SOLE-LEGACY – DISPOSITION OF FILES AND FUNDS

by Bradley R. Tamm

What kind of legacy will sole practitioners leave behind at the end of their professional, if not corporeal life? The question is not unique to sole practitioners, but it is most poignant in the solo context because no "partner" (law firm co-owners of any designation) remains to clean up the professional affairs of the departed. Costly trustees may have to be engaged. A lawyer's practice just doesn't go away on death or disability; the practice remains and it falls to those left behind to tidy up. But who are those "left behind" that have the legal obligation to act? And at what cost? Or the better question: who bears the cost?

Client files and funds must be disposed in accordance with the law. If the lawyer has not provided for this process, the Hawai'i Supreme Court, in its exclusive jurisdiction over the practice of law, steps in through the Office of Disciplinary Counsel ("ODC") to appoint a trustee to take possession of client funds and other property, and return that property to the rightful owners. The cost of these trustee proceedings, which can run into tens, if not hundreds of thousands, of dollars, are initially borne by the Disciplinary Board – funded out of each Hawai'i lawyer's annual license fee – can be charged back to the lawyer or lawyer's estate.[1]

For the last few years, the Disciplinary Board has paid approximately $150,000 annually to deal with these trustee proceedings, and with the aging lawyer population, the problem is getting more pronounced. As to the legacy left behind, a lawyer's estate was recently assessed over $75,000 to reimburse the Board for trusteeship costs. This legacy was avoidable; so let's discuss how to avoid it!

Lawyers hold property belonging to others – clients or other third parties.[2] With regard to property of others, funds are to be held in one or more trust accounts, and "other tangible property" are to be identified and safeguarded. Client files are the most common type of other tangible property that a lawyer leaves behind. For the sake of brevity, discussion here will be limited to funds and files.

When a lawyer dies, becomes disabled, is disbarred, or simply disappears ("4-D" [dead, disabled, disbarred or disappeared]), the lawyer often leaves behind the remnants of the law practice in the form of an office and storage unit filled with current and old client files, and an IOLTA account with a local bank and no signatories left to deal with it. The rules of our supreme court anticipate this situation by providing for "trustee proceedings."[3] Trustee proceedings apply where "no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist."

"Partner . . . or other responsible party" is understood to mean other lawyers in a law firm whether a general partnership, LLLP, LLLC or corporation. "Executor" implies a person appointed in a probate proceeding, but few executors are lawyers, and non-lawyers are not permitted access to client trust accounts.[4] Nor should non-lawyers be permitted to hold client files as the duty of confidentiality persists.[5]

Trustee proceedings under RSCH Rule 2.20 thus become the destiny of the solo 4-D. The ODC is the only entity authorized to seek appointment of a trustee. It does so anytime it is informed of a solo 4-D and it appears client property is in need of protection. ODC then acts promptly to verify the status of the reported lawyer, and whether there are client property or funds in need of protection. ODC reaches out to the bar to determine whether the lawyer identified a successor in the last annual license registration and to identify the bank holding IOLTA funds. ODC may check with the State of Hawai'i to verify death and attempt to find the 4-D's colleagues, employees, family or friends to gather meaningful information to determine the extent of the problem. Ideally, the 4-D has closed the client trust accounts, transferred active files to other lawyers, and securely disposed of former client files. If this has been done, ODC has nothing further to do and will close the matter internally. The problem is, reality is often far from ideal.

As to client funds, the lawyer is required to keep accurate records of all client financial transactions for up to six years beyond termination of the client matter.[6] Paper master ledgers and client subsidiary ledgers are wonderful to work with after the lawyer is gone, but difficult to maintain while alive. So, many opt for electronic records/software – but that software is usually password protected and the 4-D has often hidden the codes. Where the trustee can't gain access to the software accounting, a forensic audit must take place, which can be hugely expensive. Lawyers should provide a way for the user ID and passwords to be preserved and available to successors or trustees.

As to client files, the first question to ask is: why does the lawyer keep this stuff? Many lawyers think they have to keep files for seven years. Maybe they are confusing that with the "seven-year

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itch." *There is no rule that requires retention of client files other than the financial records mentioned above.* Subject to advice from your insurance carrier, return client files at or shortly following termination of representation. Don't keep original documents of value to your client. The less you keep, the less there is for the trustee to hunt down. You, as the lawyer, can decide what to destroy. But once the file ends up with a trustee, the trustee cannot destroy files. It then becomes your legacy to pay for that trustee to hunt down your clients and return the files; an expense to be borne by your heirs.

If you are ready to prepare for a good legacy and address these problems now, ODC is available to consult with you on wrapping up your practice. You are also encouraged to work with the bar association and get involved in the process. Additionally, if you find the matter sensitive, reach out to the Attorneys and Judges Assistance Program for confidential assistance.

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[1] RSCH Rule 2.20(f).

[2] HRPC Rule 1.15(a).

[3] RSCH Rule 2.20(a).

[4] HRGTA Rule 4(b).

[5] HRPC Rule 1.4.

[6] HRPC Rule 1.15(a)

LEGISLATIVE UPDATE FROM THE HAWAII REAL ESTATE COMMISSION

by Carole R. Richelieu

This past legislative session saw the passage of Act 223, SLH 2019, which is of special note for condominium developers, attorneys, and certain condominium unit owners.

Act 223 temporarily resurrects certain development sections of chapter 514A, Hawaii Revised Statutes ("HRS"), until July 1, 2020. Act 223 extends the safe harbor provision to allow developers who still retain developer units or units which did not undergo a bonafide first