

**April-May 2021 WSBA *Bar News Ethics & the Law* Column**

## **Hanging It Up: Closing a Law Practice on Retirement**

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Over the past decade, both national and state bar organizations—including the WSBA—have studied a key demographic facing the legal profession: the average age of lawyers is rising as the “Baby Boom” generation grows older.<sup>1</sup> Although there are many implications from this trend, one of the clearest is retirement. For lawyers at mid-size and larger firms, transitioning into retirement usually means simply having other lawyers at their firms step into continuing client relationships. For solos and lawyers at small firms who may be roughly the same age, selling their law practice can provide the functional equivalent.<sup>2</sup> For many solos and small firm lawyers, however, this transition often means closing their law practices altogether.

In this column, we’ll look at three risk management 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 preliminary points are in order.

First, this column addresses lawyers who are executing a retirement plan developed in advance. Bar associations nationally have long suggested that solos in particular have the equivalent of law firm “advance directives” outlining

business basics and designating trusted colleagues who have agreed to assist in the event the lawyer dies unexpectedly or has a health crisis that prevents the lawyer from practicing.<sup>3</sup>

Second, “retirement” from a law firm does not necessarily mean retirement from the law completely. Many lawyers who have closed their own firms remain active through pro bono and other volunteer work, mediation, teaching and a variety of other pursuits drawing on their legal training and experience. The WSBA has information on the “status changes” pages of its web site on how these other law-related activities may affect licensing.

Third, in this column, we’ll focus on the risk management aspects of closing a law practice. Other legal areas such as commercial landlord-tenant and employment law may also enter the mix to address the business aspects of winding-down a practice such as the firm’s office lease and staff. The WSBA’s Practice Management Assistance Program offers a wealth of resources and personal advice on a wide spectrum of retirement-related topics. More information is available on the Practice Management Assistance Program’s pages of the WSBA’s web site.

***Files***

When a file is closed, RPC 1.15A(f) ordinarily requires returning client originals that hold legal significance in their paper form—such as original wills—to the client concerned. Although in the past some lawyers, particularly in the estate planning area, obtained client consent to hold original wills and similar documents having legal significance in their paper form, contemporary risk management practice counsels simply returning these kinds of documents when the initial work of creating them is completed. Otherwise, the lawyer has a continuing duty to safeguard those kinds of paper documents<sup>4</sup> and ongoing retention creates the risk in our very mobile society that the lawyer will lose track of the clients over time.<sup>5</sup>

Assuming paper originals holding independent legal significance have been consistently returned throughout a lawyer's practice, it still makes sense for the lawyer to retain files for a time after they are closed in the event the matter is reopened or questions arise later.<sup>6</sup> Other than trust account records, the Rules of Professional Conduct do not specify a particular file retention period.<sup>7</sup> The WSBA Practice Management Assistance Program instead has a very useful set of file retention guidelines available on the WSBA web site that address both particular kinds of documents and specific practice areas.<sup>8</sup>

When a lawyer is nearing retirement, files should be assessed to confirm that client originals of the kind noted earlier have been returned and to gauge whether some files may already exceed the recommended file retention periods. If so on both counts, then those files can be destroyed. Just as we have a duty to protect confidential information when maintaining files, we also have a duty to securely destroy them. This applies to both paper and electronic files—and, with the latter, storage media or devices that are also being disposed. The Practice Management Assistance Program can provide recommendations on both secure paper shredding and electronic recyclers who will destroy hard drives (or the equivalent) and then salvage the remaining components.

Once older files and devices are addressed, most lawyers will still have a sizeable number of files that remain. Again, these should be surveyed and client original documents returned if this has not already been handled when the files involved were closed. To avoid the higher expense of paper file storage, paper files can be scanned into electronic form for long-term storage.<sup>9</sup> Driven by both technology and the recent pandemic, many law firms have already converted their files into solely electronic form and moved them to cloud-based storage.<sup>10</sup> Because our duty of confidentiality continues to former clients,<sup>11</sup> the advisability of using a reputable commercial storage vendor with appropriate security

protocols for both storage and access remains until the files involved are eventually destroyed.<sup>12</sup>

### ***Trust Accounts***

Under RPC 1.15A(h)(9), only an active WSBA member can maintain a trust account.<sup>13</sup> Therefore, if a lawyer is fully retiring, the lawyer's trust account will need to be closed. Trust account records must be maintained for seven years following the disposition of the funds involved under RPCs 1.15A(c)(3) and 1.15B(a). The WSBA has an excellent trust account management booklet available for download on its web site that addresses, in relevant part, closing a trust account.<sup>14</sup>

Ideally, all disbursements should reconcile neatly and the account can be closed with a zero balance. Occasionally, however, lawyers winding down their practices discover small sums in their trust accounts where, after a reasonable search, the clients owning the funds cannot be located. In that instance, Comment 6 to RPC 1.15A provides clear direction: "If after taking reasonable steps, the lawyer is still unable to locate the client or third person, the lawyer should treat the funds as unclaimed property under the Uniform Unclaimed Property Act, RCW 63.29."<sup>15</sup> RCW 63.29.170 and 63.29.190 address, respectively, reporting and payment over of unclaimed funds to the Washington

Department of Revenue. The Department of Revenue has a downloadable booklet on its website that walks holders of unclaimed property through the process.

