SUCCESSION PLANNING AND TRANSITIONING INTO RETIREMENT

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Succession Planning and Transitioning into Retirement

Planning for and Navigating Those Waters

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Presenter Biography

Since 1998, **Mark Bassingthwaighte, Esq.**, has been a Risk Manager with ALPS, the nation's largest direct writer of lawyers' malpractice insurance. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented over 600 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

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Since the Aging Process Never Stops, the Day Will Come When…

In the middle of a conversation with one of our insureds on the topic of the difficulty of learning to say no, the fine gentleman I was conversing with did a jump shift on me. For whatever reason, he felt it was important to acknowledge that he was cognizant of his age, and he wanted me to know he had taken steps to make sure he can continue to practice law competently. What really struck me, however, was his desire to also share he had instructed others at his firm to let him know if they were to ever see him start to mentally slip, because in his words "the day will come when…"

As a risk manager, I found his comments reassuring. In my mind, he's one I would describe as someone who is growing old gracefully. He's not in denial and, unlike far too many, he doesn't appear to be fighting the aging process tooth and nail. He also has recognized that with age comes certain age-related risks and he's doing something about that reality. In light of this conversation, I felt compelled to take a look at a few of these risks and talk about how to responsibly manage them.

The most obvious risk with the aging process is the unexpected event, something like a medical crisis that leads to a short or long-term absence. Should this ever occur, someone will need to step in and at least temporarily accept responsibility for your client matters, even if you aren't in a solo practice. For the solo practitioner, however, this is a particularly significant issue that underscores the necessity of having a backup attorney in place. Regardless of your age, if you haven't already found one, now's the time.

Next, don't overlook the related file status problem. Lawyers don't always keep files as current as they should. I believe for many lawyers it's a time and trust thing. There's never enough time and just about everyone trusts their own memory. Here's the problem with that line of thinking. Memory isn't as trustworthy as one ages and if you're not available due to an unexpected event, it doesn't matter anyway. Given this, committing to keeping the status of all files current at all times is equally necessary regardless of your practice setting.

Then there are the subtler risks that arise as a result of the aging process itself, many of which can be quite gradual. Eventually, everyone begins to realize their memory, hearing, and/or sight isn't as sharp as it once was. I've heard all kinds of stories and fears. Some lawyers find they have a tough time accurately seeing everything on a computer screen, which leads them to worry about making mistakes due to incorrectly entering a critical date or misreading what's on the screen. Others struggle with forgetfulness, worrying that it's only a matter of time before they'll fail to show up at a hearing, miss a filing deadline, or incorrectly remember what a client's instructions were. And yet others have shared that they have all kinds of fears about their hearing loss, not the least of which is a fear of mishearing something due to being too embarrassed to ask a client or a judge to repeat what was just said.

There are any number of steps one might take to address these subtle risks. In terms of competency issues, the use of checklists can be a great way to make sure nothing is

overlooked. Additional training on how to get the most out of your computer tech might become necessary, if for no other reason than as tech evolves so does the standard of care. You might consider prioritizing the pursuit of relevant CLE in the areas in which you wish to continue to practice. Think about it. Just because you've practiced in a given practice area for several decades doesn't mean you can ignore your obligation to remain current on the impact of any recent changes in relevant law or regulations. And finally, be open to acknowledging that at some point you may need to start slowing down because the time and energy necessary to stay on top of it all is no longer there. When that day comes, this might mean taking on fewer matters or no longer taking on certain types of matters.

With visual issues, the purchase of a bigger monitor or having IT adjust your screen settings might solve the problem. With hearing, it might mean finding time to have your hearing checked. My point with all these ideas is to encourage lawyers to find a way to work the problem of age-related risks instead of ignoring it.

A final risk worth mentioning is the comfort that can arise in long-term attorney/client relationships. Two points to make. First, it's important to remember that these long-term clients are aging as well. As clients age, their legal needs will also change. In some way we've come full circle here. It can be hard to say no to these clients; but that may be exactly what's called for. Don't allow long-term clients to push you into agreeing to help them on matters you have no real experience in. Either refer this work out or do whatever is necessary to come up to speed. Anything short of this is asking for trouble. Second, don't turn a blind eye to the possibility that forgetfulness or confusion may be in play with some of your older long-term clients. Take whatever amount of time is necessary to make certain these folks understand the advice you are sharing and couple that with a commitment to thoroughly documenting your files, focusing not only on the advice being given but the decision-making process as well.

In sum, since no one has found a way to stop the aging process, the day will come when it's time to cease practicing law. Until that day arrives, however, do all you can to age gracefully. Be aware of your limitations as they arise and be open to hearing the concerns of others. Find ways to identify your specific risks and work to responsibly address them. I say this because I have had to sit down with a few solos over the years and be the one who had to tell them their time had come. Trust me, aging gracefully is the better choice.

Succession Planning Really Isn't Optional

(Particularly for the Solo Attorney)

The two most common excuses I've heard over the years for not having a succession plan in place are these. It's either "my plan is to die at my desk," which isn't a plan at all, or "I just haven't been able to find the time," which almost always means they know it should be done but it's never going to happen. If either excuse rings true for you, now's the time to start for two reasons.

First, if you happen to be a solo, you really don't want to leave the headache of having to wind up the practice and trying to figure out what to do with all your closed files to an unsuspecting non-lawyer spouse. In fact, to this day I still get the occasional call from someone who finds themselves in this very situation. One commonality these callers all have is significant distress and anger over being left with a mess they are ill prepared to manage, and which unfortunately can all too easily lead to unintended consequences.

Here's one example of how the failure to plan can end badly. Most attorneys know full well that client property shouldn't be destroyed prematurely or haphazardly; but of course, non-lawyer spouses often haven't a clue. And understand that even if they did, non-lawyer spouses aren't bound by the rules of professional conduct. The end result is sometimes all closed files are promptly destroyed because the grieving spouse doesn't know what else to do. Then, after doing so, the spouse comes to learn that one of those destroyed files is needed to properly defend against a claim of malpractice. Making matters worse, the spouse also eventually learns there is no insurance coverage in place because she didn't know that at the time of passing, she had to contact the malpractice carrier in order to purchase tail coverage. The unintended consequence is the deceased attorney's estate may end up not being what everyone was counting on it being.

