

CLOSING A KENTUCKY LAW OFFICE:



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A GUIDE FOR AFTER THE DEATH OF A KENTUCKY SOLE PRACTITIONER

When a Kentucky sole practitioner dies suddenly, the inevitable question arises: “What is going to happen to his law practice?” The purpose of this article is to provide a primer to the attorney stepping in to protect the law practice of the deceased sole practitioner and his clients. In the practice of law, time is of the essence. Court dates, statutes of limitations, and document filing requirements continue to roll forward without pause even in the event of an unforeseen death.

DISTINCTION BETWEEN THE ATTORNEY FOR THE ESTATE AND THE ATTORNEY CLOSING THE LAW OFFICE

This guide draws a distinction between the attorney handling the estate of the deceased sole practitioner (the “estate” attorney) and the attorney closing the law office of the deceased sole practitioner (the “closing” attorney), although these two roles may be filled by the same individual. In addition, this article proceeds from the assumption that the sole practitioner has no employees who are licensed attorneys, nor a spouse or heir who is a licensed attorney. Finally, the remainder of this guide presumes the closing attorney to be an unrelated, neutral, and disinterested third party, licensed to practice law in Kentucky, who is hired to close the law office.

BEGINNING

Before the closing attorney can take any action, he will have to be hired by the estate or someone with authorization from the estate to begin the work. Sole practitioners have been encouraged by both the American Bar Association and Kentucky Bar Association to have a plan already in place that designates a closing attorney. Absent such a plan, authorization becomes an important issue, and it will not wait for even a couple of weeks. Once authorization is obtained, work may commence. The most valuable assets that should be identified first are the employees of the sole practitioner. The legal secretary will have invaluable institutional knowledge and an understanding of the inner workings of the office and the clients.

A paralegal will have the same. The closing attorney is best served by immediately retaining the services of these invaluable employees as quickly as possible. At the same time, the employees should be informed of the short-term duration of their retention and instructed to plan for the eventual last day of work at the office.

Before beginning work in earnest, the closing attorney should read the following two resources:

ABA Commission on Ethics and Professional Responsibility, Formal Opinion 92-369-Disposition of Deceased Sole Practitioner's Client Files and Property (1992); and Kentucky Bar Association Ethics Opinion-405.

Both of these opinions provide excellent guidance regarding issues that the closing attorney will likely face. The closing attorney should also review the following Kentucky Supreme Court Rules. While broader in scope, they too provide guidance and context for the work that lies ahead.

1. **SCR 3.130(1.1) Competence;**
2. **SCR 3.130(1.3) Diligence;**
3. **SCR 3.130(1.4) Communication;**
4. **SCR 3.130(1.15) Safekeeping Property;**
5. **SCR 3.130(1.16) Declining or Terminating Representation;**
6. **SCR 3.130(1.17) Sale of Law Practice;**
7. **SCR 3.130(1.18) Duties to Prospective Client;**

8. **SCR 3.395 Appointment of Special Commissioner to Protect Clients' Interests;**
9. **SCR 3.820 Client's Security Fund; and**
10. **SCR 3.830 Kentucky's IOLTA Fund.**

KEY DECISION

Under Kentucky law, it is now possible to sell a law practice. The closing attorney should consult SCR 3.130-1.17. Early on, a decision must be made by the estate as to whether the practice has value and whether a sale of the practice is feasible. An unexpected death complicates this decision. Nevertheless, this represents a significant fork in the road. One path leads to preserving the practice and selling it. The other path leads to closing the practice.

GOALS

The closing attorney must acknowledge an assignment with multiple goals. First, the closing attorney's role is to assist the estate. Second, the closing attorney must protect the estate from any and all manner of claims, including but not limited to, legal malpractice claims. Third, the closing attorney will review client files and determine which need immediate attention in order to protect the clients' interests. All the while, the closing attorney must remember that he does not represent the clients of the deceased sole practitioner. As always, the closing attorney should prepare a clear and concise engagement letter with the client who hired him clearly defining the services to be rendered and the ethical considerations to be kept in mind.

CHECK THE CALENDAR & TICKLER SYSTEM

The first thing to do is to examine the deceased attorney's calendar to identify upcoming dates and deadlines. The closing attorney will then begin to triage client matters and tasks according to the priority he designates. After the calendar review is complete, the closing attorney should turn attention to any tickler system in place, which will provide additional dates and deadlines and help to identify files that need to be reviewed immediately. Keep in mind that the hunt for statute of limitations issues is ever present.