### ***“Tail” Coverage***

Dealing with a legal malpractice claim isn't the way most lawyers would like to spend their retirement. Although Washington has a three-year limitation period for legal malpractice claims under RCW 4.16.080,<sup>16</sup> it is subject to a “discovery rule.” In other words, the three-year limitation period “does not begin to run until the client discovers, or in the reasonable exercise of diligence should have discovered, the facts which give rise to the cause of action.”<sup>17</sup> Potentially, therefore, a claim might not be asserted until long after a lawyer has retired. In addition to the risk of an adverse judgment, legal malpractice claims can also be expensive to defend due to their complexity.

To address this kind of unpleasant surprise, malpractice carriers typically offer “extended reporting” or “tail” coverage to their insureds when they leave practice. Although details on availability, length of coverage and pricing vary by carrier, some form of tail coverage is almost always an important element on the risk management side of retirement planning. The ABA Standing Committee on Lawyers' Professional Liability has useful guidance on its web site for tailoring

post-retirement coverage to particular practice areas—particularly those, such as estate planning, where the “tail” period may be longer than others.<sup>18</sup> The WSBA also has a page on its web site with many malpractice insurance resources.<sup>19</sup>

## ABOUT THE AUTHOR

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 Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.

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<sup>1</sup> The ABA has compiled a number of reports and articles discussing this trend, including here in Washington, at:  
[https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyersintransition/aginofthebar/](https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/aginofthebar/).

<sup>2</sup> RPC 1.17 addresses selling a law practice. See generally Mark J. Fucile, “Grey Area”—*Selling a Law Practice*, 70, No. 3 *WSBA NWLawyer* 43 (Apr./May 2016).

<sup>3</sup> See generally ABA Formal Opinion 92-369 (1992) (counseling advance planning for solos). Comment 5 to ABA Model Rule 1.3 also suggests advance planning as being included

within the duty of diligence reflected in the text of the rule. Although Washington did not adopt a comparable comment, advance planning—even if done informally—is prudent. The WSBA has a law firm disaster planning guide available on its web site at: [https://www.wsba.org/for-legal-professionals/member-support/practice-management/guides/disaster-planning\\_](https://www.wsba.org/for-legal-professionals/member-support/practice-management/guides/disaster-planning_)

<sup>4</sup> See RPC 1.15A(c)(3) (safeguarding property).

<sup>5</sup> RCW 11.12.265 also permits original wills for living testators to be filed under seal with “any court having jurisdiction.”

<sup>6</sup> See generally WSBA Advisory Op. 181 (rev. 2009) at 3-4 (discussing file retention).

<sup>7</sup> RPCs 1.15A(c)(3) and 1.15B(a) generally require trust account records to be maintained for seven years.

<sup>8</sup> See generally Mark J. Fucile, *Spring Cleaning*, 74, No. 4 WSBA Bar News 16 (Apr/May 2020) (discussing file retention and destruction). The WSBA’s document retention guide is available on its web site at: <https://www.wsba.org/for-legal-professionals/member-support/practice-management/guides/document-retention-guide>.

<sup>9</sup> See WSBA Advisory Op. 2023 (2003) (discussing converting paper files into electronic ones).

<sup>10</sup> See generally WSBA Advisory Op. 2215 (2012) (discussing cloud-based file storage extensively).

<sup>11</sup> See RPC 1.9(c) (continuing duty of confidentiality to former clients); see also *Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d 681 (1945) (privilege survives death of client); *Swidler & Berlin v. United States*, 524 U.S. 399, 410-11, 118 S. Ct. 2081, 141 L. Ed.2d 379 (1998) (same).

<sup>12</sup> WSBA Advisory Op. 2215, *supra*, includes suggested general factors for assessing whether a vendor’s security protocols continue to meet the regulatory requirements of RPC 1.6 over time. See also ABA Formal Op. 477R (2017) (addressing, in relevant part, the duty of confidentiality in the context of data transmission). The WSBA has a cyber security guide for law firms available on its web site at: <https://www.wsba.org/for-legal-professionals/member-support/practice-management/guides/cybersecurity-guide>.

<sup>13</sup> See also WSBA Advisory Op. 201903 (2019) (citing RPC 1.15A(h)(g) and concluding that a retired lawyer could not maintain a trust account to receive future client settlement proceeds).

<sup>14</sup> See [https://www.wsba.org/docs/default-source/licensing/iolta/managing-client-trust-accounts-booklet\(00455604\).pdf?sfvrsn=29a13cf1\\_10](https://www.wsba.org/docs/default-source/licensing/iolta/managing-client-trust-accounts-booklet(00455604).pdf?sfvrsn=29a13cf1_10).

<sup>15</sup> See also WSBA Advisory Op. 2176 (2009) (discussing unclaimed funds in trust and noting that a lawyer is not permitted to include a provision in a fee agreement granting the funds involved to the lawyer in the event the client cannot be found).

<sup>16</sup> See *Huff v. Roach*, 125 Wn. App. 724, 106 P.3d 268 (2005) (summarizing the limitation period).

<sup>17</sup> *French v. Gabriel*, 116 Wn.2d 584, 595, 806 P.2d 1234 (1991).

<sup>18</sup> See [https://www.americanbar.org/groups/lawyers\\_professional\\_liability/](https://www.americanbar.org/groups/lawyers_professional_liability/).

<sup>19</sup> See <https://www.wsba.org/for-legal-professionals/member-support/alps-malpractice-insurance.aba>.