Second, Rule 1.3 of the VT Rules of Professional Conduct addresses diligence. The Rule reads, *"A lawyer shall act with reasonable diligence and promptness in representing a client."* From the Commentary to the rule, we learn that this means attorneys are to act with commitment and dedication, and with zeal in advocacy; workloads are to be reasonable so that all matters can be resolved competently; and that procrastination is an enemy that is to be avoided at all costs. Yet an attorney's obligations don't end there. There is an obligation to prevent neglect of a client matter post attorney death or disability. Comment 5 to this rule goes on to state *"To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine if there is a need for immediate protective action."*

Given all that I have seen and experienced as a risk manager over the years, I personally have trouble coming up with a set of circumstances where I would feel comfortable saying no such plan would be required for a solo. The only question for me is how to get there.

Start by taking care of one of the most important details when it comes to planning for your death or disability and designate a successor. This attorney will need to agree to be responsible for administering the winding down of your practice. Again, it's important to remember that the purpose here is not to try to find someone who is willing to come in and take over your entire practice. It's about finding someone willing to step in and take the lead in winding down your practice. Keep this distinction in mind because it can help when it comes to trying to find someone willing to take on this important responsibility.

That said, should the unexpected ever happen, this person will need to be able to make rapid decisions and, for a brief period of time, take on some of the responsibilities of an additional practice. This means your designated attorney should be someone who is competent, experienced, and displays the utmost professionalism because this person must be able to be expeditious about notifying clients, conducting file review, taking any necessary protective actions, and transitioning files to other attorneys. Your designated attorney should also be someone who is quite familiar with your areas of practice and not likely to have a considerable number of conflict concerns arise should he or she ever need to step in.

An additional benefit of designating a successor attorney (and consider making this a reciprocal designation if both of you are solos) is that this individual can also act as your backup attorney thereby allowing you to take extended absences from your office for work, pleasure, or health reasons. Also, don't forget to make sure appropriate employees are made aware of who your designated attorney is and how to contact this individual should that ever become necessary.

Once the successor designation process is complete, there are a few other tasks worth doing. Consider providing notice of the existence of and reason for a designated attorney in your fee agreements so clients are aware of the steps you have taken to protect their interests in the event of an emergency. For example, something as simple as the following might suffice.

Succession Planning/Backup Attorney Notice:

While I strive to deliver excellent legal services to all my clients, I also have an ethical obligation to protect your interests during any extended absences, such as a vacation, or in the event of my unexpected death or disability. To accomplish this, I have named [insert name] as my backup attorney who will be available during any extended absences or will step in to assist in the winding up of my practice should that ever prove necessary. I will personally provide you with advance notice of any planned absences and my office staff or backup attorney will contact you with information on how to proceed should any unexpected event ever occur.

Develop and maintain an office procedures manual that discusses your calendaring system, conflict system, active file list, open and closed file systems, accounting system, and any other key system. This resource will prove valuable in helping your designated attorney quickly come up to speed with how you run your practice. This is also just one of a number of reasons why it is so important to keep critical systems such as the calendar and conflict system current at all times.

Your designated attorney will need to review all client files as quickly as possible in order to determine if any immediate protective action is necessary. Given this, never get lackadaisical with your file documentation process. The documentation in all files should

always be thorough and current. Missteps can all too easily occur as a result of poorly documented files.

Finally, write a letter for the designated attorney that details duties for all employees; includes login instructions to all necessary computers and systems; provides financial details such as location and account numbers for all bank accounts, particularly client trust accounts; and contact information for all staff and principal vendors such as banks, insurance companies, utility companies, and the landlord. In short think about what you would need to know if you were the person coming in to wind down your practice and capture that intellectual capital in a way that will be useful to the designated attorney.

Additional assistance in developing a plan for your death or disability can be found in a handbook published by the Oregon State Bar Professional Liability Fund. This valuable free resource is available online and may also prove quite useful to your designated attorney should his or her services ever be needed. In the handbook ***Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*** you will find items such as a checklist for closing another attorney's office, a sample notice of designated assisting attorney, sample letters to clients, a sample authorization for the transfer of a client file, and much more. Also, be aware that a number of resources based upon the materials in this Oregon guide are also available on the websites of a number of other state bars.

Getting from Here to There: The Retirement Plan

When I first graduated from law school, retirement seemed a long way off. Today, it's a lot closer for me as well as for many fellow baby boomers because we all are approaching or have reached retirement age. Currently, 3.5 to 4 million people retire here in the States every year. Will those who are attorneys be happy in retirement? Are they going to be ready for it? Do they have a plan for wrapping up their practice?

While I hope many have taken the appropriate and necessary steps to be financially prepared, I do wonder how many have given any serious consideration to what life will be like post retirement. As with succession planning, attorneys should invest time in retirement planning during the years leading up to retirement. How else can you try to ensure your retirement years will be as fulfilling as your working years were if not more?

An important first step in retirement planning begins with trying to answer the question of when, which can be exceedingly difficult for some. Yes, life happens, and the unexpected can put to rest the best laid plans; but having some type of a plan is better than no plan at all. To help get you there, consider what your responses to the following questions might be as a way to begin the process of trying to set that target retirement date.

- How is your physical health or the health of your significant other? How long can you handle the pace of your current circumstances? Is there anyone you may be

called upon to care for in the coming years such as an elderly parent or a grandchild with special needs?

- When will you have the financial wherewithal to retire? If this date seems too far off, are there any financial planning steps that you could take now to shorten the overall time frame?

