

CLOSING A LAW OFFICE:

NEW MEXICO GUIDE FOR A THIRD PARTY CLOSER



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SENIOR LAWYERS DIVISION

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INTRODUCTION

This guide deals with some of the issues created by the death or permanent disability of an Attorney who leaves an on-going law practice. There are many ethical, practical and financial considerations facing the family of the Attorney who has left a law practice. Often the survivors are overwhelmed with the responsibility of closing the office, selling it, or continuing the practice.

Today, with many husbands and wives engaged in the legal profession, the surviving spouse may be Executor of the Attorney's Estate, the Closer and the Estate Attorney. The three-hatted lawyer- spouse is immediately placed in a position of potential conflict requiring scrupulous attention to the ethical references provided herein.

This Guide is applicable to the sole practitioner and to an Attorney who is associated or in partnership with others whether or not there is a formal agreement with the Associates or Partners. Although it may offer some assistance to anyone closing the office of a disbarred attorney, that situation may involve additional problems not addressed here.

In this Guide:

“Attorney” means the deceased or disabled attorney.

“Closer” means the lawyer closing the Attorney's law practice.

“Personal Representative” means the personal representative of the Attorney's estate.

“Client” means client of the deceased or disabled Attorney.

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from the Bar Association of Nassau County to use its Guide to produce this work.*

THE CLOSER

WHO IS THE CLOSER

The Closer must be a lawyer if the Closer is to do anything more than deliver the unexamined file to the Client. The Closer may be the estate attorney or one selected by the estate attorney, a spouse, an executor, an associate or a surviving partner.

If no such person is known to exist, the Office of Disciplinary Counsel can and will petition the Supreme Court to appoint an attorney or attorneys to inventory the files of the Attorney and to take such action as appropriate to protect the interests of the Clients of the Attorney, as well as the interests of the Attorney (or his or her estate). *See* Rule 17-213(A) of the Rules Governing Discipline.

ESTATE ATTORNEY AS CLOSER

There is no rule prohibiting an estate attorney from being the Closer but there are areas of possible conflict that must be avoided. Since the Closer stands in the shoes of the Attorney, Closer's allegiance is to protect the Attorney's Client. Because the estate attorney's loyalty is to the estate, its executor and the heirs and distributees of the estate, this may conflict with the best interests of the Attorney's Clients.

If the estate attorney determines that there is an area of potential conflict, he or she should contact the Office of Disciplinary Counsel and request that an attorney be appointed as Closer pursuant to Rule 17-213(A).

SURVIVING SPOUSE AS CLOSER

A surviving spouse, if an attorney, may be a Closer. The Closer spouse must take great care that the personal relationship with the Attorney does not affect the Closer spouse's duties and responsibilities to the Attorney's Clients lest the Closer-spouse violate the code and be subjected to discipline.

PROTECTING THE CLOSER

If the Closer performs any service beyond returning the unexamined file to the Client it is recommended that the Closer have a written agreement with the Personal Representative of the Attorney. If the Closer is acting by direction of the Court, there would be no need to have an agreement.

OPTIONS OF THE CLOSER

1. The Closer may return the file to the Client in the same condition as it is found in the Attorney's office. This constitutes a purely ministerial act.
2. The Closer may cull the file and return all original and/or legal documents, and other instruments requested by the Client. Work product of the Attorney, duplicate agreements, etc., may be removed. The closer should obtain a receipt for all papers delivered and authorization to destroy the balance of the file.

3. The Closer may be substituted and retained by the Client to complete unfinished matters. However the Closer should be careful not to engage in conduct that conflicts with ethical standards involving solicitation. The Client should be given the option of retaining another attorney or permitting the Closer to complete unfinished matters.

The Closer may not solicit the Client to become the Client of the Closer. Solicitation or coaxing must be avoided or the Closer may be in violation of Rule 16-703 of the Rules of Professional Conduct. If however the Client does retain the Closer, the Closer should obtain a Substitution of Attorneys properly signed. It should be served upon all interested parties and filed as required by law. It is also suggested that the Closer have a written Retainer Agreement with the Client to obviate future disagreements as to fees.

4. The Closer may refer the Client to another attorney if the Client requests it.
5. The Closer if authorized by the Personal Representative of the deceased Attorney, or the Legal Representative of the disabled Attorney, may negotiate the sale of the law practice pursuant to Rule 16-117 of the Rules of Professional Conduct.

CLOSER'S PROCEDURE

DETERMINE THE CASELOAD

1. Are file drawers labeled active and/or closed?
2. Is there a card index or ledger of files?
3. Check calendars, diary, Lawyer's Answering Service for pending litigation.
4. Inquire of Attorney's Secretary.
5. Check for original documents in inactive files that have not been formally closed.
6. Check whether all work has been completed in files that have not been marked closed.

PRIORITIES

1. Inventory all files and prioritize according to urgency and time restraints.
2. Determine the next step in any pending litigation.
3. Check for Statutes of Limitations in all cases.
4. Estates and Trusts (See Separate Section)
5. Inventory and reconcile IOLTA and escrow accounts.