BEGINNING FILE REVIEWS

Beginning the review of a deceased attorney's files is a daunting task. A conference room with a large table, rather than the personal office of the deceased attorney, is preferable. Next, the closing attorney must identify the physical location of the files to be reviewed. In an ideal world, all files would be found neatly organized in a file cabinet, but in the real world, files may be found in the file cabinet, the attorney's office, the conference room, the secretary's office, the paralegal's office, the attorney's briefcase, the trunk of the attorney's car, and possibly at the attorney's personal residence. Be sure to inquire about files that were previously closed, purged, destroyed, or lost. Wherever they may be, the files should be gathered and brought to a central location to be reviewed.

The closing attorney should then begin to identify active versus inactive files. If the deceased attorney did not maintain a computer system to provide a master list of files, the closing attorney should create his own master list (such as an Excel spreadsheet) to log in files that are reviewed and any actions that need to be taken.

It is crucial that the closing attorney understand the nature of the deceased attorney's practice and develop categories. Civil cases, criminal cases, medical malpractice cases, domestic cases, and others must be reviewed differently. Additionally, the closing attorney may need to seek outside assistance to review files that are beyond his comfort level. The closing attorney must also keep in mind the duty of confidentiality owed to the deceased attorney's clients. The closing attorney is not practicing within the file, but rather only reviewing the file to determine immediate needs and actions that must be taken.

THE TWO KEY DOCUMENTS TO CREATE

One of the primary duties that the closing attorney will perform is to notify clients about the deceased attorney's untimely death. This notification will also place the clients on notice that the sole practitioner's representation of them has come to an end. Develop a form template letter to be sent to all clients providing them with notification and guidance. Use the deceased attorney's letterhead, if available.¹ For lack of a better term, this "end of representation" letter needs to emphasize that the sole practitioner had no partners or employees who will continue their legal representation. The letter should emphasize that the office can no longer handle the client's legal matter. It should request instructions about safekeeping the client's property. It should request that the client make contact with the office as soon as possible in order to obtain a copy of the file and emphasize the urgency of doing so.

A second document that will need to be created is a "receipt of original file" form. As clients come in to retrieve their file, you will want them to sign a receipt documenting that they have received the file. The receipt should include a basic description of the items received, such as pleadings, correspondence, legal research, evidence, and/or other items found in the file. The closing attorney should also consider whether the receipt should contain an authorization to destroy the file at a later date. Keeping copies and a master list of these "end of representation" letters and "receipt of original file" forms is an important system to put in place early. Once a client has been notified, retrieved the file, and signed a receipt, the closing attorney may move on to another matter.

TRIAGE

With each passing day, new challenges will arise. Some of the things that the closing attorney may be doing are the following:

1. **Contacting co-counsel or opposing counsel to stay or hold a matter in abeyance.**
2. **Contacting the secretary of a judge or court clerk in order to stay or hold a matter in abeyance.**
3. **Corresponding with co-counsel or opposing counsel to advise them of a matter that needs to be addressed.**
4. **Drafting a notice to be filed in the record informing the court and all parties of the untimely death of the sole practitioner.**

5. **Holding teleconferences with clients regarding their legal issues, their file, and/or client funds.**
6. **Having teleconferences with insurance adjusters, lien holders, and/or others with regard to specific matters within files.**
7. **Directing staff to send out updated or final bills for services previously rendered by the practitioner.**
8. **Keeping a total of all costs incurred in closing the law office.**

With each passing day, the phone will continue to ring and mail will continue to arrive. Remember that the telephone answering machine can be a useful tool; record a new message and provide instructions about what clients should be doing. Additionally, it is important to identify whether or not the practitioner used e-mail. If so, access to the e-mail account may be needed. Of course, the closing attorney will have to be sensitive to e-mails received that are of a clearly personal nature.

PHOTOCOPYING

Early on, the closing attorney will have to make various judgment calls in regard to what files need to be photocopied. Does the file need to be photocopied in its entirety? Does only part of the file need to be photocopied? Can you give the original of the file to the client and not photocopy it? While the safest answer is to photocopy everything, such is not practical. The amount of photocopying can be tremendous. The closing attorney may wish to consider hiring one person to just make photocopies. In other words, the closing attorney must identify whether there are adequate resources to make copies of files, and if not, he will have to address this necessity.