- Do you still like what you are doing professionally or are you starting to find that law is a distraction from what you would really like to be doing? Do you find the call of family time, volunteer work, extended travel, personal hobbies, or even just trying your hand at making a little money by doing that one thing you always wanted to do a strong calling? Do you even have the energy to stay with it or does working feel like a burden?

- Are you as sharp as you used to be or have colleagues, family members, or trusted friends begun to suggest you slow down or stop practicing out of concern for your wellbeing? Age does have a way of catching up and sometimes what's best for our clients is a decision to stop before a serious misstep occurs, do you agree? If so, when might such a transition feel right?

These questions are meant to begin a thought process that can help establish a timeline. Several of these questions deal with certain realities that may be in play and others focus on desires and hopes for what might come in retirement. This is just the beginning, however. There is more to retirement planning than just setting a date.

The next step is to move beyond the "when" question and give thought to the "what will happen next" question. This can help drive the process forward. Numerous articles have been written over the years that talk about how life in retirement turned out to not be the panacea so many attorneys thought it would be. Often the explanation given was that these retirees failed to address the significant lifestyle changes that occur in retirement. There are stories about attorneys who felt lost or felt a lack of purpose once their structured workday was gone. Others struggled with the loss of social contacts, the majority of which were tied to their past professional life.

In order to avoid these kinds of missteps, you do need to take the time to plan for what will come in retirement. Focus on how to maintain some degree of daily structure and meaningful social contact as you do so. For some, this second step comes naturally and the list of all they hope to accomplish in retirement could easily take another lifetime to work through. For others, the effort may be more difficult; but this is an essential step. Again, by asking yourself a few questions like the ones set forth below, you can jumpstart the process. Just remember to be honest and realistic with your answers.

- What are you looking forward to in retirement? What concerns or fears do you have about retirement? Do you view this as an end or a beginning? When thinking about retirement, what are your expectations? Are your expectations compatible and in line with the expectations of your significant other?

- Once you stop practicing, what will you miss? Are there any alternative ways to meet that need?

- Do you know anyone who in your mind successfully retired? This might be a family member, a good friend, or even a fellow colleague. If so, what worked for them? How did they do it? If you don't know, ask them.

- What kinds of things do you enjoy doing in your spare time? What are your passions? Is there something you have always wanted to do? What are all the things you hoped to accomplish in life that remain undone?

- (Here's a tough one.) How do you want to be remembered? What can you yet do to make sure that happens?

- Are there any aspects of your professional or personal life that were particularly satisfying? Think about things that you continue to be proud of. If so, is there a way to carry those aspects forward with you into retirement and perhaps even build on them?

As you think through the above questions, focus on the specifics. For example, there is a difference between wanting to be remembered as a good person and being remembered for making a difference in the community by being responsible for a successful fund-raising campaign for a local charity. If your desire is to remain connected to the law in some fashion during retirement, the options might include becoming involved in politics; transitioning into an of counsel position; becoming an adjunct professor; acting as a mentor to younger attorneys; doing pro bono work; or working with your bar association perhaps by presenting CLE programs, writing, or serving on a committee. The idea here is to leverage your intellectual capital.

If your desire is to explore options outside of the legal profession, I can assure you that volunteer opportunities in so many segments of your community are going to be bountiful; but why stop there? Retirement doesn't have to mean that you never work again. This can be a time to try your hand at something else and make a little money while you're at it. It just takes time to explore and think through what the options might be. Yes, this process might be hard; but it must be done because there is no plan if there are no specifics on the table.

The Transition

With your date and plan in place, the real work will be in starting to implement your plan as the date for retirement draws near. Regardless of whether you work in a firm or as a solo, the reality is you don't simply close up shop one day and ride off into the sunset. Many retiring attorneys need to plan for a gradual winding down of their practice. If your

specific circumstances will allow for it, a twelve-to-twenty-four-month timeline is what is most often recommended.

Understand this transition doesn't necessarily have to be completed in one single stage. Depending upon the needs of the individual attorney and the law firm, a decision to transition into a part-time role for a few years before finally completely retiring is perfectly acceptable. Often this is accomplished by having the attorney move into an of counsel role whereby the semi-retired attorney can complete the process of reducing his or her workload and transitioning clients. Once the caseload is reduced, the of counsel attorney will sometimes even switch gears and move into a mentor role in order to help groom younger attorneys at the firm or she may simply represent the firm in the community[1].

Solo attorneys often wind down slowly and work part-time as well before they fully retire. They often choose to stop accepting any new matters and will continue to work until they are able to wrap up all active matters. Other solos will decide to work until they find someone who is interested in buying their practice or they may take the time to groom someone to take over the practice. Regardless, all these options take time to run their course.

While there are going to be a number of variables in play depending upon the specific circumstances of your transition period, there are also going to be some commonalities. With this in mind, let's look at what is involved with closing a solo practice. The decision to close one's law practice can come as a result of many factors to include a retirement, merging firms, a disability, or an appointment to the bench. The checklist that follows provides some guidance and direction as to the key issues that will need to be addressed. Again, depending upon the nature of the practice and your specific circumstances, plan on starting with these basic steps twelve to twenty-four months prior to your desired retirement date.

1) **Assess the status of all active matters and build out a timeline.** Start by creating a detailed list of all active matters in a spreadsheet. For each of these matters, your answers to two key questions will help clarify the next step. What is the current status of each file and what type of fee agreement is in play?

   Next, try to estimate the amount of time it will take to finish the work on each matter and add this to your spread sheet. The total of these time estimates will help you determine the actual amount of time it will take to close your practice. While you may find you are unable to keep your practice open long enough to finish everything, the goal is to try and close as many active matters as you can.

   Finally, consider if any of the matters you're unable to wrap up require special attention. For example, if you have any pro bono, reduced fee, or other special fee arrangement matters you're unable to finish, you will need to try and find another

[1]For more information on of counsel relationships see Appendix I.

qualified attorney who might be willing to take one or more of these matters on under the same fee arrangement.