6. Check Will files for original Wills. If more than one original Will, check dates to determine the last executed.

NOTIFICATION

1. Notify Client that the office is being closed. If a matter of urgency use telephone and follow with letter.
2. Notify Court and Attorneys in all pending litigation.
3. Notify Clerk of the Supreme Court and New Mexico State Bar of date of death of Attorney to terminate registration requirement.

PERSONNEL

Provide for the continued employment or orderly termination of the Attorney's employees.

CLOSER'S SYSTEM

1. Develop a system to record all files returned to Clients, including all action taken by Closer relating to each file.
2. Develop a tickler system to track notices to Clients and responses.
3. Use calendar for timetable, particularly due dates for tax returns, accounting reports and statutes of limitation.

FEES

1. Check all files on retainer. Determine on quantum meruit basis value of services rendered by the Attorney. If file returned, Client to receive difference between monies paid and services rendered.
2. It is improper for the Closer to pay a non-lawyer surviving spouse any portion of the legal fees collected. Payments must be made to the Estate.
3. The Closer may be paid by the Estate for services rendered in closing the office.

ACCOUNTS RECEIVABLE

1. Send out updated bills.
2. Bill Client for services rendered to date on quantum meruit basis. Estate is entitled to retain file until bill is paid providing prejudice to Client can be avoided.

INCOMPLETE FILES

1. If the Closer finds matters that have been neglected or barred by the Statute of Limitations, return the file to the Client and advise the Client to consult an attorney of the Client's own choosing.
2. Notify the Attorney's malpractice carrier of possible suit.

OFFICE ADMINISTRATION

1. Check lease, determine whether office is to be closed or remain open and discuss with Landlord.
2. Arrange for disposition of furnishings or books. If not saleable, furnishings in good condition may be donated. Books that have not been kept up to date have little or no value. Libraries and law schools have limited space and usually are not interested in accepting books. A notice in the Bar Bulletin or a sign posted at the Bar Association may be of assistance.
3. Check whether there are deposits/credits with book companies, utilities, Federal Express, etc. Arrange for refunds.
4. Notify book companies to cancel future deliveries. The Post Office will not accept packages for return if they have been opened.
5. Check whether any of the equipment is leased, i.e. copier, computer, etc. Determine date of termination or cancellation.
6. Check insurance policies and decide which ones to cancel or if claims should be made.
7. Keep complete records of all expenses incurred in closing the office.

PRESERVATION OF FILES AND RECORDS

TAX DOCUMENTS

1. The Internal Revenue Service can audit for three years after the return is filed even if filed late. Therefore all of the Attorney's returns and justifying data should be kept at least that long. Some Accountants say you should keep the tax returns and backup data forever.
2. All records pertaining to an Employer-Employee plan showing deposits and/or withdrawals should be kept for at least three years. If applicable, all Form 5500's filed with the Internal Revenue Service should be preserved for at least three years.

MANDATORY PRESERVATION OF ATTORNEY'S RECORDS

The Closer is under the same obligation to preserve files and records as the Attorney. The following records must be preserved for five (5) years after disposition of funds or termination of the trust relationship. (*See* Rule 17-204(A) of the Rules of Governing Discipline)

1. A record of all deposits into and withdrawals from the Attorney's trust account(s) specifically identifying the date, source and description of each item deposited as date, payee and purpose of each disbursement. Deposit slips shall separately identify each item deposited. Trust account disbursement shall be made only by authorized bank transfer or by check payable to a named payee and not to cash.
2. A separate ledger or account for each separate trust Client, containing the information required by subparagraph (1) of this paragraph. A continuing balance of each individual Client trust ledger shall be maintained. The total of the balances of all individual Client trust ledgers must equal the beginning balance of all individual Client trust accounts, plus the total of all additional amounts received in trust, minus the total of all trust monies disbursed.
3. Copies of all retainer and compensation agreements with Clients.
4. Copies of all statements to Clients, which statements shall reflect all transactions on the trust account for the period to which statements relate.
5. All checkbooks, check stubs, bank statements, cancelled checks and duplicate deposit slips on each trust checking account.
6. Copies of all invoices and statements received from others and paid out of trust funds;
7. Written reconciliations made at least quarterly of the checkbook balance, the bank statement balance and the Client trust ledger sheet balances.
8. Copies of those portions of each Client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.
9. If the Attorney participates in the IOLTA program, proof of compliance with Subparagraph (b) of Paragraph D of Rule 16-115 of the Rules of Professional Conduct and copies of reports received from the financial institution in compliance with Subparagraph (5) of Paragraph D of Rule 16-115 of the Rules of Professional Conduct.
10. For properties other than cash, a separate ledger for each Client identifying the date received, the name of the person from whom received, the description of the property (including make, model, serial number and other identifying marks), its location in the attorney's office or other location, the date released by the Attorney and to whom released.

