

CLOSING A SOLO PRACTICE IN NEW HAMPSHIRE

By the NHBA Ethics Committee

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If you are a solo practitioner contemplating closing your practice, consider four pieces of advice. First, consider alternatives to closing your practice. Your clients and your purse may be better served by these alternatives to simply closing your solo practice. Clients may find it helpful if you consider other transitional plans like merging your practice with another solo or small firm or hiring an attorney who would take over your practice. ABA Model Rule 1.17 also permits the sale of a practice under certain conditions. The New Hampshire Rules of Professional Conduct do not currently permit the sale of a law practice, but the Supreme Court is considering a change in this area.

Second, if you are committed to closing your practice, plan for the closure well in advance. Even if you anticipate pursuing another form of transition, you should plan for a practice closure in the event that you become unable to practice. The problems that occur when a practice must close suddenly due to death or disability are obviously most acute with solo practices and advance planning is the only reasonable means to avoid the problems that you may leave behind for clients and your family.

Third, consult available checklists and other materials about closing a practice that are published by bar associations across the nation. The New York State Bar Association has published a helpful pamphlet entitled, "Planning Ahead, Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death." The guide is available at www.nysba.org (under "publications"). The State Bar of Michigan also offers a helpful article that emphasizes relevant ethical considerations entitled, "Closing a Law Practice," available at www.michbar.org (under "opinions" and then "ethics packages"). Finally, New Mexico offers a guide for the "third party closer" that will help each of you understand what may happen in the absence of proper planning at www.nmbar.org.

Relevant articles on the subject of closing a practice, including a solo practice, are published by the American Bar Association. A good example is Peter H. Geraghty, "Winding Down and Moving On," available at www.abanet.org/media/youraba/200611/article11.html. Jay Foonberg has written prolifically about practice issues and it should be no surprise that he has published on this topic. See e.g., "Checklist for Closing or Selling a Law Practice," available at www.seniorlawyers.org/checklist.htm.

Fourth, obtain good business advice. You will be dissolving a business when you close your practice. Work with your accountant to address standard business considerations that include paying debts and wages, collecting receivables and dealing with taxes. Affirmatively advise your banks when you close your trust and operating accounts to limit opportunities for fraud.

The following considerations are relevant to the legal and ethical aspects of closing your practice. This list is not exhaustive and is not intended to substitute for good, current and specific legal advice. As well, lawyers licensed in more than one state must consider each state's professional conduct rules.

Your Clients and Their Property

You must plan to deal with open matters in a way that does not have a material adverse affect on the interests of your clients (N.H. Rule of Prof'l. Conduct 1.16). Depending on the nature of your practice, this may mean continuing to represent a client through completion of a transaction. It may mean seeking court permission to withdraw from ongoing litigation. You may have an obligation to suggest competent replacement counsel. If you are a named executor, you may wish to advise the client to amend her will for planning purposes. Of course, you may also decline to serve when the time comes. At the very least, you should provide your clients with written notice, preferably by mail with a return receipt, of your plans and request that they advise you in writing of their preferences as to how they wish to proceed.

The process of protecting your clients' interests should ordinarily start with a full and complete understanding of all your open matters, the scope of representation expected of you in each matter and up-to-date contact information for each client. You must then decide which tasks may reasonably be completed before your planned closing date and which tasks must be the subject of discussions with your clients about transfers to other counsel.

Your clients' property must also be protected. This includes funds held in trust, open files, and closed files. You must maintain records of all client property that you have handled for six years after disbursal (N.H. Rule of Prof'l. Conduct 1.15 and Supreme Ct. Rule 50). Your accountant will be helpful to questions about reconciling your trust accounts, but it is ultimately your responsibility. Id.

You may be unable to locate clients who have money in your trust account. You should contact the New Hampshire Department of the Treasury at www.nh.gov/treasury (under "abandoned property" and then "holder reporting") to download the proper reports to be completed and notarized. You will eventually pay the trust money due the missing clients to the state treasury to be treated as unclaimed property.

Open files should be transferred or returned per the clients' written instructions. Closed files require some logistics to be considered and there are not hard and fast ethical rules on this subject. Former Bar President Richard Uchida said it best when he wrote: "While a lawyer does not have an ethical obligation to maintain a client's file indefinitely, it is important to remember the overriding considerations of confidentiality, proprietary rights, a client's reasonable expectations, and the lawyer's duty to avoid foreseeable prejudice to the client's interests." R. Uchida, "Ethical Considerations and the Retention of Client Files," N.H.B.A. Practical Ethics Article, 3/99.

A good rule of thumb may be to maintain files for six to eight years. You will need to make arrangements for the continued safekeeping of these files until the time they may be destroyed or returned. Some possible arrangements may include your retention of the files in a reliable storage facility or your making arrangements with a subsequent law firm to maintain the storage of the files for you. Regardless of how you meet your responsibilities in this area, client confidentiality must be maintained. N.H. Rule of Prof'l. Conduct 1.6. Remember, your client files also include materials in electronic form. New Hampshire Ethics Op. 2005-06/3. You should consult with a competent technology professional as to which forms of storage media would be most appropriate and under what conditions the media must be stored. Not all media are created equal and some degrade more quickly than others.

Your Interests

Peace of mind should be your most important consideration. Thoughtful planning may protect you from ongoing practice problems after you have closed your practice. Consult with your malpractice carrier about ongoing coverage. The three-year statute of limitations may not be a fair estimate of your coverage needs, depending on the nature of your practice. Review your general liability policies. Are they claims made? Will you require ongoing general liability coverage? Cancel policies where appropriate when you close and obtain premium refunds.

The previous comments about file preservation are also appropriately considered here. Do you want to preserve your electronic files for future reference in the event you are sued? Consider and plan for this possibility before closing your practice.

Make plans for ending office leases or selling your office real estate. Sell or give away your furniture and books; they are probably not worth much. Treat staff fairly. You may need the help of a trusted assistant after the practice has closed. Provide fair notice to your employees of your plans and consider providing incentives for key employees who agree to stay through the end of the wind up. Pay wages due and owing at the time you close your practice to avoid personal liability for unpaid wages (R.S.A. 275:44). Depending on your policies and practices, wages may include sick, vacation and severance pay. Consult with your accountant or plan professionals for the wind-down of any employee benefit plans, including healthcare and pension or 401k. Consider how you will provide for your own continuing needs in these areas after you have closed your practice.

Pay your payables and collect your receivables. Document your interests in collecting fees in contingent matters in which you have performed work, but have not completed the representation. Balance your efforts to collect receivables. Develop your own “heartburn index” to guide you in making decisions to write off receivables versus engaging in aggressive collection activities.

Make arrangements, with your accountant’s advice, to pay your taxes. You will require some winding-up period after you end your active practice to continue to collect receivables. Plan for necessary bookkeeping services during the wind-up period.

Remember your association memberships. Cancel, withdraw or become inactive if these options are available. Consider maintaining *pro bono active* status if appropriate. The New Hampshire Bar Association does not currently maintain contact information for attorneys who have retired from practice, but may soon begin to do so. Contact the Bar Association with your information.

Best of luck with your retirement or new career.

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