ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have a new client that is a party to a number of related actions with many parties. My client's prior attorney was a solo practitioner and she recently passed away unexpectedly. My client relied on the prior attorney implicitly, doesn't have any of the voluminous files for the litigation, and believes that the attorney was holding money in her escrow account pending the resolution of the litigation. I have been in communication with the prior attorney's husband, who is attempting to wind up the law office. It is clear, however, that in addition to being completely distraught about the loss of his wife, he is not an attorney and doesn't have any idea what to do. He is so concerned that he is going to turn over the wrong files to the wrong person, or turn over files without having collected all of his wife's fees, that he just refuses to turn anything over. He isn't sure if he is going to try to sell the practice or just dissolve it. It doesn't seem like he will be able to resolve this quickly. Meanwhile, I am having a very difficult time moving forward with my client's cases without her file, and the client and remaining parties are beginning to lose patience.

Although I am sympathetic to the husband's dilemma, my client is beginning to suffer from the delays. I am worried that I am not doing enough to convince the former attorney's husband to assist me in getting the files and turn over the escrow funds. In our last conversation, he even asked me, "Do you have any thoughts about whether I should dissolve the practice or try to sell it? Would you be interested in purchasing it?" When I asked my client if he had fully paid the prior attorney's fees, the client told me he thought he might owe some fees, but due to the recent delay, he believed that he no longer had to pay them.

Is there anything I can do to encourage the prior attorney's unrepresented husband to turn over the file and escrow funds? Should I be concerned that I am trying to get the file even though the prior attorney may not have been fully paid by my client? I have also been thinking about the offer to buy the practice. Here, it would kill three birds with one stone: I would get the file for my client, help out the prior counsel's husband, and expand my practice. Would I create a conflict of interest with my client by performing due diligence and negotiating to purchase the practice? What if I wasn't buying the practice, but just offering to assist in dissolving the practice?

Sincerely,
Somewhat Conflicted

Dear Somewhat Conflicted:

Your dilemma is a cautionary tale for all solo practitioners who have not created a plan in the event that they should unexpectedly pass away or become disabled and unable to practice law. Rule 1.3(b) of the New York State Rules of Professional Conduct (RPC) states that a "lawyer shall not neglect a legal matter entrusted to the lawyer." Comment 5 to RPC 1.3 addresses the ramifications of an attorney who suddenly is unable to practice: "To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action." Similarly, the American Bar Association has stated that "[t]o fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-369 (1992). The New York State Bar Association (NYSBA) publishes an excellent tool to assist in creating such a plan entitled, *NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interest in the Event of Your Disability, Retirement or Death*. This free guide is available online and is highly recommended for any solo practitioner or practice that has not prepared an exit plan. *See* www.nysba.org/PlanningAheadGuide2016. Unfortunately, it appears that your client's prior counsel did not prepare such a plan and that you and your client are now left to unravel the difficult ramifications from that oversight.

As a general matter, Rule 321(c) of the N.Y. Civil Practice Law and Rules (CPLR) protects parties where their attorney unexpectedly passes away in that it prohibits further proceedings against the party, "without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs." However, it appears that you have already been substituted as new counsel and your client may no longer be entitled to this statutory protection. While we would hope that both opposing counsel and the judge on the matter would be sympathetic to your client's situation, and that you have explained your efforts to obtain the file, we are cognizant that opposing counsel similarly faces a diligence burden for their clients under RPC 1.3.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

As we read your question, you are trying to obtain your client's files and escrowed funds in an expedited manner from the deceased lawyer's husband, a non-lawyer and unrepresented party, and there is a reasonable possibility that your client has conflicting interests with the deceased lawyer's estate due to your client's intent to contest legal fees owed to the estate.

As an initial matter, we note that RPC 4.3 governs your communication with the former attorney's husband because he is unrepresented. *See* RPC 4.3. It provides that an attorney "shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." *Id*. Moreover, RPC 4.3 prohibits you from stating, or even implying, to the prior lawyer's husband that you are disinterested in his situation and, if you should reasonably know that the husband misunderstands your role in the matter, you must take reasonable efforts to correct the misunderstanding. *See id*. Therefore, it goes without saying that you should not assist him in dissolving the practice or otherwise. Indeed, if you have not done so already, you should make clear to the deceased lawyer's husband that you cannot provide him with advice concerning his wife's estate or law practice, other than to recommend to him that he hire counsel immediately to advise him on the various issues he is confronting as a result of his wife's death. *See id*.

