

October 2002

EXIT STRATEGY FOR LAWYERS: How to Close a Law Practice When Retiring or Changing Careers

by
Daniel C. Crane, Bar Counsel

People change jobs and careers more frequently than ever before. Gone are the days of holding one job for all or most of someone's work life, if that ever existed. Lawyers are just as likely as anyone else to change career directions these days. The reasons may involve retirement or pursuing a new career within the profession or outside it.

A lawyer making such a change needs to think first about how to notify the clients and conduct an orderly transition so that there is no material adverse effect on the interests of any client. Rule 1.16 (b) This is more easily done by attorneys who practice with a group of colleagues such as a law firm, public agency, or in a corporate law department. It is a different challenge for a sole practitioner or space sharer. This article will identify matters that a sole practitioner or space sharer needs to address to exit practice and what to do about them.

The exiting lawyer must identify all client matters and take an adequate amount of time to accomplish the activities that follow so that lawyer leaves without causing any material adverse effect on any client interest. This means that the exiting lawyer must take whatever steps are necessary to protect the client's interests until an adequate amount of time has elapsed for the client to secure new counsel after the client has received notice of the lawyer's plan to terminate the representation. This may require taking additional action involving transactions or court matters that have critical deadlines before the client has engaged new counsel. Where the client matter is in suit or pending before another tribunal, the lawyer must also obtain leave to withdraw according to the rules of the tribunal. Rule 1.16(c)

The lawyer should give written notice to all clients of the lawyer's intentions to withdraw from representing the client. The notice should clearly communicate that the client is entitled to select new counsel and that the client's file will be delivered to successor counsel as the client directs or be made available to the client. Files that are not delivered to clients or new counsel must be retained or discarded where and as permitted. See, D.C. Crane, Talking Trash-Recycled, MBA Lawyers Journal, Sept. 2001 (also available at the B.B.O. website: www.mass.gov/obcbbbo). The usual notice will communicate a period of time during which the files will be available at the lawyer's office or another location where they will be readily available for delivery to clients until they go to offsite storage.

When files are returned or delivered, the exiting lawyer is also required to account for and return any unearned retainers or advances that the client may have paid. A lawyer leaving practice must also deliver any other funds that the lawyer holds for clients or third persons. Funds to which clients are entitled must be paid to them or as they direct. If clients cannot be located, it may be necessary to pay the money into court on their behalf or to the Commonwealth under the laws of escheat. Money held for missing clients does not belong to

the lawyer. Also, alternative arrangements may need to be made for funds held in escrow on behalf of clients or third persons. Records of all of these transactions are required to be maintained for six years after the final distribution and termination of the representation. Rule 1.15(a)

A lawyer must be careful to keep client information confidential throughout this process. Files may not be delivered to anyone but the client without the client's consent. Unless the client has given consent to the lawyer to disclose information to prospective new counsel, the exiting lawyer cannot provide another lawyer or law firm selected by the exiting lawyer with information about the matter or permit access to the file. If files are to be left with anyone other than the lawyer's staff to be held for delivery to clients, care must be taken that the files are held in a secure manner so that persons other than the lawyer's staff do not have access to confidential client information.

Lawyers may also sell their practices to another lawyer or law firm, but only if the sale is of the entire practice. Rule 1.17(b) Sale of a practice also requires written notice to the client, including the terms of any proposed change in the fee arrangement, the client's right to retain other counsel or take possession of the file, and the fact that consent to the transfer will be presumed if the client does not take any action or otherwise object within ninety days of receipt of notice. Rule 1.17 (c) All of the requirements of confidentiality, transfer of funds, and protection of client interests from any materially adverse effect also apply to a sale.

For work in progress that is not billed on an hourly or other basis where the final fee for services due to the departing attorney cannot be determined at the termination of the representation, it is important for the client, departing attorney and new counsel to arrive at some agreement then. The situation where this usually arises is in contingent fee matters. The better course is for the client, departing attorney, and new attorney to agree upon an allocation of how any fees that may be due will be divided between new and departing counsel if any come due. A fee dispute between the lawyers is much less likely if there is a written agreement among the client and the lawyers before any award or settlement occurs.

The departing lawyer is also faced with many other business decisions about how to deal with former employees, landlords, and other commercial relationships. These are not matters of professional responsibility and are beyond the scope of this article. One business decision that relates to professional responsibility for the departing lawyer is what to do about professional liability insurance. Since all professional liability insurance policies are written on a "claims made" basis, the departing lawyer will have no coverage for claims made against the lawyer after the date of expiration of the policy unless the lawyer purchases "tail" coverage. No rule requires an attorney to purchase professional liability insurance in the first place, but if a lawyer wants to protect former clients and the lawyer as well, it is important for the departing lawyer to consult with a competent broker and even the lawyer's own counsel to make the best decision possible before leaving a practice.

One of the final acts that the departing lawyer needs to do before putting out the lights for the last time is to notify the Board of Bar Overseers of the lawyer's new address and to request inactive status if the lawyer is leaving the practice of law. S.J.C. Rule 4:02. Otherwise, the departing attorney runs the risk of administrative suspension for failure to file an annual registration statement if the Board does not have an address to direct the statement to. See, R. Geller and S. Straus Weissberg, Dues and Don'ts, MBA Lawyers Journal, Jan. 2002 (also available at the B.B.O. website: www.mass.gov/obcbbo). In appropriate circumstances, the Board also uses this information to assist clients to get in contact with their former counsel when the departing lawyer could not find the client to give notice at the time that the lawyer ceased to practice.

Lawyers who include these steps as part of an exit strategy will be able to enjoy the next adventure with less concern that something from the days of private practice will come back to bother them.

Please direct all questions to webmaster@massbbo.org.
© 2003. Board of Bar Overseers. Office of Bar Counsel. All rights reserved.