

Retiring from Practice: Understanding your Options

Introduction

An attorney, like anyone else, looks toward retirement with mixed emotions. Retirement means bidding farewell to angry client phone calls and late night brief writing, but it also means stepping away from your life's work. Although the decision of whether to retire can be a difficult one, the decision of how to retire need not be.

The reasons for closing a practice are as diverse as the practices themselves. As a result, there is no one-size-fits-all approach. Attorneys must carefully consider when they wish to retire, how much effort they are willing to put into the process, and whether their practice could ever survive without them. Among all attorneys, however, one thing is true: failing to prepare is preparing to fail. Without adequate planning, attorneys may be stuck putting out fires long after they planned to retire, or worse, dragged out of retirement to face a malpractice claim. Deciding on and committing to the right plan is a critical step in ensuring your financial wellbeing and peace of mind after you turn the lights off for good.

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Closing the Practice

The most common exit plan, and the simplest one, is to close down the practice. Closure may be the only option for attorneys who cannot sell their practice, have not lined up a successor, or lack the time to arrange for either. Regardless, winding down a practice takes time and requires careful attention to both the needs of clients and of the business itself.

Initiating the Process

The first step in closing a practice is setting a target date, typically six to twelve months in advance, at which point the closure process will be entirely concluded. Whether more or less time is required will depend upon the nature of the practice. For example, transactional attorneys may only need a few months, while litigators may need far more time to wrap up most or even some of their cases. In any event, upon selecting a date the attorney should cease taking on any new clients.

Of course, it is unrealistic to presume that all client matters will come to a conclusion before the attorney retires. An initial part of this process, then, requires the attorney working with staff to create an inventory of all active matters. The inventory should indicate:

- The identity of the client and nature of the matter
- The current status and any unresolved issues
- Any time limitations or deadlines
- Whether client property or funds are being held
- The amount of any outstanding fees

Based on this information, the attorney can decide whether a matter should remain with the practice or be transferred to another attorney.

Client Matters

The attorney should notify all clients that he or she is planning to retire. Long-time clients may call for an in-person meeting or, at the very least, a telephone conversation. Nevertheless, each notification should be memorialized in a written letter. It may be wise to address outstanding fees before the retirement announcement, especially if they have mounted over time, as clients can be less willing to pay when they know the practice will soon be dissolving.

Active clients who will need to retain new counsel should be notified of any deadlines, what property or funds the firm is holding, how they can obtain their file, and the current status of fees. The attorney must notify former clients as well, and provide them with instructions on how they can receive their file or a date on which the file will be destroyed. For litigation matters, the attorney must notify the relevant courts and opposing counsel that they are transitioning off of the case, and file a motion to withdraw and/or substitute counsel as appropriate.

Pursuant to American Bar Association Model Rule of Professional Conduct (“Model Rule”) 1.16(d), the attorney must fully cooperate with successor counsel and ensure that the client’s interests are protected post-termination. This means giving the client plenty of advance warning and promptly turning over to the client his or her file, unearned portions of fees and any other property the attorney may be holding for the client. Upon transferring any documents or property to a client, the attorney should request a signed receipt from the client and maintain a record of each transaction.

Tying up Loose Ends

When all cases have been transferred or finalized, the attorney can begin taking stock of final billings and closing operating and trust accounts, preferably in consultation with the firm’s accountant. The procedure for addressing unclaimed or unidentifiable trust funds varies by jurisdiction, but initially requires a reasonable effort to ascertain and contact the rightful owner. After a certain period of time, typically two or three years, the property will most often escheat to the state. A growing trend, however, places unidentifiable (but not merely unclaimed) property with a local lawyers trust or client protection fund.

Even setting aside client matters, the list of tasks an attorney must complete before closing a practice will accumulate quickly: an attorney must terminate the firm’s lease, discontinue utilities and subscription services, notify the local attorney registration authority, remove the firm’s name from any marketing publications, and arrange a sale of the firm’s physical assets. Attorneys may also want to arrange for their telephone company to provide their new phone

number when their disconnected number is called. Last, but not least, attorneys should discuss purchasing tail coverage, also known as an extended reporting period, from their professional liability insurer. An extended reporting period provides coverage for legal malpractice claims made after the termination of a professional liability policy and during the tail coverage period, provided that the acts or omissions which form the basis of the claim occurred prior to the termination date.

Selling the Practice

Building a practice takes hard work, especially if it was built from the ground up. As a result, an attorney will understandably want to extract as much value as possible from the practice before shutting its doors. Selling the practice to another attorney or firm allows an attorney to reap the benefits of years or decades of hard work and enter retirement with a little extra cash in hand. The process, however, can be lengthy, and attorneys must understand the numerous ethical limitations that can delay a sale or prevent it entirely.