2) **Notify staff.** Let your most trusted staff know what your plan is as you're going to need their help in implementing it. Additionally, key staff deserve to know your intentions once you know the date you hope to have the transition completed. If possible, give them a date certain and advise them if you are willing to be a reference for them. After all, these folks should be able to plan for their transition as well.

3) **Close as many active matters as you can and curtail the taking on of new matters.**

4) **Notify your clients.**[2] Write to all clients who have active matters you will be unable to complete to let them know you will not be able to finish their work before leaving the practice. Advise them that you will be unable to continue representing them and that they will need to retain new counsel. Your letter should inform them about time limitations and time frames important to their matter or matters. The letter should explain how and where they can pick up copies of their files and set forth a deadline for doing so.

5) **Notify the court.** On any matter that has pending court dates, depositions, or hearings meet with the client to discuss how to proceed. Where appropriate request extensions, continuances, and the resetting of hearing dates. Send written confirmation of these extensions, continuances, and resets to opposing counsel and to your client.

6) **Submit motions to withdraw.** For matters before administrative bodies and courts, obtain the client's permission to submit a Motion and Order to withdraw as attorney of record.

7) **File Substitutions of Counsel.** With matters where the client has chosen a new attorney, be certain that a Substitution of Counsel gets filed.

8) **The double check.** Pick an appropriate date and check to see if all matters have either a signed Motion and Order allowing your withdrawal as counsel of record, or a Substitution of Counsel has been filed with the court.

9) **Preserve client files.** Provide clients with copies of their files so that you can retain your original files. All clients should either pick up their file (and sign a receipt acknowledging that they have done so) or sign an authorization for you to release their file to their new attorney. If a client is picking up a file, original documents should be returned to the client and copies should be kept in your file. Retain your files in accordance with your file retention policy.

[2] See Appendix II for a sample client notification letter.

10) **Notify clients of file storage arrangements.** Let all clients know where their closed files will be stored and with whom. If not previously taken care of, also let all clients know what your file retention policy is and obtain permission to destroy their files in accordance with that policy's provisions.[3] 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. Retain an index that indicates whether the files were transferred and if so to whom, where the closed files are stored, and if or when they are to be destroyed.

11) **Closeout client trust accounts.** Pursuant to VT RPC 1.15, a critical part of closing a law practice is the need to address all funds held in a client trust account. Start by making sure your trust account is fully reconciled.

    Once the trust account is fully reconciled, prepare and send the final bill to each client. Next, disburse money owed to you for earned fees and reimbursement for costs advanced in accordance with the terms of your fee agreement. You should deposit this money into your general business account. Finally, disburse any remaining funds belonging to your clients directly to them. If any of these clients have retained a new lawyer and their trust account funds are to be transferred to the new firm, make that check payable to both the client and the new firm.

    If you have any unclaimed funds in your trust account once all disbursements have been made, you'll need to determine the source of those funds. For example, funds just sitting due to an uncashed check paid to a witness would revert to that client and should be refunded. Unclaimed funds belonging to clients may be subject to your state's Disposition of Unclaimed Property Act once all reasonable efforts to locate any missing clients have been completed. Finally, let your bar association know that you have closed your trust account.

12) **Preserve your books and records.** In Vermont, RPC 1.15 requires that attorneys keep trust account records for six years following the termination of the representation. This information can be preserved in a digital format. Just remember to save multiple copies of the backup.

13) **General account funds**: A firm may continue to operate a general account consisting of firm funds for the purpose of collecting accounts receivable and to continue paying for firm overhead, including lawyers and staff, beyond the date of the firm closing. Once all such transactions are completed, close it out.

14) **Anticipate future contact problems.** If you are a sole practitioner, ask the telephone company to provide a new phone number which can be given out when your old number is called. This eliminates the problem created when clients call

[3] See Appendix III for file retention and destruction policy basics.

your current phone number, get a recording stating that the number has been disconnected, and then have no idea where else to turn for information.

15) **Contact the Bar.** Contact the state bar of every state you are licensed to practice in order to update your membership records as to status and contact information.

16) **Review your malpractice policy and contact your malpractice insurance carrier.** Do this at least several months prior to the actual date of your retirement in order to understand the costs and options associated with the purchase of an extended reporting endorsement (ERE), commonly referred to as a "tail." It is important you understand that an ERE is not a new policy. It is simply an endorsement that will be added to the policy that is in place on the date of your retirement.[4]

17) **Wind up the business.** There are number of other considerations involving personnel and office matters that will need to be addressed prior to closing your doors if the transition is to be a smooth one. These matters might include cancelling your telephone service, advertising agreements, and equipment leases; determining where to safely store employee files, your business records, and closed files; and notifying all insurance carriers, and any other authority with which you may have a duty to report the closing to. Consider having mail and e-mail redirected to your home as a way to help ensure that important client matters that haven't found their way to any successor attorney will receive attention after your firm has officially closed.[5]

Appendix I

What Lawyers Should Be Thinking About Before Entering into an Of Counsel Relationship

The term "of counsel" has multiple meanings. It has been used as an honorary designation for retired partners, a special designation for firm attorneys who are neither a partner nor an associate, and to describe part-time attorneys who have created an association with a firm. Some even try to use the term solely for advertising purposes. After all, the public presentation of close ties with another firm might prove to be an effective marketing tool that could help drive additional business to a firm, right? Setting ethics aside for a moment, the answer is maybe; but there are risks that come into play with use of the term and these risks should not be taken lightly.

What is an of counsel attorney?

[4] For a more detailed discussion of ERE's, see Appendix V.
[5] See Appendix IV for checklists for closing your practice and winding up your business.

