PLANNING FOR THE INEVITABLE

What happens when you are no longer practicing?

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Marisa Combs is an attorney in the Nashville office of Lewis Thomason. She has a diverse background, having started her practice on a court square in a suburb of Nashville, handling a variety of litigation matters in a small firm environment. Now, Ms. Combs concentrates her practice in professional liability defense of lawyers, architects, engineers, surveyors, and other professionals. Ms. Combs has experience assisting professionals in disciplinary matters as well. Ms. Combs also regularly represents businesses with a variety of general service needs, including business organization and succession questions, contracts with customers and vendors, and commercial leases. In addition, Ms. Combs has experience representing the interests of design professionals, contractors, and subcontractors in all aspects of the construction process, including contract negotiations, liens, collections, subpoena responses, and civil litigation. In 2013, she received the Tennessee Bar Association’s President’s Award for her work on the state’s succession planning rules for attorneys who no longer practice law, and she serves on the state bar’s Ethics Committee.

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Brett Stewart is Risk Manager for XL Catlin. He is responsible for developing risk management and education materials for architects and engineers with the goal of minimizing the frequency and severity of loss exposures, while focusing on increasing best practices. Brett also interfaces with a variety of stakeholders in an effort to promote issues that are relevant to the design community. Previously, Brett was Senior Claims Examiner handling design professional claims. He is a licensed California attorney and was a litigator at two San Francisco law firms. His practice focused on construction and real estate litigation representing owners, developers, contractors and design professionals. Brett is a graduate of the University of California, Santa Barbara and the University of San Francisco School of Law.

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Major Factors in Succession Planning for Professionals:

(1) Strategic Long-term Legacy Plans
   - Who are the clients?
   - Who has the relationships with the clients?
   - What realistic expansion opportunities exist?
   - What firm policies should we adopt that match our long-term plans?

(2) Ownership Transition
   - When will the talent be leaving?
   - Who is poised to take over that role? (Promotion; Laterals)
   - How long is realistic for such a transition in client relationships?
   - Do we have compensation plans that encourage transition?

(3) Management Succession
   - Who is prepared to lead?
   - How can we incentivize people to prepare to lead?
   - Mentoring and evaluation

(4) Document Selection and Execution

(5) Financial and Estate Planning Personally

Factors in Selling a Professional Practice:

Price-Payout-Workout

(1) Qualified buyer (licensed, experienced, within the right locality, have money?)
(2) Method of transfer (sale, merger, stock transfer, something else?)
(3) Valuation (the big divide between buyer’s value and seller’s value)
(4) Closing terms (how will we cash flow it?)
(5) Post-Sale Services (is the seller involved in helping the buyer post-closing?)
CHECKLIST FOR OFFICE PROCEDURE MANUAL:

1. How to check for a conflict of interest if that applies to this discipline;

2. How to use the calendaring system;

3. How to generate a list of active client files, including client names, addresses, and phone numbers;

4. Where the client ledgers are kept for trust accounting and billing purposes;

5. How the open/active files are organized;

6. How the closed files are organized and assigned numbers, and where the closed files are kept and how to access them;

7. The office policy on client files (retention and destruction) and any sample fee agreement language applicable to the policy, as well as when that sample fee agreement language began to be used; include the office policy on keeping client originals and where original client documents are kept, if any;

8. Whether the office has a safe deposit box and how it may be accessed;

9. The bank name, address, account signers, and account numbers for all office bank accounts, including operating and trust accounts; provide a copy of any bank form authorizing the assisting attorney to access the bank accounts without a court order;

10. Where to find, or who knows about, computer passwords;

11. How to access your voicemail (including any necessary code numbers);

12. Where the post office or other mail service box is located and how to access it;

13. How the billing software works, where copies of most recent invoices are kept, etc;

14. Where lease, subscription, vendor, and employee contracts can be found for the office;

15. Where applicable insurance policies can be found;

16. Provide a copy of any applicable power of attorney or other appointment naming an assisting attorney to run your business in your absence. Some states require that lawyers designate another lawyer in advance. Include the person’s contact information; and

17. Leave instructions for loved ones and the personal representation of your estate concerning your Assisting Attorney’s duties in winding up your practice. This is critical to protecting your staff and clients from the pressures of heirs who do not understand your professional responsibilities. There is always a stress here, so leaving your thoughts in writing will help everyone behave more appropriately. You can consider leaving these as part of an overall estate planning component—perhaps stating in a will that you want the staff to be paid from your estate for a specified time or a lump sum, and specifying any other essential instructions.
25 Steps for Closing a Professional Practice:

1. Meet with your financial advisor and discuss your plans. What goals do you need to meet before you cut off your source of income?

