WHAT IF?
ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT CLOSING A LAW PRACTICE ON A TEMPORARY OR PERMANENT BASIS

If you are planning to close your office or if you are considering helping a friend or colleague close his or her practice, there are numerous issues to resolve. How you structure your agreement will determine what the Successor Attorney must do if the Successor Attorney finds (1) errors in the files, such as missed time limitations; (2) errors in the Absent Attorney's trust account; or (3) defalcations of client funds.

Discussing these issues at the beginning of the relationship with your friend or colleague will help to avoid misunderstandings later when the Successor Attorney interacts with the Absent Attorney's former clients. If these issues are not discussed, the Absent Attorney and the Successor Attorney may be surprised to find that the Successor Attorney (1) has an obligation to inform the Absent Attorney's clients about a potential malpractice claim or (2) that the Successor Attorney may be required to report the Absent Attorney to the Disciplinary Committee (GRPC 8.3).

The best way to avoid these problems is for the Absent Attorney and the Successor Attorney to have a written agreement, and, when applicable, for the Successor Attorney to have a written agreement with the Absent Attorney's former clients. If there is no written agreement clarifying the obligations and relationships or plainly limiting the scope of the Successor Attorney's role, a Successor Attorney may find that the Absent Attorney believes that the Successor Attorney is representing the Absent Attorney's interests. At the same time, the former clients of the Absent Attorney may also believe that the Successor Attorney is representing their interests. It is important to keep in mind that an attorney-client relationship can sometimes be established by the reasonable belief of a would-be client. (GRPC 1.7, 1.8, and 1.9).

This section reviews some of these issues and the various arrangements that the Absent Attorney and the Successor Attorney can make. All of these frequently asked questions, except #9, are presented as if the Successor Attorney is posing the questions.

1. **Must I notify the former clients of the Absent Attorney if I discover a potential malpractice claim against the Planning Attorney?**

   The answer is largely determined by the agreement that you have with the Absent Attorney and the Absent Attorney's former clients. If you do not have an attorney-client relationship with the Absent Attorney, and you are the new lawyer for the Absent Attorney's former clients, you must inform your client (the Absent Attorney's former client) of the error, and advise the client of the option of submitting a claim to the professional malpractice insurance carrier of the Absent Attorney, unless the scope of your representation of the client

excludes actions against the Absent Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

If you are the Absent Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Absent Attorney and advise the Absent Attorney of the obligation to inform the client of the error. (GRPC 1.4(a)). If you are the attorney for the Absent Attorney, you would not be obligated to inform the Absent Attorney's client of the error. You would, however, want to be careful not to make any misrepresentations. (GRPC 4.1, 8.4(c)). For example, if the Absent Attorney had previously told the client a complaint had been filed, and the complaint had not been filed, you should not reaffirm the misrepresentation and you might well have a duty to correct it under some circumstances. In any case, you or the Absent Attorney should notify the Absent Attorney's malpractice insurance carrier as soon as you become aware of any circumstance, error or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to the "late notice" provision.

If you are the Absent Attorney's lawyer, an alternative arrangement that you can make with the Planning Attorney is to agree that you may inform the Absent Attorney's former clients of any malpractice errors. This would not be permission to represent the former clients on malpractice actions against the Absent Attorney. It would authorize you to inform the Absent Attorney's former clients that a potential error exists and that they should seek independent counsel.

2. I know sensitive information about the Absent Attorney. The Absent Attorney's former client is asking questions. What information can I give the Absent Attorney's former client?

Again, the answer is based on your relationship with the Absent Attorney and the Absent Attorney's clients. If you are the Absent Attorney's lawyer, you would be limited to disclosing any information that the Absent Attorney wished you to disclose. You would, however, want to make clear to the Absent Attorney's clients that you do not represent them and that they should seek independent counsel, as well as that you are not able or permitted to answer all of their questions. If the Absent Attorney suffered from a condition of a sensitive nature and did not want you to disclose this information to the client, you could not do so.

3. Since the Absent Attorney is no longer practicing law, does the Absent Attorney have malpractice coverage?

This depends on the type of coverage the Absent Attorney had. Lawyer professional liability policies are "claims made" policies. As a result, as a general rule, if the policy period has terminated, there is no coverage. However, most malpractice policies include a short automatic extended reporting period of usually 60 days after the termination date of the policy.

