors/vendors to ascertain all known clients and client property beyond available records
- Consider publication in local media of the office closure and need of clients to retain new counsel and to take possession of the files.
- Track and confirm that clients have received notice.

- Keep copy of files for the deceased/disabled attorney for²:
 - Potential claims vs the attorney
 - Determine rights to fees and reimbursed expenses
- Act in a manner that protects confidential information of the clients. [Mass. R. Prof. C. 1.6](#)

A more extensive set of resources, maintained by Massachusetts Law Office Management Assistance Program, may be found [here](#).

² Conflicts which may arise between the clients and the estate of the deceased or disabled lawyer, such as claims of malpractice and disputes over fees, are beyond the scope of this article.