PRESERVATION OF CLIENT'S FILES

1. Wherever possible the Closer should deliver to the Client, all original documents and all documents which the Client is obligated to keep or may want to preserve. The Closer should advise the Client of the need to preserve them. The Closer should obtain authorization to destroy the balance of the file unless there is a possible malpractice claim against the Attorney or the Attorney is required to preserve the file. If the Client cannot be located, the Closer must be guided by the foreseeable need for the documents in question and preserve them as applicable.
2. Original Wills must be preserved by the Closer if the Client cannot be located.

ESCROW ACCOUNTS

ACCOUNTING

1. Closer should prepare an informal accounting of each Client's escrow fund.
2. If the Attorney was the sole attorney signatory on the escrow account an application should be made to the Supreme Court by Chief Disciplinary Counsel pursuant to Rule 17-213 of the Rules Governing Discipline to appoint a successor signatory for the account. At least one attorney must be a signatory on the account. Rule 17-204A(1).

TRANSFER OF ESCROW FUNDS

In transferring escrow funds to another, care must be taken to protect all interested parties.

1. Obtain written consent from Client and all interested parties to transfer escrow funds to new Attorney retained by Client.
2. Obtain acknowledgment by substituted Attorney of receipt and acceptance of funds and terms of escrow agreement.
3. Obtain release from each interested party, releasing Attorney, Estate and Closer from any future obligation.
4. Notify all necessary parties for whom funds are being held on behalf of Client (with copy of notice to Client) that funds are being disbursed and that in event of dispute between Client and third party as to ownership of funds, disputed amount will be held in trust or placed in court registry until dispute is resolved.

MALPRACTICE INSURANCE

1. The Closer should review the Attorney's professional liability policy to ascertain if the Attorney is entitled to a free extended reporting period or in the alternative, the cost of purchasing an extended reporting period. The purpose of an extended reporting period is to extend the time in which claims can be reported to the professional liability carrier after the termination of a claims-made policy. It will not provide coverage for work done after the termination of the policy.
2. The Closer should contact the Attorney's carrier to ascertain whether the Attorney's policy covers the Closer.

ESTATES AND TRUSTS

GENERAL

The Closer should:

1. For all active estate matters, read all Wills and Trust Agreements, outline and calendar due dates of tax returns and all of the Attorney's obligations under the particular document.
2. Notify all beneficiaries, adversaries, and any Court where a proceeding is pending of the Attorney's death or disability.
3. Offer to return all original Wills, Living Wills, Trusts, Health Care Proxies and Power of Attorneys to the Client. If the Attorney is a named Executor or Trustee of any Will, the Testator should be advised that the fiduciary named in the Will has died or is disabled.
4. Where the Testator cannot be located the original documents must be preserved.

OBLIGATIONS WHERE ATTORNEY IS FIDUCIARY

1. Closer should preserve and assemble any assets of Client's estate or trust and arrange to deliver to successor.
2. If necessary, make application to the Court for appointment of a successor Executor or Trustee.
3. If more than one fiduciary is serving, a successor will not be necessary unless specifically required under the Will or Trust Agreement. If not required, the remaining fiduciaries may file an ex parte motion to delete the name of the deceased fiduciary.
4. The Closer should evaluate and determine the obligations of the Attorney/Fiduciary's Personal Representative, to wit: accounting tax returns, payments to beneficiaries, etc.
5. The Personal Representative of the Attorney does not have inherent authority to take control of the estate or trust. However, the Personal Representative of a deceased or incompetent Attorney/Fiduciary may make final distribution under Court direction without the appointment of another fiduciary.

ACCOUNTING BY ATTORNEY'S PERSONAL REPRESENTATIVE

The Personal Representative should determine the feasibility of an informal account. An "informal account", i.e. one done voluntarily without a Court proceeding, should be considered if all interested parties are adults, not under any disability, and amenable.

TAX RETURNS

It is the responsibility of the Personal Representative of the Attorney/Fiduciary to file tax returns until a successor is appointed or request extensions to file Federal and State estate tax returns, and file or request extensions to file Federal and State fiduciary income tax returns.

ATTORNEY/FIDUCIARY CLIENT'S IRA, PENSION PLANS

1. The Closer should carefully examine the Client's estate file to determine whether there are any IRA or Pension Plans among the assets.
2. The rules concerning distributions and rollovers from IRAs and Pension Plans are complex, and an expert should be consulted. Most investment companies will provide complimentary brochures explaining available options.
3. If the deceased Client was a fiduciary of a qualified plan, Form 5500 must be filed with the Internal Revenue Service until all monies are disbursed from the qualified plan. These forms are provided by the Client's Plan together with verification of the status of the Plan.

SALE OF A LAW PRACTICE

On February 6, 2002 the Supreme Court authorized Attorneys to sell a law practice by adopting a Rule 16-117 of the Rules of Professional Conduct. The provisions of this Rule should be followed if the Attorney's law practice is to be sold.