2. Meet with your accountant and discuss your plans. What sorts of records and returns do you need to prepare?

3. Meet with your lender and discuss your plans. How will debts be paid off?

4. Meet with your broker and discuss your plans. What notice should you give to your professional liability insurance carrier? What necessary future benefits should you consider, such as health, life, and disability policies? Contemplate extended reporting coverage for claims regarding your professional services.

5. Calculate accounts receivable. Get those down as low as possible before you announce that you are closing. Some recommend A/Rs be in the low four figures before announcing.

6. Inform staff of your plans. Discuss the parameters of their continued service to the firm. When will you stop paying them? When can they feel free to search for a replacement job? What do you expect during the wind-up? Are there other professionals who may want to hire them?

7. Stop taking new matters. Ethical obligations may require this.

8. Give notice of termination for all lease and rental agreements. If the agreements do not provide for termination upon death/disability/retirement, attempt negotiation of a settlement.

9. Inform clients of your plans. If appropriate, write to clients with active files advising them you are unable to continue representing them and that they need to retain new counsel. Refund any unearned fees and maintain a record of this refund in the client’s file. Alternatively, tell them you are winding down your practice but intend to finish their matter. Consider requesting additional retainer money if you are concerned the client will not pay when they know you are closing your practice, and consider which fees must be refunded. Your letter should also inform them about time limitations and other factors important to their cases. The letter should explain how and where they can pick up copies of their files and should give them a deadline for doing this.

10. Conclude all active matters or transfer client files to new professionals. For each open file, evaluate the current status of the file and type of fee. Estimate the timeline to finish. The aggregation of these factors will help create an overall timeline to windup. Remember clients get to choose their professional—you may only recommend. For legal cases, obtain the client’s permission to submit a motion and order to withdraw as attorney of record. In cases where the client is obtaining a new attorney, be certain that a substitution of counsel is filed. Calendar a date upon which you will review all files and make sure these motions and orders are submitted and entered, with a copy in your file and mailed to the client. If transferring the file to a replacement lawyer, have the client sign a document to that effect. A sample is included in these materials. Note the new lawyer may not change the fee, depending on the state’s rules.
11. Return files to clients as appropriate. It is perhaps prudent to make copies of the files for clients and retain original files or scan the files for electronic storage. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the file to the new attorney of the client’s choice. See sample documents included in this material. If a client is picking up the file, return original documents to the client and keep copies in the file. Make sure you return all original wills, corporate documents, and deeds in particular.

12. Address retained files. Destruct appropriate files, but keep a list. For files that are not being returned, tell clients where their closed files will be stored and whom they should contact to receive them. Obtain all clients’ permission to destroy their files where possible. If a closed file is to be stored by another attorney, get the client’s permission to allow the attorney to store the file for you and provide the client with the attorney’s name, address, and phone number. If fee agreements provide that files will be destroyed after a certain date without notice to the client, proceed to destruct those files as provided therein. Where there is no fee agreement addressing file destruction, and where there is no state bar association policy or contract provision stating you must keep files longer, maintain them for a minimum of 10 years to assist in defending any malpractice claim or ethical complaint that may arise. For public projects, A/E providers should keep critical documents like the contract and deliverables in perpetuity. Return all original documents to the clients, especially wills, corporate records, and deeds (requires file review). Note that title insurance agents may be contractually obligated to maintain files in perpetuity. Keep all trust account records indefinitely unless the state’s rules specify (ABA model rule says 5 years from termination).

13. Discontinue use of any lines of credit or credit cards.


15. Finalize accounting for the business and send final client bills. Pay final bills, which may come after final closure.

16. Make final contact with the malpractice insurance carrier and the assisting attorney’s excess carrier, if applicable, for extended reporting coverage.

17. Address any unclaimed account funds. The state’s unclaimed property act may apply.

18. Close firm operating accounts and any other accounts, including cards and lines of credit.

19. Close client trust accounts if any. Note in some states, only lawyers can sign trust checks. Only close after an audit is completed, if necessary. Make the client sign an acknowledgement of the disbursement of trust fees. A sample document is included in these materials.

20. Finalize accounts receivable in last attempt to collect unpaid fees.

21. Deal with any safe deposit box contents.

22. Notify any professional organizations.

23. Take down computer system and store the back-up files.

24. Notify the phone, web hosting, and email providers, as well as the post office. Forward mail and calls if desired. Consider an auto-reply to any emails.

