NOVEMBER 2019

Closing your shop

Tips for succession to ensure your last case is the one you choose – not one brought against you

By Karen Stromeyer

Hopefully, when you consider ending your solo law practice, you are planning on sailing off into the sunset to enjoy your hard-earned retirement, or perhaps starting an exciting new career as a professor, mediator or judge. This decision can also be the untimely product of disability or family circumstances. In any event, the business of law is unique in that the retirement of a solo attorney means that the practice must either be closed or placed in someone else's hands.

On the business side, both the State Bar of California and the American Bar Association offer comprehensive checklists for the closing of a law office. This article endeavors to offer practical and ethical considerations for practitioners considering the voluntary suspension or termination of their law practice.

Determine what status with the State Bar best suits you

Only active members of the State Bar may practice law in California and this status confers all of the duties, responsibilities, and privileges of being a lawyer, including representing and advising clients and receiving legal fees for your services. (Bus. & Prof. Code, § 6125; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 137-140.) There are three status options when you consider retirement: active, inactive, and resigned.

Remaining active for a period allows you to wrap up remaining client matters and still charge and receive fees for legal work; however, you still must pay full bar dues and meet full MCLE requirements. Inactive status means that you are no longer authorized to practice law but can transfer back to active status at any time by filing an application and paying dues for that year. If there is any possibility you may want to return to the active practice of law, this is the best option.

While inactive status means lower bar dues and reduced MCLE requirements, as an inactive member you really, really, cannot practice law – you cannot give legal advice, receive referral fees, or share in any legal fees that were not earned *while you were an active member* of the bar. (See California Rules of Professional Conduct ("CRPC") 5.5; Bus. & Prof. Code, § 6125 et seq. [unauthorized practice of law]; CRPC 5.4 [financial and similar arrangements with non-lawyers]; (*Hardy v. San Fernando Valley C. of C.* (1950) 99 Cal.App.2d 572, 576 ["No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar."].)

For example, you cannot remain a partner in a law firm, and you cannot receive any profits derived from the performance of legal services. However, there is little guidance regarding whether an inactive attorney can receive referral fees or enforce a contingency-fee agreement after they have gone inactive. While it is clear that the inactive lawyer is entitled to quantum meruit for the work performed while they were an active member, contingency fees are generally considered earned at the conclusion of the case. (See *Fracasse v. Brent* (1972) 6 Cal.3d 784, 792.) Therefore, to avoid any unwanted scrutiny from the State Bar, the retiring lawyer should avoid any agreement to receive a portion of the contingency fees to be received while the lawyer is inactive. The safer course by far is to remain active for a period of time to collect on any outstanding contingency fee agreements.

Finally, if you are sure you want to hang up your spurs for good, and no disciplinary charges are pending, you may tender your resignation to the Supreme Court for acceptance, and upon approval, you are no longer a lawyer.

Get insurance

Once you resign or go inactive with the bar your current malpractice insurance will no longer cover you for any acts or omissions arising out of your legal practice after that policy period. Malpractice policies are on a claims-made basis, so the policy that applies is the one when the claim is made, not when the allegedly wrong act occurs. So even if you were insured when the alleged malpractice occurred, if you don't have coverage when the claim is made, you will be denied coverage. As the statute of limitations for legal malpractice is one year from discovery or four years from the alleged wrongful act, claims conceivably can be made against the retiring lawyer well after they have moved on from active practice. (Code Civ. Proc., § 340.6.) Therefore, you should purchase an Extended Reporting Endorsement or "tail" coverage. Virtually all insurers offer this coverage; some include it for free for long-standing policy holders. The length of the extended period depends on your risk profile and the nature of your practice. For example, if long-term contracts or estate planning are part of your practice, a longer tail will be warranted.

Notify current clients, find them a good home, and return their property

Your retirement from the active practice of law is a material development in the representation that must be communicated to the client. (CPRC 1.4 [communication with clients].) However, while you should advise your clients as soon as reasonable of your intentions, you cannot simply dump current clients. (CRPC 1.16(b) [declining or terminating representation].) Rather, it is best to identify a few lawyers who would be a good fit for the objectives and temperament of the client, and seek to have them take over the matter, being careful to maintain client confidences. (CPRC 1.6 [client confidences].)

Most importantly, a lawyer may not terminate any representation until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client. (CRPC 1.16(d).) This includes giving the client sufficient notice to find new representation and advising them of any upcoming deadlines. This may also require moving pending trial or hearing dates, so that new counsel has time to adequately become familiar with the matter.

The retiring lawyer must also promptly release all client property. (CPRC 1.16(e).) The client owns the original file, regardless of whether they have paid for all services, so if kept in hard copy, that should be released to the client "promptly." (*Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599.) An attorney's obligation to turn over the file (electronic or non-electronic) to the client is taken very seriously by the state bar and the courts. (See *Friedman v. State Bar*, 50 Cal.3d 235, 244 (Cal. 1990). If you would like to keep a copy of the file for any reason, you should make a copy and cannot charge the client for that expense.

Generally, client files must be maintained for a reasonable amount of time. There is no "bright line" rule for determining how items contained in a closed file must be maintained or when they may safely be destroyed. Opinion 1996-1 of the Legal Ethics Committee of The Bar Association of San Francisco states:

> There is no rule that provides . . . a time period [after which client papers may be destroyed] and, in our view, no rule should. The key to retention of client papers, absent client agreement to other arrangements, is the attorney's obligation as a bailee of the client's personal property and the need to retain those papers that are necessary to preclude reasonably foreseeable prejudice to the client. This duty cannot be discharged merely by reference to a fixed time period.

Therefore, the question depends on the nature of your practice and the specific work done for the client. In typical litigation matters that have concluded with no foreseeable additional work, five years is often suggested as a minimum retention period.

If you do not have a document retention policy, now is a good time to start one, especially with the ever-decreasing cost of digital storage. However, before disposing of the items, the lawyer first must use all reasonable means to notify the former client of the existence of the file, of the former client's right to examine and retrieve the contents, and of their intended destruction. While there is no specific authority as to what such a notice should contain, the purpose of the notice will be advanced if it states plainly that the files in question will be destroyed unless contrary instructions are received by the attorney by a specific date, and

gives a reasonable opportunity to respond. If the former client cannot be located by any reasonable means, or fails to respond to the notice after a reasonable time, the lawyer may destroy the items, while at all times protecting the confidentiality of the contents of the files. (Bus. & Prof. Code, §§ 6068(e), 6149.)

In the immortal words of (Mr.) Fred Rogers, "I hope you're proud of yourself for the times you've said 'yes,' when all it meant was extra work for you and was seemingly helpful only to someone else." Again, congratulations on your new adventure. Just remember that the way you leave the practice should be treated with as much attention and effort as how you entered the practice.


Stromeyer

Karen Stromeyer is a senior associate attorney at Murphy, Pearson, Bradley & Feeney *with a practice emphasizing general civil litigation including defending lawyers against claims of professional liability. Prior to joining Murphy, Pearson, Bradley & Feeney, she spent several years as an associate at a prominent plaintiffs' firm in San Francisco where she represented catastrophically injured individuals.*