The "of counsel" designation, as envisioned by the authors of various ethics opinions around the country, refers to something altogether different from a traditional attorney within a firm. These opinions generally define the term "of counsel" as an attorney who is not a partner, associate, shareholder, or member of a firm, and further state that an attorney may only be designated "of counsel" to a firm if the attorney will have a close and continuing relationship with that firm. Thus, any attorney who works at a firm and has a significant degree of shared liability with that firm or has any managerial responsibilities to that firm and/or its staff should never be designated as "of counsel." And be aware that related terms such as "special counsel," "tax counsel," "senior counsel," and the like are understood to have the same meaning as "of counsel" and thus the requirement of a close and continuing relationship will apply here as well.

Okay, so what constitutes a close and continuing relationship?

The requirement of a close and continuing relationship has been defined as providing for close, ongoing, regular, and frequent contact for the purpose of consultation and advice. Further, the of counsel attorney must be more than an advisor on only one case or just a forwarder or receiver of legal business. Now you know why attorneys sometimes find themselves in ethical hot water after designating an attorney, whose sole role is to act as a referral source, as "of counsel" to a firm. Use of the term in this manner is considered to be a misleading client communication.

Who can properly be designated "of counsel?"

Evaluating the appropriateness of the designation in the light of what a disciplinary committee could perceive as misleading can help one avoid some of the common "of counsel" designation pitfalls. In short, any attorney contemplating being listed on another firm's letterhead as of counsel, should only do so if he or she is truly able to be available and committed to providing counsel to that firm.

Examples of acceptable relationships for the "of counsel" designation have included but are not limited to 1) retired lawyers, 2) withdrawing partners or associates, 3) part-time practitioners, 4) permanent non-partner/non-associates, 5) partners on leave, and 6) probationary partners-to-be. Examples of unacceptable relationships for the "of counsel" designation have included but are not limited to 1) outside consultants, 2) suspended lawyers, 3) when the affiliation involves only a single case, 4) those who merely share office space and nothing more, and 5) public officials who are not engaged in active practice with their former firm.

Can a law firm be of counsel to another firm? Can an attorney be of counsel to more than one firm? Can an attorney be of counsel to an out-of-state firm?

While the answers to questions such as these can be yes, the reality is that the answers to these questions and a number of others will differ depending upon the jurisdiction in which you practice. Given the numerous and varying state specific rules regarding this designation, best practices would dictate that prior to establishing any of

counsel relationship you review any relevant ethics opinions and/or contact bar counsel in your jurisdiction.

What are the risks?

There are a few issues of concern with of counsel affiliations. In particular, imputed disqualification, vicarious liability, insurance coverage disputes, and disputes over the terms of the relationship warrant special attention.

Imputed Disqualification - For conflict purposes the of counsel affiliation means that the affiliated firm and the of counsel attorney will often be treated as one entity. This does mean that the conflicts the of counsel attorney brings to the table may prevent the affiliated firm from continuing to represent current or future clients. Likewise, the of counsel attorney must be concerned about apparent or actual conflicts between his own clients and those of the affiliated firm. The imputed disqualification rule is a two-way street and there is little that can be done to correct the problem once it has arisen. Conflict checks can be burdensome and the potential cost in lost business if a conflict is ever missed can be substantial. Always address the conflict issue prior to establishing of counsel relationships so that everyone understands what the additional burden will be and can agree that the benefits outweigh the costs.

Vicarious Liability - While the affiliated firm is not going to be liable for the independent acts, errors, and omissions of the of counsel attorney that were outside of the apparent scope of the of counsel attorney's involvement with the affiliated firm, this doesn't prevent claims from arising. Problems can and will arise based upon any given client's perspective of the affiliation. Unrestrictive use of letterhead listing the of counsel attorney by the affiliated firm or the of counsel attorney sends the message that all participants are involved on any and all matters of the firm and/or the of counsel attorney even if this isn't the case. To help avoid becoming a named co-defendant in each other's suits, create two versions of letterhead. One will list the of counsel attorney and the other will not. Then only use letterhead showing the of counsel attorney's name when that attorney is actually working on a firm matter. Likewise, make sure that the of counsel attorney abides by the same rule.

Insurance Coverage Disputes - In the unfortunate event of a claim, coverage problems can arise when an affiliated firm has done work on a matter that the of counsel attorney was not involved in or had no awareness of but was unfortunately listed as "of counsel" on the letterhead that was in use. Should this of counsel attorney not have coverage under the affiliated firm's malpractice policy there may be a significant problem because the of counsel attorney's own policy will often not afford coverage either. Why is this? The of counsel attorney's own policy will only cover work done on behalf of clients of the named insured which is the of counsel attorney's own firm. In this situation the of counsel attorney would be facing a claim that arose out of work done for a client of the affiliated firm thus the coverage gap. These sorts of "who is the client," "who is the attorney of record," and "who is the named insured" are common challenges that underscore the necessity of investigating and addressing the insurance coverage issues early on.

Appropriate coverage for the exposures of both the affiliated firm and the of counsel attorney can usually be obtained if the issue is addressed at the outset.

Disputes Over the Terms of the Relationship – The best way to mitigate this risk is to have a written and signed of counsel agreement because reasonable minds can disagree, and memories can be short. Always have a written agreement that at least covers the essentials, which would include setting forth the purpose of the relationship, the duties of the of counsel attorney, any limitation of authority, the compensation plan, how overhead and any fringe benefits will be handled, and the termination and dispute resolution procedures.

Closing Thoughts

Beyond the above, the best risk management advice I can give regarding of counsel relationships is to encourage every attorney considering entering into an of counsel relationship to always keep in mind joint accountability. Of counsel relationships can be quite valuable, but clients will rightly respond to these affiliations as if they represent a single entity. Mutual accountability will be in play, particularly when a client is directly involved with both parties to the of counsel affiliation. Here's the bottom line. Of counsel relationships can be quite beneficial as long as they are created with client interests in mind as opposed to being the latest innovative marketing strategy. In light of all the above, that's simply never going to be a clever idea.

Appendix II

NOTE: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research and draw your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will **ALPS** be liable for any direct, indirect, or consequential damages resulting from the use of this material.