This provides the opportunity to report known or potential malpractice claims when a policy ends and will not be renewed. In addition, most malpractice policies provide options to

purchase an extended reporting period endorsement for longer periods of time. These extended reporting period endorsements do not provide ongoing coverage for new errors, but they do provide the opportunity to lock in coverage under the expiring policy for errors that surface after the end of the policy, but within the extended reporting endorsement time frame. For frequently asked questions on extended reporting period coverage visit https://www.americanbar.org/groups/lawyers_professional_liability/resources/extended_reporting_coverage/.

4. **What protection will I have under the Absent Attorney's malpractice insurance coverage if I participate in the closing or sale of the office?**

You must check the definition of "Insured" in the malpractice policy form. Most policies define "Insured" as both the firm and the individual lawyers employed by or affiliated with the firm. This typically is broadened to include past employees and "of counsel" attorneys. In addition, most lawyers' professional liability policies specifically provide coverage for the "estate, heirs, executors, trustees in bankruptcy and legal representatives" of the Insured, as additional insureds under the policy.

5. **In addition to transferring files and helping to close the Absent Attorney's practice, I want to represent the Absent Attorney's former clients. Am I permitted to do so?**

Whether you are permitted to represent the former clients of the Absent Attorney depends on (1) if the clients want you to represent them and (2) whom else you represent.

If you are representing the Absent Attorney, you are unable to represent the Absent Attorney's former clients on any matter against the Absent Attorney. This would include representing the Absent Attorney's former client on a malpractice claim, ethics complaint, or fee claim against the Absent Attorney. If you do not represent the Absent Attorney, you are limited by conflicts arising from your other cases and clients. You must check your client list for possible client conflicts before undergoing representation or reviewing confidential information of a former client of the Planning Attorney. (GRPC 1.7, 1.8 and 1.9).

Even if a conflict check reveals that you are permitted to represent the client, you may prefer to refer the case. A referral is advisable if the matter is outside your area of expertise, or if you do not have adequate time or staff to handle the case. If you intend to participate in a referral fee, the requirements of GRPC Rule 5.4 must be met. In addition, if the Absent Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her may make you vulnerable to the allegation that you didn't zealously advocate on behalf of your new client. To avoid this potential exposure, you should provide the client with names of other attorneys, or refer the client to the State Bar of Georgia's Lawyer Referral Service (telephone number 404-527-8700) or other appropriate lawyer referral service.

6. **What procedures should I follow for distributing the funds that are in the Absent Attorney's escrow account?**

If your review of the Absent Attorney's escrow account indicates that there may be conflicting claims to the funds in the account, you should initiate a procedure for distributing the existing funds, such as a court directed interpleader.

7. If there was a serious ethical violation, must I tell the Absent Attorney's former clients?

The answer depends on the relationships. The answer is (A) no, if you are the Absent Attorney's lawyer; (B) maybe, if you are not representing the Absent Attorney or the Absent Attorney's former clients; and (C) maybe, if you are the attorney for the Absent Attorney's former clients.

(A) If you are the Planning Attorney's lawyer, you are not obligated to inform the Absent Attorney's former clients of any ethical violations or report any of the Absent Attorney's ethical violations to the disciplinary committee if your knowledge of misconduct is a confidence or secret of your client, the Absent Attorney. (GRPC 8.3, GRPC 1.6). Although you may have no duty to report, you may have other responsibilities. For example, if you discover that some of the client funds are not in the Absent Attorney's escrow account as they should be, you, as the attorney for the Absent Attorney, should discuss this matter with the Absent Attorney, and encourage the Absent Attorney to correct the shortfall.

If you are the attorney for the Absent Attorney, and the Absent Attorney is deceased, you should contact the personal representative of the estate. Remember that your confidentiality obligations continue even though your client is deceased. If the Absent Attorney is alive but unable to function, you may notify the Absent Attorney's clients of the Absent Attorney's situation and suggest that they seek independent legal advice.

If you are the Absent Attorney's lawyer, you should make certain that clients of the Absent Attorney do not perceive you as their attorney. This should include informing them in writing that you do not represent them.

