Winding Down A Law Practice

BY CAROLE R. RICHELIEU

While sixty-five may be the new fifty, there comes a time when an attorney contemplates winding down his or her practice, perhaps to embark on a new career, pursuit, or enjoy a well-deserved traditional retirement. According to the American Bar Foundation statistics, more than a quarter of a million attorneys are age fifty-five or older, and Hawaii is not dissimilar.

How an attorney approaches winding down a practice is dependent upon the structure of his or her law practice. If an attorney practices within the context of a law firm or partnership, the process is simpler, as the clients are the clients of the firm or partnership and not of the individual attorney. Motions to withdraw are not mandated, and client property and funds need not be returned, as the attorney-client relationship continues with the firm or partnership.

As a matter of professionalism and courtesy, however, the retiring lawyer should notify clients with whom she or he had direct dealings of the impending retirement from active practice. As a guide, years ago, the ABA approved a helpful sample notification letter for departing attorneys, ABA Informal Opinion No. 1457 (1980). The notification letter should be simple and direct. While joint notification by the firm and the retiring attorney is preferred, ultimately, it is the responsibility of the retiring attorney to provide timely notice to those clients for whose active matters the attorney is responsible or plays a principal role in the delivery of legal services. The impending retirement of an attorney is information that may affect the status of a client's legal matters where the retiring attorney is responsible for the client's representation or plays a role in the firm's delivery of legal services. HRPC 1.4; ABA Formal Opinion No. 99-414. The notice should be limited to clients for whose active matter the attorney had direct responsibility at the time of the notice.

While a client is normally deemed to employ the entire firm, the client has the choice, not the firm or partnership, on how to handle the retirement situation. If a client's favorite attorney is retiring or changing paths, it is up to the client to decide whether or not to stay with the firm. ABA Formal Opinion No. 99-414 (1999); ABA Informal Opinion 910 (1966). Clients, like ethics, cannot be the subject of horse-trading. "Clients are not merchandise." ABA Formal Opinion 266 (1945).

In order to avoid a later dispute, attorneys should provide in the firm agreement how to handle departing attorneys. This agreement, however, must comply with HRPC 5.6(a), which provides, in pertinent part, that an attorney shall not participate in offering or making a partnership or employment agreement that restricts the rights of an attorney to practice after termination of the relationship, *except* an agreement concerning benefits upon retirement. While the contractual relationship among attorneys of a firm is generally controlled by the firm agreement, the relationship is also subject to applicable law and the ethics rules. Restrictive covenants on the ability to practice law, either direct or indirect, can violate the ethics rules, and are usually judicially unenforceable as against public policy.

The rationale for HRPC 5.6(a) is to prevent undue restrictions on the ability of present and future clients of the attorney to make a free choice of counsel. These restrictions also limit professional autonomy. HRPC 5.6, Comment [1]. The retirement exception is permissible as it only minimally interferes with the ability of clients to freely choose counsel and is balanced with the attorney's intent to retire from the practice of law. HRPC 5.6(a) underscores that each client has the right to decide who will represent him or her.

If an attorney practices solo, the process is more complex. Closing a law office due to retirement or career change takes time and planning.

A retiring attorney must provide adequate notice to all active clients of his/her impending retirement and the need to retain new counsel. HRPC 1.16(d). The attorney may wish to recommend successor counsel. This is a personal decision; however, there are possible legal ramifications, such as negligent referral. The retiring attorney, of course, cannot "sell" a client to successor counsel.

A retiring attorney must obtain court permission to withdraw where applicable. If this request is denied, the retirement will have to be delayed.

A retiring attorney must also refund any unearned fees and costs, and return active client files. HRPC 1.15(f)(4); HRPC 1.16(d). Contemporaneous books kept in strict accordance with the ethical rules will make this process less stressful.

Should the client want funds and files transferred to successor counsel, the retiring attorney must ensure, preferably in writing, that the funds and files are delivered as instructed by the client to the correct recipient. An attorney should not rely on a conversation or another's representation when delivering funds (and property). Funds delivered to the wrong person or entity can have a disastrous effect on the client's case and the attorney's reputation and end an attorney's legal career.

With regard to closed files, the attorney should contact former clients and ask whether they wish their files to be returned. If the former client does not want the file back or cannot be located after diligent effort, the file may be destroyed after a careful examination to ensure that the file contains no original documents or materials that might prove helpful to the client at some future date or the destruction might harm the client. The attorney should keep a record of the file distribution and destruction. The method of file destruction must preserve client confidentiality which, of course, continues after the representation ends. HRPC 1.6(a). The files should not be put out with the trash or tossed in a dumpster. If original or client-helpful materials are present, then the attorney cannot destroy them. They must be safely and securely stored or placed in an appropriate depository, such as the probate court, if permitted.