SAMPLE LETTER ADVISING THAT ATTORNEY IS LEAVING THE PRACTICE
(Modify as appropriate)

Re: **[*Identify matter*]**

Dear **[*Client Name*]**:

Effective **[*date*]**, I will cease practicing law due to **[*identify the reason, if possible*]** and thus my representation of you will cease at that time.

Because this matter has not yet reached a conclusion, I recommend that you immediately hire another attorney who will be able to step in and see this matter through to completion. You are free to select any attorney you wish. If helpful, I would be happy to provide you with a list of local attorneys who practice in the area of law relevant to your

legal matter. Also, our State Bar Association provides a lawyer referral service. Their number is XXX-XXX-XXXX.

Be advised that it is imperative that you hire a new attorney immediately in that **[*Insert appropriate reason to include notification of any time limitations or other critical information that the client would need to be aware of.*]** Once hired, please provide me with written authority to transfer your file to your new attorney. If you prefer, you may come to our office to pick up a copy of your file so that you can personally deliver it to your new attorney.

I **[*or insert the name of the attorney or firm who will store your files*]** will continue to store my copy of your closed file for **[*list relevant time period in accordance with your firm's file retention policy*]** years. After that time, I **[*or name listed above*]** will destroy my copy of your file unless you notify me in writing within the next 30 days that you do not want me to follow this procedure and I will try to make alternative arrangements that will better meet your needs. If a copy of your closed file is ever needed, you may reach me **[*or name listed above*]** at XXX-XXX-XXXX.

Within the next **[*fill in number*]** weeks I will be providing you with a full accounting of any trust account funds still in my possession as well as a statement of any fees that remain outstanding.

You will be able to reach me at the address and phone number listed on this letter until **[*date*]**. After that time, I may be reached at the following phone number and address. **[*List Name, Address, Phone, and/or Email*]**

Again, please don't delay in trying to hire a replacement attorney in order to protect any time limitations applicable to your case and make certain that your legal rights are preserved.

It has been a pleasure to be of service to you and please don't hesitate to check with me if you have any additional questions or concerns.

Sincerely,

[*Attorney*]

Appendix III

"How Long Do We Need to Keep Our Closed Files?" File Retention & Destruction Basics

This question is the one question I have been asked more than any other and I get it. Although my wife is a physician, she had to deal with the same issue. We had to pay to store her closed files for years after she left private practice and we both breathed a sigh of relief when that last bill finally came. Truth be told, for attorneys the answer to this question isn't a simple one; but it is manageable, and it begins with determining when any given file can be destroyed.

While guidelines and ethical opinions, formal or otherwise, differ and you should always check with the powers that be in the jurisdiction in which you practice, most recommend a retention period of seven to ten years. Speaking as a risk manager working for a malpractice insurance company, I lean toward the shorter end of this window and feel comfortable with the seven-year time frame for most files. So, if seven years have not yet passed, keep the file.

I will share that I have worked with a few firms that have far more aggressive destruction practices, several of whom destroy all files within several months to one year of being closed. I strongly advise against doing something similar if for no other reason than if a malpractice claim were ever to arise, you would have no file with which to defend yourself. That's not a position you ever want to find yourself in. Trust me on that one.

Unfortunately, once the seven years have passed on any given file you still may not be able to destroy it. As with so many rules, there are exceptions that require an additional amount of storage time. These exceptions include but are not necessarily limited to the following:

- Files on which the malpractice statute of limitation has not yet run (and don't forget about the doctrine of continuous representation which can toll these statutes for years);
- Files involving a client who was and still is a minor;
- Estate plans for clients who still are alive;
- Files that contain agreements that have yet to be executed or have not been fully paid off;
- Files that establish the tax basis of one or more client assets;
- Adoption files;

- Support or custody files with continuing support obligations;
- Files with renewable judgments;
- Corporate books and records of active client entities;
- Files of clients convicted of a capital crime; and
- Files of certain "problem clients."

In a perfect world, and with the above exceptions in mind, every file should have been given a destruction date or a review for destruction date when the file was first closed. If that didn't occur, keep these exceptions in mind as you now seek to determine which files can and which files can't be destroyed.

For those files that that are cleared for destruction, I would recommend that one final file review occur before doing so. This final file review process is intended to prevent a file from being prematurely destroyed and also assures that any remaining documents in these files that should not be destroyed are preserved. For example, when any given file was first closed, someone should have separated out all of the original documents that belonged to the client and returned them at that time. If that didn't happen, make sure that it occurs during this final pre-destruction review. The goal is to identify and preserve the following: documents that clearly or probably belong to the client; all original documents; any other documents that the client may need or reasonably might expect his lawyer to preserve; and every file's letter of closure.

The letter of closure is an important document to retain because it can help clarify whether or not a conflict of interest is in play later on. If closure letters are destroyed, you take away your ability to provide documentation that an inactive client is actually a past client under Rule 1.9 of the Rules of Professional Conduct, also known as the "Former Client" Rule.

To varying degrees in most jurisdictions, the file is viewed as client property. This means clients should be made aware of and give their permission to have their property destroyed. If your clients were never informed of your file retention and destruction policy at the time their file was closed, an effort should be made to contact them now in order to see if they want their file.

While some attorneys try sending letters to the last known addresses of these clients, on older files this approach often proves less than fruitful. In light of the problem of trying to locate clients on files closed years ago, many firms now place in their engagement and/or closure letters a short paragraph that discloses their firm's file retention policy as a way to solve the problem at least on a going forward basis. If you wish to do something similar, I can offer the following sample file retention language that can be inserted into your closure letters.

I have enclosed your original documents as I no longer need to keep them, and I thought you would want them for your records. It is our firm's practice to destroy files [number of] years after we close them. If you would like us to return your file to you [number of] years from now instead of destroying it, please send me a note to that effect within the next thirty days so that we can segregate your file from all our other files and accommodate your request. You will need to be responsible for keeping us informed as to how to reach you should your contact information ever change.