(B) If you are not the attorney for the Absent Attorney, and you are not representing any of the former clients of the Absent Attorney, you may still have a fiduciary obligation (as an authorized signer on the escrow account) to notify the clients of the shortfall, and you may have an obligation under GRPC 8.3 to report the Absent Attorney to the Disciplinary Committee. You should also report any notice of a potential claim to the Absent Attorney's malpractice insurance carrier in order to preserve coverage under the Absent Attorney's malpractice insurance policy.

If you are the attorney for a former client of the Absent Attorney, you have an obligation to inform the client about the shortfall and advise the client of available remedies such as pursuing the Absent Attorney for the shortfall and filing claims or complaints with the Georgia Bar Foundation, 104 Marietta Street, NW, Suite 610 Atlanta, GA 30303 (404-588-2240); the malpractice insurance carrier; and the Disciplinary or Grievance

Committee. If you are a friend of the Absent Attorney, this is a particularly important issue. You should determine ahead of time whether you are prepared to assume the obligation to inform the Absent Attorney's former clients of the Absent Attorney's ethical violations. If you do not want to inform your clients about possible ethics violations, you must explain to your clients (the former clients of Absent Attorney) that you are not providing the clients with any advice about ethics violations of the Absent Attorney. You should advise the clients in writing to seek independent representation on these issues.

As a general rule, whether you have an obligation to disclose a mistake to a client will depend on the nature of the Absent Attorney's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm from the possible error or omission, and the likelihood that the Absent Attorney's conduct would be deemed so deficient as to give rise to a malpractice claim. Ordinarily, since lawyers have an obligation to keep their clients informed and to provide information that their clients need to make decisions relating to the representation, you would have an obligation to disclose to the client the possibility that the Absent Attorney has made a significant error or omission.

8. If the Absent Attorney stole client funds, do I have exposure to an ethics complaint against me?

You do not have exposure to an ethics complaint for stealing the money, unless in some way you aided or abetted the Absent Attorney in the unethical conduct. Whether you have an obligation to inform the Absent Attorney's former clients of the defalcation depends on your relationship with the Absent Attorney and with the Absent Attorney's former clients. (See #7 above.)

If you are the new attorney for a former client of the Absent Attorney, and you fail to advise the client of the Absent Attorney's ethical violations, you may be exposed to the allegation that you have violated your ethical responsibilities to your new client.

9. What are the pros and cons of allowing someone to have access to my escrow account? How do I make arrangements to give my Successor Attorney access?

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you suddenly become unavailable or unable to continue your practice, a Successor Attorney is able to transfer money from your trust account to pay appropriate fees, disbursements and costs, to provide your clients with settlement checks, and to refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account, until a court allows access. This court order may be through a guardianship proceeding, or an order for a court-directed interpleader. This delay may leave your clients at a disadvantage, since settlement funds, or unearned fees held in trust, may be needed by them to hire a new lawyer.

On the other hand, the most important "con" of authorizing access is your inability to control the person who has been granted access. Since serving as an authorized signer gives the Successor Attorney the ability to write trust account checks, withdraw funds, or close the account, he or she can do so at any time, even if you are not disabled, incapacitated, or for some other reason unable to conduct your business affairs, or dead. It is very important to carefully choose the person you authorize as a signer, and when possible, to continue monitoring your accounts.

If you decide to allow your Successor Attorney to be an authorized signer, you must decide if you want to give the Successor Attorney (1) access only during a specific time period or when a specific event occurs (e.g., incapacity) or (2) access all the time.

10. The Absent Attorney wants to authorize me as an escrow account signer. Am I permitted also to be the attorney for the Absent Attorney?

Not if there is a conflict of interest. As an authorized signer on the Absent Attorney's escrow account, you would have a duty to properly account for the funds belonging to the former clients of the Absent Attorney. This duty could conflict with your duty to the Absent Attorney if (1) you were hired to represent him or her on issues related to the closure of his or her law practice and (2) there were defalcations in the escrow account. Because of this potential conflict, it is probably best to choose to be an authorized signer OR to represent the Absent Attorney on issues related to the closure of his or her practice, but not both. (See #4 above.)