The Decision to Sell

Not all practices can be sold. Whether a practice is salable depends on the answers to a number of questions, including:

- Does the practice generate revenue sufficient to justify a sale?
- How likely are the clients to remain with the purchasing attorney?
- How specialized is the practice area?
- Does the practice have a strong reputation and marketing presence?
- Is the goodwill of the practice too closely linked to an individual attorney?

A firm providing a niche service with a strong marketing presence and few local competitors will be more likely to attract a buyer than a general practice in an area saturated with lawyers. These factors may be largely out of the attorney’s hands, but other factors, like the firm’s recent annual revenues and the organization of the firm’s client files and records, can be improved closer to the time of sale. Even minor cosmetic improvements to the office itself can enhance the firm’s marketability.

The Process

The sale process, from making initial preparations to finalizing the transaction, can take as long as two years. Finding the right buyer can be especially difficult. While local bar association newsletters and online marketplaces are available, many attorneys wisely turn to a broker, who will often not only help to locate a buyer, but also assist with valuing the firm, setting an asking price, and negotiating the sale. As one might expect, valuing a law practice is a complicated task requiring an evaluation of the firm's market demographics, location, sources of business, reputation, practice area, profitability, and infrastructure, among other factors, and the ultimate figure can vary anywhere from 50 to 300 percent of the firm's annual revenue.

Early on in the process, the seller and prospective buyer must exchange information in order to detect and resolve conflicts of interest. Disclosure of such information, including the identities of clients and adverse parties, a high-level summary of the general issues involved, and whether the matter has terminated, is authorized under Model Rule 1.6(b)(7) absent harm to any client.

While the seller can furnish tax returns and financial statements to prospective buyers to give them a sense of the firm's value, disclosure of any specific fee arrangements, or any other details pertaining to a particular representation, requires client consent pursuant to Model Rules 1.6 and 1.17. A few states, however, have relaxed their confidentiality rules to allow for broader disclosure in the event of a sale. Maine and Oregon, in their versions of Model Rule 1.6, specifically permit a seller to provide a description of "the nature and extent of the legal services involved" and "fee and payment information" without consent as long as the client is not harmed.¹ Pennsylvania is even more liberal, permitting disclosure of any information "the lawyer reasonably believes necessary . . . to effectuate the sale of a law practice,"² up to and including a complete review of the client file.³ Attorneys should consult their local rules, or assume limited authority to disclose client information in sale negotiations.

1 Maine Rule of Prof. Cond. 1.6(b)(6); Oregon Rule of Prof. Cond. 1.6(b)(6).

2 Pennsylvania Rule of Prof. Cond. 1.6(c)(6).

3 Pennsylvania Formal Ethics Op. 2010-100 (2010).

Other Limitations

Prior to 1989, attorneys were ethically precluded from selling any part of their practice apart from physical assets such as books or furniture. Although most states have since adopted Model Rule 1.17, which permits the sale of a practice, attorneys in Alabama, Louisiana, and Texas remain prohibited from doing so.

Model Rule 1.17 is not without limitations, however, some more onerous than others. First, Model Rule 1.17 authorizes a sale of either the entire practice or a specific area of the practice. This provides attorneys with flexibility when, for example, a partner who led a highly specialized practice group decides to retire, or when an attorney seeks to scale back his or her hours by narrowing the scope of their professional activities before fully retiring. A number of states⁴ require a sale of the entire practice, however, and attorneys should refer to their local ethics rules for specific guidelines.

Next, Model Rule 1.17(a) requires the seller to refrain from practicing law, either entirely or in the practice area sold, within the geographic location where the firm was sold. Jurisdictions vary on whether they define "geographic location" as the city, county, or even the entire state where the seller had practiced, and a handful of states⁵ have not adopted any geographic limitation at all. As far as the scope of the rule in terms of "ceas[ing] to engage in the private practice of law," Comment 3 to Rule 1.17 clarifies that an attorney may work for a public agency, for a legal organization that serves the poor, or as in-house counsel to a business. Moreover, in Formal Opinion 468 the American Bar Association has clarified that engaging in "transition activity," that is, helping to transition active client matters to the purchasing attorney after a sale, does not violate the rule.⁶

Subsection (b) requires that the purchaser be a lawyer or law firm, a mandate that has been adopted uniformly across all jurisdictions. Model Rule 1.17(c) requires the seller to give written notice to each client describing the sale, acknowledging the client's right to retain other counsel and retrieve their file, and explaining that the client's consent to transfer the file is presumed absent an objection within 90 days. Subsection (c) can vary as well, with perhaps the most dramatic difference found in Virginia's version of the rule which presumes the client's *refusal* after 90 days of inaction.⁷ Finally, subsection (d) requires the buyer to honor the existing fee agreements between the seller and each client, and expressly forbids any increase in fees on account of the sale.