STATE BAR AND LOCAL BAR

One item that should not be overlooked is that the closing attorney and/or the estate should notify the Kentucky Bar Association of the attorney's passing. Local bar associations should be notified. The closing attorney should also determine if the deceased attorney was licensed in other states. It is best not to rely upon word of mouth.

CLIENT FUNDS

One of the more difficult tasks the closing attorney will face is that of talking to the deceased attorney's clients about money. A common question arises: "What happened to the money I paid him?" Refunding money to clients is a matter that will have to be handled by the estate. In order to get money back, clients must file a claim against the estate. The closing attorney should direct them to the estate attorney with regard to these matters. In the event that monies are not available for whatever reason, the closing attorney may direct clients to the Kentucky Bar Association Client Security Fund. The phone number and application to make a claim with the Client Security Fund can be found on the Kentucky Bar Association website. To learn more about the fund, the closing attorney may wish to consult SCR 3.820 and the KBA website.

REFERRALS

One of the more common questions from clients will be: "Who is going to handle my case?" The follow-up to this question typically will be: "Are you going to handle my case?" KBA Ethics Opinion 405 provides that "clients may obtain other counsel or employ the lawyer contacting them, subject to any interest of the estate arising from any preexisting contract." This guidance, however, is in reference to a lawyer formerly employed by the sole practitioner. As to the closing attorney who is an unrelated, neutral, and disinterested third party, the opinion provides that the closing attorney has "no obligation to the clients or the estate of the responsible [deceased] attorney to provide continuing professional services." Thus, the closing attorney must make a decision early on as to whether or not he will take any cases he is reviewing. It is probably best that the closing attorney does not in order to avoid situations or issues regarding solicitation or barratry.

This decision can lead to the client's request for a recommendation, which poses a new dilemma for the closing attorney, because the issue of "negligent referral" raises its head. In an ideal world, the closing attorney will make no recommendation or referral and will simply end the conversation by telling the client that he needs to find an attorney as soon as possible. In the real world, however, the closing attorney may need to develop a list of three to four names of attorneys that could handle such a matter competently. This will place the burden upon the client to find the attorney

of his choosing, but will not leave the client completely in the dark.

In the event of an unforeseen death, it is not uncommon for there to be an outpouring of goodwill towards the deceased attorney. Attorneys rise to the occasion and provide the professional courtesy that each of us would hope for. Colleagues and local practitioners may offer to take cases on a reduced fee or *pro bono* arrangement. Nevertheless, the closing attorney must accept these gestures of goodwill cautiously. A client may not like the attorney who has offered free assistance, so the match does not work. Further, attorneys may receive a file and realize that it requires much more work than anticipated. This can lead to discussions of a fee arrangement that the client was not expecting, creating additional complications. If the closing attorney wanders into the quicksand of trying to play matchmaker and negotiator of fee arrangements, he can potentially find himself with more problems than he anticipated. This is not to say that it cannot be done. It simply should be an endeavor that is entered into with eyes wide open.

LEGAL MALPRACTICE INSURANCE

As soon as possible, the closing attorney should contact the deceased attorney's legal malpractice insurance provider so that limits and terms of coverage can be identified. The attorney for the estate or the closing attorney should have a discussion with the legal malpractice insurance carrier regarding an extended reporting period that may be provided after an unforeseen death. Remember that most legal malpractice policies are written on a "claims made" basis. A claim filed against the estate after the policy has expired can have a catastrophic effect on the estate of the now uninsured, deceased attorney. For this reason, a constructive and proactive dialog with the attorney's legal malpractice insurance carrier should occur very early in the process.

CLIENTS BEGIN TO PICK UP FILES

Shortly after clients learn of the attorney's death, they will begin to come in to pick up their files. Ideally, the client comes in, picks up the file, signs the "receipt of original file" form and advises the closing attorney that an appointment has been made with another competent attorney who is going to take over the matter. Sometimes, the new attorney will make contact with the of-

fice and want to come in and sign a receipt for the file. It is best to communicate with the client to make sure that this is with permission and authorization. If the new attorney picking up the file will acknowledge on the receipt that she is indeed taking over the matter, this is wonderful. Beware of the new attorneys who request to retrieve a file for review, before deciding on representation. Having an attorney return the file and decide not to take the case does not help and can hinder the closing attorney's dealings with clients.

The closing attorney will have to make judgment calls in regard to mailing files to clients that are located out of town. The closing attorney may also have to place files in the hands of a relative or other designee for the client that is imprisoned. In all of these situations, the key to getting the files into the client's hands is to follow up, follow up, and then follow up again.