If you find yourself needing to send past clients a letter years after closing their files, you might consider designing a letter based upon this sample language.

Our policy is to destroy files [number of] years after they are closed. We have retained your file for that period of time and are now preparing to have it destroyed. If your desire is to have our firm continue to store it or see that it is returned to you, you must send me a letter telling us of your desire and this must be done no later than ten days after the date you receive this letter.

Once you determine which files can be destroyed, please follow through and see that these files are properly destroyed. "Destruction" does not mean tossing all the old files in a dumpster out back and, yes, this does need to be said. Take the necessary steps to have old files incinerated or shredded. You cannot compromise your client's confidences, even during the file destruction process.

The final step in all this is to create and keep an inventory of the final disposition of all files. At a minimum you should track the client's name, file matter, method of disposition (destroyed, returned), and date of disposition.

Now, one side note. I continue to find that some firms decide to more or less keep client files indefinitely because virtual storage is so cheap. They will scan, then destroy the hard copy and keep the digital copy. On the surface this may seem like an easy answer but remember that as computer hardware and related storage devices are replaced over the years, the digital data on these devices must still be reviewed in order to ensure that certain data isn't prematurely lost. Once that's been accomplished, make certain to follow through on properly destroying your digital files. You can't just give this stuff away or recycle it without wiping the data off the drives. The bottom line is that the issues remain the same regardless of whether your files are paper or virtual.

Appendix IV

Checklist for Closing Your Practice

____ Build out a timeline and assess the status of all active matters.

____ Let your most trusted staff know what your plan is as you're going to need their help in implementing it. Additionally, key staff deserve to know your intentions once you know the date you hope to have the transition completed. If possible, give them a date certain and advise them if you are willing to be a reference for them. After all, these folks need to be able to plan for their transition as well.

____ Cease taking on any new matters.

____ Bring to completion and close as many active matters as you can.

____ Notify all clients of your plans on matters you are unable to complete. This letter should advise them that you are unable to continue representing them and that they will need to retain new counsel. Inform them about relevant time limitations and time frames important to their matter. Explain the how and where they can obtain a copy of their file and set forth a deadline for doing so.

____ Provide active clients with copies of their file and keep your original files. Clients who pick up their file should sign a receipt. Clients who wish to have their file transferred to another attorney should sign an authorization for you to do so.

____ Notify the court. On matters with pending court dates, depositions, or hearings discuss how to proceed with each client. Request extensions, continuances, and the resetting of hearings where called for. Send written confirmation of these changes to opposing counsel and your client. Obtain permission to submit a motion and order to withdraw as attorney of record.

____ Confirm you are out. On matters before an administrative body or court, pick an appropriate future date to check and confirm that a substitution of counsel has been filed or that your motion to withdraw has been granted and then follow through with checking.

____ Notify all clients of your file storage arrangements. Let them know where files will be stored, how they can obtain a copy if ever necessary, and if not previously addressed, set forth your file retention policy. If closed files will be stored by another attorney, obtain client permission to have the closed files transferred and provide contact information for this attorney.

____ Closeout your trust account once it has been audited and reconciled. If funds are to be transferred to a new attorney, disburse those funds by making the check payable to the

client and the new attorney. Notify the bar that your trust account has been closed and maintain your trust account records in accordance with the rules in your jurisdiction.

____ Preserve your books and records. In a number of jurisdictions, RPC 1.15 requires you to keep general and trust account records for at least five full years following the termination of the fiduciary relationship. This information can be preserved in a digital format.

____ Review your malpractice policy and contact your carrier in order to understand the options and costs associated with the purchase of an extended reporting endorsement, commonly referred to as a "tail."

____ Notify relevant bar associations and professional organizations.

____ Deal with client property still in your possession such as original wills, client corporate books, unclaimed funds, etc.

Checklist for Winding up the Business

____ Give notice of termination of all rental or lease agreements.

____ Cancel your telephone service and arrange to have calls to your office number forwarded to your home or other number or consider placing an automated message on your office line that will remain active for at least several months post closure.

____ Address any confidentiality and file storage concerns with computers and related tech. Prior to donating, selling, or giving away any device, backup all data that you wish to maintain long-term and then wipe the data from every device.

____ Notify all vendors and make plans to close these accounts.

____ Cancel or change any existing advertisements and legal directory listings wherever possible. Don't forget about your website and social media presence.

____ Meet with your accountant to discuss dissolution of your firm, obtain tax advice, establish the schedule for preparation of final financial statements, determine what state and federal agencies need to be notified, etc.

____ Meet with any lenders to discuss repayment of outstanding loans.

____ Cancel all firm credit cards.

____ Determine where and for how long you will need to store your business records.

____ Determine where mail and e-mail should go post closure then notify the post office and make any necessary changes to all email accounts.

____ Consider setting up an automated reply on email accounts that are to be closed and placing a static page on your website that announces the closure of your practice along with information about where closed files will be stored.

____ Cancel all business memberships and subscriptions to include online accounts.

____ Determine the disposition of furniture, fixtures, library, art, etc.

____ Make arrangements to have all utilities turned off in a timely fashion.

____ Check with your accountant or financial planner regarding retirement plans and rollover options.

____ Notify all insurance companies, to include your premises liability and workers compensation carrier. Don't forget to obtain advice on conversion options for health, life, and disability insurance.

____ Close the operating account once all outstanding receivables have been collected and all outstanding bills have been paid.

____ Dispose of unused office supplies. Schools or charitable organizations would be pleased to be the beneficiary of such items.

____ Destroy all unused checks, deposit slips, etc.

____ Avoid potential fraud and identity theft issues by responsibly "retiring" your online presence to include your firm's domain name, website, email accounts, online listings, and social media profiles. A great resource that details all you should be thinking about as well as the steps you will need to take can be found at https://www.themodernfirm.com/retirement-guide-law-firms-website-online-presence/.