25. Dispose of office equipment and furniture, etc.
Initial Steps in Law Firm Crisis Situations:

1. Review any applicable rules in the states where the lawyer practiced and familiarize yourself with the requirements.

2. Look for an office procedure manual and other advanced planning documentation. Determine whether you can easily access electronic records, bank account information, and other relevant information. If not, you may need an order from the court authorizing you to take additional emergency steps.

3. Check the calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, etc. Prioritize your work to those files that have most urgent needs.

4. Write to clients with active files, advising them that they need to retain new counsel or the identity of the new lawyer who can handle the matter for the firm, if desired by the client. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a deadline to do so.

5. For cases with pending court dates, discovery, depositions, or hearings, discuss with the clients how to proceed. Contact courts and all opposing counsel. When appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and your client.

6. For cases before administrative bodies and courts, obtain the client’s permission to submit a motion and order to withdraw as attorney of record.

7. Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate files.

8. Make a list of next priorities, now that some of the urgency has passed, and set time frames for accomplishing the items on the list.
Sample Forms:

FORM REQUEST FOR FILE SENT TO NEW ATTORNEY
I hereby authorize the law office of __________________________ to deliver a copy of my file to my new attorney at the following address: ________________________________.

Signed: __________________________
Client
Date: __________________________

FORM REQUEST FOR COPY OF FILE
I hereby request that __________________________ provide me with a copy of my file. Please send it to me at the following address: ________________________________.

Signed: __________________________
Client
Date: __________________________

FORM ACKNOWLEDGMENT OF FILE RECEIPT
I hereby acknowledge that I have received a copy of my file [original documents] from the law office of __________________________. I acknowledge that the law office is not responsible for maintaining a copy of my file for the future.

Signed: __________________________
Client
Date: __________________________

FORM ACKNOWLEDGMENT OF RECEIPT OF TRUST FUNDS
I hereby acknowledge that I have received $________, which I agree are all the funds due me that were previously being held in trust for me by the law office of __________________________.

Signed: __________________________
Client
Date: __________________________
SAMPLE LETTER TO CLIENTS THAT LAWYER IS UNABLE TO CONTINUE IN PRACTICE – ASSISTING ATTORNEY FOR CRISIS ONLY

Re: ____________

Dear ____________:

Due to ____________, _________ is no longer able to continue the practice of law. You will need to retain the services of another lawyer to represent you in your legal matters. I will be assisting _________ in closing his practice. We recommend that you retain the services of another attorney immediately so that your legal rights can be preserved. I am unable to serve as your new lawyer.

You will need a copy of your file for use by you and your new attorney. I am enclosing a written authorization for your file to be released directly to your new attorney. You or your new attorney can forward this authorization to us, and we will release the file as instructed. If you prefer, you can come to _____ and pick up a copy of your file so that you can deliver it to your new attorney yourself.

Please make arrangements to pick up your file or have your file sent to your new attorney by no later than _____. It is very important that you act promptly so that all your legal rights will be preserved. You will not receive another notice if you do not comply by the date requested, and we will construe that as permission to close your file with no further action and no further notice to you.

Your closed files will be destroyed if they are not retrieved before _______. You will not receive another notice before the file is destroyed. Until the time scheduled for their destruction, your closed files will be stored in ______. If you need a closed file, you can contact me at the following address and phone number until _____: _________________________________.

After that date, you may contact _______ for your closed files at the following address and phone number: _________________________________.

You will receive a final bill from _______ in a few weeks. This will include any outstanding balances that you owe ______ and an accounting of any funds in the trust account that belong to you. Trust account funds must be returned to you, so please make arrangements with us.

On behalf of _______, I would like to thank you for giving him the opportunity to provide you with legal services. If you have any additional concerns or questions, please feel free to contact me.

Sincerely,

___________
SAMPLE LETTER TO CLIENTS THAT LAWYER IS UNABLE TO CONTINUE IN
PRACTICE – ASSISTING ATTORNEY FOR FUTURE REPRESENTATION OF CLIENT

Re: ____________

Dear ____________:

Due to ____________, _________ is no longer able to continue the practice of law. You will need to retain the services of another lawyer to represent you in your legal matters. I will be assisting ______ in closing his practice. We recommend that you retain the services of another attorney immediately so that your legal rights can be preserved.

If you want to Continue with _____ as your New Lawyer

You have the right to select the attorney of your choice to represent you in this matter. If you would like for me to assume responsibility for your case and act as your new lawyer, please sign the authorization at the end of this letter and return it to the following address: ________________________________.

