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Gone Fishing:
Closing a Law Practice

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Retiring is nothing new for lawyers. Retirement, however, is becoming more common as the demographic bulge of "Baby Boom" lawyers wind-down their practices. If a lawyer is at a mid-size or larger firm, transitioning into retirement usually means simply handing-off ongoing work to other partners because the retiring lawyer's firm is continuing. For solos and even some small firm lawyers where partners are retiring at roughly the same time and who are not selling their practice, transitioning often means closing their law practice altogether.

In this column, we'll look at three aspects of closing a law practice on retirement. First, we'll survey file retention. Second, we'll address closing the firm's trust account. Finally, we'll discuss "tail" insurance coverage.

Before we do, however, three caveats are in order.

First, this column addresses lawyers who are affirmatively executing a retirement plan. Bar associations nationally have long suggested that solos in particular have the law firm equivalent of advance directives outlining business basics and colleagues who have agreed to help in the event the lawyer concerned dies unexpectedly or has a serious health problem that prevents the

lawyer from practicing. ABA Formal Opinion 92-369 (1992) (among others) remains an excellent resource on this point.

Second, "retirement" from a law firm does not necessarily mean retirement from the law altogether. Many lawyers who have closed their own firms remain active through pro bono work, mediation, teaching and a variety of other law-related positions. The Oregon State Bar and the Professional Liability Fund both have information available on how these other law-related occupations may affect licensing and the need for malpractice coverage.

Third, in this column, we'll focus on the risk management aspects of closing a law practice. Other areas, such as commercial landlord-tenant and employment law, may also enter the mix to address other business aspects of winding-down a practice such as the firm's office lease and staff.

Files

Lawyers wind-down their practices in different ways. Some continue to handle a routine workload while transitioning clients to new counsel. Others stop taking on new work and then handle their existing matters to conclusion. Even if work is transitioned to replacement counsel, prudent practice suggests keeping a "loss avoidance" copy of the file in the event any issues arise later.

In the not-too-distant past, maintaining paper files into retirement often meant renting storage space from a commercial vendor. With the advent of largely cloud-based electronic files, the cost of long-term storage has been reduced considerably. Electronic files, nonetheless, present their own unique issues. OSB Formal Opinion 2016-191 (2016) discusses electronic files generally and Formal Opinion 2011-188 (rev 2016) addresses cloud storage. The former suggests that once a lawyer has returned original documents having legal significance in paper form (such as original wills) to clients, the balance of the files involved can be scanned and stored electronically (if not already in electronic form). The latter generally approves cloud storage provided the vendor has appropriate security protocols.

The PLF recommends that most files be maintained for at least 10 years after closing. Formal Opinion 2016-191 notes that lawyers should generally store electronic files in a format that will remain accessible for the duration of any chosen retention period. When either electronic files or their paper counterparts are eventually destroyed, OSB Formal Opinion 2005-141 (rev 2015) counsels that the destruction (and any associated recycling) should be done using a process compatible with a lawyer's continuing duty of confidentiality—including

any associated equipment such as old computers and other data storage devices that are being recycled.

Trust Accounts

The PLF has a detailed checklist available on its web site for closing trust accounts. Ideally, all disbursements should reconcile perfectly and the account can be closed with a zero balance. Occasionally, however, lawyers winding down their practice discover small sums in their trust accounts where, after a reasonable search, the clients owning the funds cannot be located. In that event, OSB Formal Opinion 2005-48 (rev 2010) provides detailed guidance for reporting the unclaimed property to the Department of State Lands and disbursing the abandoned funds to the Oregon State Bar.

Insurance

Having a malpractice claim surface after retirement isn't what most lawyers anticipate. Although Oregon has a two-year limitation period for malpractice claims under ORS 12.110, it is coupled with a "discovery rule" (*see Stevens v. Bispham*, 316 Or 221, 227, 851 P2d 556 (1993)) that can extend that window. At the same time, under Oregon's statute of repose—ORS 12.115—malpractice claims are generally barred if brought more than 10 years from the date of the alleged error regardless of discovery (*see Davis v. Somers*, 140 Or

App 567, 570-71, 915 P2d 1047 (1996)). Even if a court ultimately determines that a claim is time-barred by the repose statute, however, the defendant lawyer still had to incur defense costs.

Carriers provide "extended reporting" or "tail" coverage to address, among other things, claims that arise following a lawyer's retirement. The PLF Basic Plan provides tail coverage automatically—but the limits are those applicable in the last year the lawyer was in private practice. If the lawyer had excess coverage through the PLF while in practice, tail coverage is also available for purchase under the PLF Excess Plan. More information on both is available on the PLF's web site.

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Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in

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