Appendix V

The Ins and Outs of Tail Coverage

To this day I still get the occasional call from an attorney wanting to know how to go about purchasing a tail policy and my response is always the same. I need to make sure that the caller understands there really is no such thing as a tail "policy." Clarification on this point is important because confusion over what a tail is and isn't can have serious repercussions down the road. To make sure you don't end up running with any similar misperceptions, here's what you need to know.

An attorney leaving the practice of law can't purchase a malpractice insurance policy because he or she will no longer be actively practicing law. There simply is no practice to insure. This is why an attorney can't buy a tail "policy." What you are actually purchasing when you buy a tail is an extended reporting endorsement (ERE - and note that some insurers may use the term extended reporting period or ERP). This endorsement attaches to the final policy that is in force at the time of your departure from the practice of law. In short, purchasing an ERE, which is commonly referred to as tail coverage, provides an attorney with the right to report claims to the insurer after the final policy has expired or been cancelled.

Again, under most ERE provisions, the purchase of this endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. For example, if a claim were to arise several years post retirement out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like never write a will for someone while in retirement. I know it can be tempting, but don't practice a little law on the side in retirement because your tail coverage will not cover any of that work.

Another often misunderstood aspect of tail coverage arises when an attorney semi-retires and makes a decision to purchase a policy with reduced limits in order to save a little money during the last few years of practice. The problem with this decision is insurance companies will not allow attorneys to bump up policy limits on the eve of a full retirement, again, because no new policy will be issued. For many attorneys, this means the premium savings that came with the reduced limits on the final policy or two will turn out not to have been worth it and here's why. All claims reported under the ERE will be subject to the available remaining limits of the final policy that was in force at retirement, and this may not be enough coverage.

By way of example, if you were to reduce your coverage limits from one million per occurrence/three million aggregate to five hundred thousand per occurrence/five hundred thousand aggregate during the last year or two of active practice in order to save a little money, you will only have coverage of five hundred thousand per occurrence/five hundred thousand aggregate available to you for all of your retirement years assuming there was no loss payout under that final policy. In terms of peace of mind, for many attorneys that would be an insufficient amount of coverage. Therefore, if you anticipate wanting those higher limits of one million/three million during your retirement years, keep those limits in place heading into retirement.

Unfortunately, while many attorneys hope to obtain an ERE at the end of their career, the availability of tail coverage isn't necessarily a given. For example, most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductible amounts paid on prior claims. An attorney's failure to comply with the terms

and conditions of the policy; the suspension, revocation, or surrender of an insured's license to practice law; and an insured's decision to cancel the policy or allow coverage to lapse may also create an availability problem.

An attorney's practice setting is also relevant. Particularly for retiring solo practitioners, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a stated number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one's practice isn't a good idea because the opportunity to obtain a free tail could be lost. Review policy provisions or talk with your carrier well in advance of contemplating retirement in order not to unintentionally lose this valuable benefit.

The situation for an attorney who has been in practice at a multi-member firm is a bit different. Here, when an attorney wishes to retire, leave the profession, or is considering a lateral move and worried about the stability of the about-to-be-departed firm, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm's existing policy will continue to be in force post attorney departure. This isn't as much of a problem as it might seem in that the departing attorney will be able to rely on former attorney language under the definition of insured. However, because the definition of insured varies among insurers, you should discuss this issue with your firm's malpractice insurance representative so options can be identified and reviewed well in advance of any planned departure. That said, I can share that under two ALPS policies and as long as certain conditions are met, we provide some of the most comprehensive tail coverage options in the industry, to include free individual EREs in event of retirement, death, disability or a call to active military service.

Be aware that the period in which one can obtain an ERE can be quite limited. Most policies provide a 30-day or shorter window that will start to run on the effective date of the expiration or cancellation of the final policy. There are even a few very restrictive policies in the market that require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Given this, you should review relevant policy language well in advance of contemplating departing the profession as the opportunity to purchase an ERE is one you can't afford to miss.

The duration of tail coverage or more accurately the length of time under which a claim may be reported under an ERE varies depending upon what is purchased. Coverage is generally available with a fixed or renewable one, two, three, four, or five-year reporting periods or with an unlimited reporting period. If available to you, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice.

The premium charge for an ERE is usually specified in the policy. Often the cost is a fixed percentage of the final policy's premium and can range from 100% to 300% depending on the duration of the purchased ERE.

Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed, now's the time. One final thought, be aware that if the unexpected ever happens such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney's estate if timely pursued in accordance with policy provisions. This is why even attorneys who are not nearing retirement should still have some basic awareness of ERE policy provisions because one just never knows.

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*Specific policy language does apply. Please review to ensure actual coverage is understood.

COVERAGE FEATURES	ALPS BASIC	ALPS PREFERRED	ALPS PREMIER
All Claims Handled by Licensed Attorneys	✓	✓	✓
Supplementary Payments for Disciplinary Proceedings	$5000	$25,000 per attorney $75,000 in the aggregate	$50,000 per attorney $150,000 in the aggregate
Scope of Professional Services Covered	Includes Mediators, Court-Appointed Family Investigators & Notary Public	Expanded to include Title Insurance Agents, Author/Presenter of Legal Materials, & Lobbyist	Expanded further to include Expert Witness
Professional Services to Related Organization Covered	Must own 5% or less	Must own 10% or less	Must own 15% or less
Claims Expense Allowance Outside the Limit of Liability	✗	50% of the per claim limit (Up to $500,000)	50% of the per claim limit (Up to $1,000,000)
Insured's Consent to Settle Required	✗	✓	✓
Reduced Deductible for Voluntary Formal Mediation	✗	✓	✓
Annual Deductible Cap of Twice the Per Claim Amount	✗	✓	✓
Reduced Deductible if Engagement Letter used	✗	✗	✓
Supplementary Payments for Loss of Earnings	✗	✗	✓
Supplementary Payments for Subpoena Assistance	✗	✗	✓
Supplementary Payments for Public Relations Event	✗	✗	✓

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