Please respond no later than ____. It is very important that you act promptly so that all your legal rights will be preserved.

If you choose to continue with me as your new lawyer, you will receive a final accounting from ______ in a few weeks. This will include any outstanding balances that you owe ______ and an accounting of any funds in the trust account that belong to you. Any fees we incur as your new lawyer will be billed according to the fee agreement you had with ______.

If you want to Hire Someone Else

If you wish to retain another attorney, you will need a copy of your file for use by you and your new attorney. I am enclosing a written authorization for your file to be released directly to your new attorney. You or your new attorney can forward this authorization to us, and we will release the file as instructed. If you prefer, you can come to ______ and pick up a copy of your file so that you can deliver it to your new attorney yourself.

Please make arrangements to pick up your file or have your file sent to your new attorney by no later than ____. It is very important that you act promptly so that all your legal rights will be preserved. You will not receive another notice if you do not comply by the date requested, and we will construe that as permission to close your file with no further action and no further notice to you.

You will receive a final bill from ______ in a few weeks. This will include any outstanding balances that you owe ______ and an accounting of any funds in the trust account that belong to you.

Notice of File Destruction

...
Your closed files will be destroyed if they are not retrieved before ______. You will not receive another notice before the file is destroyed. Until the time scheduled for their destruction, your closed files will be stored in ______. If you need a closed file, you can contact me at the following address and phone number until ____: _________________________________. After that date, you may contact ______ for your closed files at the following address and phone number: _________________________________.

We want to make this transition as simple and easy as possible. If you have any additional concerns or questions, please feel free to contact me.

Sincerely,

___________

I want _____ to handle my case in place of ______ effective immediately upon my signature below. I consent to the transfer of my file to ______.

__________________________  ____________
CLIENT                     Date

SAMPLE WILL PROVISIONS

With respect to my law practice, my personal representative is expressly authorized and directed to carry out the terms of the Agreement to Close Law Practice I have made with Assisting Attorney on , [and/or with Authorized Signer on ____]; if that [these] Agreement[s] are not in effect, my personal representative is authorized to enter into [a] similar agreement[s] with other attorneys that my personal representative, in his or her sole discretion, may determine to be necessary or desirable to protect the interests of my clients and dispose of my practice.

OR

My personal representative is expressly authorized and directed to take such steps as he or she deems necessary or desirable, in my personal representative’s sole discretion, to protect the interests of the clients of my law practice and to wind down or dispose of that practice, including, but not limited to, selling of the practice, collecting accounts receivable, paying expenses relating to the practice, providing trust accounting and issuing unused trust balances owing to my clients, employing an attorney or attorneys to review my files, completing unfinished work, notifying my clients of my death and assisting them in finding other attorneys, and providing long-term storage of and access to my closed files.
SAMPLE RETAINER AGREEMENT LANGUAGE

1. **My File.** At the conclusion of my case, I may request that my attorney provide to me the contents of my file. If the request that my attorney provide me with a copy of my file is not made within seven (7) years of the conclusion of my matter, I understand that my attorney may, at her option, destroy my file, and I consent to the file’s destruction without further notice to me. Further, I understand that it is my responsibility to obtain any originals of documents upon conclusion of my case if having the original is important to me. I understand that my attorney will not provide me a future notice of my right to obtain a copy of my file, the notice provided in this fee agreement being sufficient.

2. **Contact Information.** I have provided my attorney with a current address, email address, and phone number where she is authorized to send me client communications, including bills for her services and other confidential documents about my matter. I will notify her of any change in my address, email address, or telephone number within 48 hours to make sure she can communicate with me at all times regarding my case. I understand that failing to do so may result in her withdrawing from my case and closing my file, giving notice to my last known address.

3. **Abandoned Trust Funds.** If I leave funds in my attorney’s trust account, and she makes reasonable attempts to contact me for its return but I do not respond or otherwise take receipt of the funds, I hereby agree that I will have abandoned my property and realize and agree that those funds held in trust may be construed as unclaimed property pursuant to Tennessee law or that a court may order that the funds be given to the IOLTA program upon review of a copy of this Agreement and the correspondence demonstrating that my attorney has made a good faith attempt to return funds.

4. **Succession Planning.** While we do not anticipate any circumstances in which services would discontinue prior to completion, in the event of my attorney’s death, disability, impairment, or incapacity, my attorney has explained to me that an assisting attorney may become involved. If that happens, I will receive a letter explaining the situation and providing me with further information and instructions.