COMPUTERS

The purpose of photocopying and retaining files is to protect the deceased attorney's law practice and estate. In the event of a legal malpractice claim, a copy of the file is critical. We live in an electronic age, however, and much of the useful information that will need to be preserved may be found on computers. It is recommended that hard copies of the attorney's calendars and ticklers be printed out and retained. Further, the closing attorney may want to contact a competent computer professional about backing up all electronic data and information on an external hard drive. Remember that the estate may very well wish to sell the computers for their value. Having an external hard drive with all of the information that can be accessed later will be most welcome in the event it is needed at some point in the future.

A LOT OF WORK

The closing attorney who begins a project such as this will wonder about how much time this assignment will take. Every situation is different, and circumstances will vary. With that said, the closing attorney should anticipate that the assignment will last at least one to six months, if not longer in some instances. The first 30 days will be intense. Closing someone else's law practice will divert almost all of the closing attorney's time and attention from his own law practice. Entering into this engagement without carefully analyzing one's own law practice is unwise.

DISSOLUTION

Another item to be considered is the form of practice that the deceased attorney chose. Did he practice as a sole practitioner in his own name? Did he practice in the form of a PSC? The closing attorney and/or the estate attorney should consider the proper way to dissolve the practice. Formally dissolving a corporation can provide certain additional bars to claims that may arise in the future.

BRINGING THINGS TO A CLOSE


At some point in time, the closing attorney must begin to move things to a close. Files that have been reviewed should be stored in some sort of alphabetical or numerical order. Failing to do so will make them harder to find later when needed. The closing attorney must consider where is best to store all the files, taking into account that they contain confidential and personal information. When the deceased attorney's building is sold or the lease runs out, the files must be moved and maintained elsewhere. The duty to maintain client files and property must be thoroughly considered. The closing attorney may be required to rent a storage unit to separately maintain and secure the files until they can be destroyed after the proper passage of time.

The closing attorney should also determine how the mail of the deceased attorney should be rerouted. Rerouting the mail to someone that can properly field it and note any potential problems, inquiries, or needs is helpful. The deceased attorney's phone number and website should be considered in the same way. If they can be transferred to someone, this too may assist with protecting the estate, the law practice, and the clients.

SOME CLIENTS WILL NOT RETRIEVE THEIR FILE

Inexplicably, some clients will not retrieve their file. For some, it will be because they do not care. For others, it will be because they did not receive notice as the letters advising them came back undelivered. The closing attorney must make diligent efforts to notify all clients. At the end, the closing attorney's question will be "What do you do about the lingering files when clients will not come in to get them?" After multiple efforts to provide clients with notice and an opportunity to retrieve their file, the file should be retained with all others in the event that they one day change their mind.

CONCLUSION

Accepting the assignment to serve as the closing attorney for the law practice of a deceased sole practitioner is a formidable task. The closing attorney is dealing with personnel and clients that he does not know. The closing attorney is asked to deal with unfamiliar legal files and unfamiliar law office systems. The assignment, as described in KBA Ethics Opinion 405, is to "step into the deceased lawyer's shoes, not for the purpose of practicing law, but for the purpose of notifying clients, arranging for the disposition of files, and winding up the deceased lawyer's affairs." At times, it may not seem like the closing attorney is practicing law at all. Nevertheless, the closing attorney must keep in mind that at the heart of the assignment there are clients. The clients have a legal matter, and their attorney/client relationship has ended through no fault of their own. Regardless, their legal matter goes on. The closing attorney must assist the deceased attorney's clients with a transition as best as is possible. If successful, the clients will continue on with their legal matter with a new attorney. If successful, the deceased sole practitioner's estate will be protected, and his good name untarnished. All are worthy objectives. 

ADDITIONAL RESOURCES

Del O'Roark, *Post Mortem Professional Responsibility: What does a sole practitioner owe those dearly beloved clients left behind?* 57 Bench & Bar 2, Spring 1993 (page 41).

ALI/ABA's *A Practical Guide to Achieving Excellence in the Practice of Law*.

James E. Brill, *Dealing with the Death of a Solo Practitioner*, 4th Annual Advanced Estate Planning and Probate Course, Chapter 8. This has an excellent Appendix with additional resources and citations.

¹Caution should be taken to avoid misleading the client since the closing attorney's name will not be included on the deceased attorney's letterhead.



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