4 Maryland, Minnesota, New Jersey, Ohio, and South Carolina

5 California, Georgia, Maine, Nebraska, and Washington

6 ABA Formal Opinion 468 (2014).

7 Virginia Rule of Prof. Cond. 1.17(c)(5).

The Gradual Transition

A third option, and one that is often overlooked, is to transition the practice to an associate-purchaser. This exit plan offers several benefits to the existing owner, including consistency for the firm's clients, continued employment for staff, the opportunity to pass on a legacy, the ability to cut back hours rather than immediately retire, and the increased likelihood of an orderly sale in the end. The associate, in turn, is able to inherit an established office infrastructure and stream of business, learn from a seasoned attorney, and eventually own a practice without having to start from scratch. Like all exit plans, however, this option is not for everyone, and requires considerably more time and effort than a simple closure or sale.

The Ideal Candidates

The ideal predecessor attorney will be eyeing a retirement date at least three years, but preferably five to seven years, down the road. The attorney should also prefer, or be willing, to assume a more diminished role as time goes on. Although the outgoing attorney has ultimate control in terms of selecting a successor, the attorney must have the patience to allow the associate to grow into their role and the humility needed to hand over the reins of their practice. Too little trust will scare off potential successors; too much will result in a failed business during or shortly after the transition. The practice itself should enjoy revenue adequate to attract and support a new employee, and be organized and situated as if it was being prepared for a traditional sale.

The ideal successor should be qualified in the relevant practice area and motivated to take on the challenges of firm ownership. It is unrealistic, however, to expect a successor with a lengthy and proven track record or experience running his or her own practice. Most importantly, the owner and associate should share the same priorities and vision that will forge a successful partnership moving forward. The predecessor's role, particularly at the outset, is that of a mentor, which is why setting aside time for professional growth, and possible false starts, is so important.

The Transition in Practice

The transition process entails gradually ceding greater responsibility, ownership and control of the practice to an associate who will ultimately become the majority owner. This requires developing a timeline, memorialized in a written agreement, which begins with the hiring of a successor and ends with the predecessor's retirement or permanent "of counsel" status. The timeline will be punctuated with performance benchmarks, at which point the associate will be allowed to purchase a greater share of ownership in the practice. The table below exemplifies one way that a predecessor and successor attorney might structure such a transition.

SAMPLE TRANSITION TIMELINE

| | |
|-----------------|--|
| Years 0 to 1 | Successor works as non-owner associate |
| End Year 1 | Successor offered 15% (owns 15%) |
| End Year 2 | Successor offered 15% (owns 30%) |
| End Year 3 | Successor offered 15% (owns 45%) |
| End Year 4 | Successor offered 15% (owns 60%—majority ownership) |
| Year 5 & Beyond | <ul style="list-style-type: none">Successor continues purchasing shares until full ownership, or Predecessor retains minority share until fully retiringPredecessor assumes a salaried "of counsel" role as long as minimum revenue goals are met |

The performance benchmarks are based upon earned revenue and will vary depending on the practice. If the successor fails to meet any of the established benchmarks, or one of the parties seeks to terminate the relationship before the successor reaches majority ownership, the agreement should allow that party to sell back or retake the transferred shares at their original purchase price. Once the successor has complete or near-complete ownership of the practice, the agreement should guarantee the predecessor an "of counsel" role as long as minimum revenue goals are met.

Ethical Concerns

In a nutshell, the arrangement is a gradual sale with “transition activity” built into the transaction. Some authorities, however, have reasoned that the transaction is not a “sale” as contemplated by Rule 1.17 and is therefore exempt from the rule’s requirements. The North Carolina Bar, for example, explained in 98 Formal Ethics Opinion 6 that when a firm is purchased by a current employee, “there is no potential for harm to the interests of the clients of the firm due to conflicts of interests, breaches of confidentiality, or abuse of fee agreements.”⁸ The Nebraska Supreme Court Lawyers’ Advisory Committee in Opinion 13-03 agreed that Rule 1.17 is not applicable, although it cautioned that “attorneys should be mindful of the fact that a client of one attorney in a law practice may not wish to become a client of another attorney in the same law practice for a variety of reasons.”⁹

These opinions are premised on the fact that the associate-purchaser will continue the existing firm. In Opinion 07-02, the Illinois State Bar Association considered slightly different facts in which an associate sought to purchase the practice from the retiring owner with plans to reconstitute it into a new practice.¹⁰ Keeping the owner on “of counsel” in this scenario, according to the opinion, would violate the “cessation from practice” provision of Illinois’ Rule 1.17.

Conclusion

Even after retiring, an attorney’s duties never truly end. Attorneys must keep careful records, preserve copies of client files, and forever adhere to a strict standard of confidentiality. But by choosing a plan that works for you and putting in the necessary effort before you retire, you can be sure that your ethical obligations will be met, your legacy will remain intact, and your transition into retirement will be a smooth one.

⁸ North Carolina Ethics Op. 98-6 (1998).

⁹ Nebraska Ethics Op. 13-03 (2013) (finding that 1.17 does not apply, but also noting that Nebraska’s Rule 1.17 does not contain a “cessation from practice” provision).

¹⁰ Illinois Ethics Op. 07-02 (2007).



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