The length of time that this continuing duty lasts underscores the fact that it is a best practice not to maintain originals in client files. An attorney should return originals to the client as soon as practicable after the attorney-client relationship ends. Otherwise, the attorney can end up storing documents for a long time after retirement or his or her career ends.

What if funds, files, and property remain unclaimed? This scenario is entirely possible after a long career. The attorney should safeguard client proper-

ty during the applicable statutory period. Originals of documents, such as wills, trusts, and deeds, should never be destroyed. There are several options with regard to client funds. The attorney can hold the funds in the attorney's client trust account or deposit the funds into a separate interest-bearing account in trust for the missing client. The funds can be held indefinitely in hope that the client will reappear or can be eventually disposed of in accordance with law..

The attorney with a missing client should also consult with his or her professional liability insurance carrier, as well as review applicable laws on abandoned property and escheatment. In cases of escheatment, the attorney should keep a record so that a reappearing client would have sufficient evidence in order to reclaim the funds.

Finally, the retiring attorney must retain his or her books and records regarding funds and property of all clients or third persons for at least six years after completion of the employment to which they related. HRPC 1.15(g). The following must be retained related to the representation: cash receipts and disbursements journals for each trust and business account; subsidiary ledgers; copies of the retainer agreement; copies of statements to the client; copies of all bills to the client; copies of records showing all payments of services performed by persons not in the attorney's regular employ; all checkbooks, check stubs, bank statements, canceled checks (or access to checks), and deposit slips (or access to slips) relating to the representation; copies of all monthly trust account reconciliations; copies of all records showing the quarterly reconciliation of trust accounts; and records showing all non-cash property held in trust.

If an attorney wishes to retire by selling his or her law practice, HRPC 1.17 imposes many conditions on such a sale, recognizing that the practice of law is not a mere business. This rule should be carefully studied if such a sale is contemplated. Restrictive covenants in conjunction with the sale of a law practice are also covered by HRPC 1.17. HRPC 5.6, Comment [3].

Unfortunately, while an attorney makes plans for others, he/she often fails to plan for the event of death, disability, or incapacitation prior to retirement. Not anticipating these contingencies are a great disservice to clients, colleagues, family, friends, the profession, and administration of justice. While there are certain mechanisms in place, such as RSCH 2.19 and RSCH 2.20, in the event of these types of life-changing events, these processes are slow, cumbersome, burdensome, and most undesirable. Professionalism and best practice (and some malpractice carriers) mandate that successor counsel be prearranged to handle notification of the clients and the distribution of files and funds in the event of death, disability, or incapacitation.

Any attorney who is retiring should notify the change of status and contact information to the Hawaii State Bar Association and Supreme Court entities, such as the Office of Disciplinary Counsel, Lawyers' Fund for Client Protection, and Attorneys and Judges Assistance Program. All changes to the annual Attorney Registration Statement must be reported within thirty days to the state bar association. RSCH 17(d). A retiring attorney should contact his/her malpractice insurance carrier for advice and information on coverage.

Solo attorneys should also take care of prudential business notifications, such as the landlord, United States Postal Service, utilities, and tax authorities. Solo attorneys should seriously contemplate making special arrangements for telephone messaging and forwarding.

Completion of the winding down process, although it takes effort, will help ensure that an attorney can enjoy retirement or a new career path with a clear, trouble-free conscience.

Carole R. Richelieu currently serves as Secretary in the Senior Counsel Division.

NOTICE OF DISCIPLINE SUSPENSION OF RICHARD HACKER

On August 16, 2011, the Hawaii Supreme Court suspended attorney **RICHARD HACKER** from the practice of law for a period of five years, effective thirty days from the date of the Order, or on September 15, 2011. Hacker's suspension is based upon his falsifying of two letters that were material to a lawsuit pending against him and presenting them to opposing counsel as authentic, fraudulently misrepresenting his financial assets to a federal bankruptcy court for personal benefit, violating his professional duty of diligence and competence to a client in an underlying divorce matter, and demonstrating a pattern of misconduct before tribunals.

The public is cautioned and advised that Hacker is not eligible to practice law until reinstated by order of the Hawaii Supreme Court. Hacker cannot accept any new retainers, clients, or legal matters.

Hacker, 60, was admitted to the Hawaii Bar on May 9, 1986, and is a graduate of Golden Gate University School of Law.