With respect to the husband's refusal to turn over the files, we note that while the files belong to the client and the delays caused by his refusal may be problematic, the husband's position is not entirely unreasonable. The NYSBA Planning Ahead Guide states that "[c]are should be taken to safeguard against improper access to client files and information by unauthorized persons, *e.g.*, non-attorney family members." *NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death* (2015), www.nysba.org/PlanningAheadGuide2016, at 7. The guide also states that if the "executor [of the solo practice] is not an attorney, it is important that he or she avoid inappropriate access to client files and information and rely instead on an attorney or office staff to attend to these matters." *Id.* at 9. These risks may be avoided if the husband were to retain counsel to review the files to make sure that only the appropriate files are turned over.

This analysis applies even if you are engaged in discussions to potentially buy the deceased attorney's practice. Indeed, RPC 1.17(b) specifically restricts the information that a seller may disclose to prospective buyers providing that only certain information about clients may be disclosed, such as the identity of the clients, the status and general nature of the matters, material available in public court files, and the financial terms and payment status of the clients' accounts. *See* RPC 1.17(b)(2). Absent the informed consent of the client, the seller is prohibited from revealing confidential information or information that would cause a violation of the attorney-client privilege under RPC 1.6. *See* RPC 1.17(b)(1), (5). While RPC 1.17 does not explicitly state that a non-lawyer is prohibited from providing prospective buyers with information as to individual clients, an attorney is clearly needed to review the files to assess which materials are confidential and protected by attorney-client privilege.

The husband's concern about releasing the funds held in the practice's escrow account is similarly a legitimate one. As a non-lawyer, the husband is prohibited from being an authorized signatory to the escrow account. *See* RPC 1.15(e) ("Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account."); NYSBA Comm. on Prof'l Ethics, Op. 693 (1997) ("[I]t is clear that only a lawyer may control the lawyer's client escrow account and be a signatory of it"). RPC 1.15(g) identifies the procedure regarding control of escrow accounts where the sole signatory attorney on the escrow account passes away. It requires an application to the Supreme Court of the State of New York for an order designating a successor signatory for the escrow account who is a member of the bar and admitted to practice in New York. *See* RPC 1.15(g)(1). This application may be made by, among others, a legal representative of the deceased lawyer's estate or any person who has a beneficial interest in the funds in the escrow account, such as your client. *See* RPC 1.15(g)(2). The New York Supreme Court can then designate a successor signatory and direct the disbursement of escrowed funds where appropriate. *See* RPC 1.15(g)(3).

In light of the foregoing ethical considerations, if you find that the husband is not inclined to retain an attorney for the estate, or is not acting expeditiously to hire one, your best option here may be to move before the appropriate court for an order directing that the files be turned over and appointing a successor signatory to the escrow bank accounts pursuant to the procedure set forth in RPC 1.15(g). *See In re Hickey*, 142 A.D.3d 753, 754 (3d Dep't 2016) (application made by Tompkins County Bar Association for the appointment of one or more attorneys as custodian of the files of a law office of a solo practitioner who died without a plan for his practice after his death and for the appointment of a successor signatory to decedent's law office and escrow bank accounts under RPC 1.15(g); granting bar association's motion to become a limited custodian of the law office files, but denying the motion for appointment of a successor signatory on the escrow account, without prejudice, because the motion failed to comply with procedure set forth in RPC 1.15(g)(2).) A motion would circumvent any conflicts that may arise from any direct communications with the husband, and may also ultimately encourage the husband to retain an attorney to review the files and make determinations as to which files should be turned over. Even if the husband chooses not to retain counsel once you have filed your motion and

proceeds *pro se*, at that point, a judge is likely to appoint a custodian of the law firm's files and successor signatory to the attorney's escrow account in order to protect the deceased lawyer's clients' funds.

The decision to make such a motion and have a successor signatory appointed is not without risks to your client. If an attorney is appointed by the court as a successor signatory, the outstanding legal fees issue is likely to be brought to the forefront since the successor signatory will likely review the file, and any outstanding charged fees, before releasing any escrowed funds or your client's files for that matter. Even though you may have replaced the former attorney as counsel of record in the litigation, the estate may claim a retaining lien and retain the file until the estate has been paid. *See* RPC 1.8(i)(1) (a lawyer may "acquire a lien authorized by law to secure the lawyer's fee or expenses"); *see, e.g.*, *Roe v. Roe*, 117 A.D.3d 1217, 1218–19 (3d Dep't 2014) ("A retaining lien . . . permits the discharged attorney to retain the contents of the client's file until such time as the attorney has been paid or 'the client has otherwise posted adequate security ensuring [the] payment [there] of'") (internal citation omitted); *Sec. Credit Sys., Inc. v. Perfetto*, 242 A.D.2d 871, 871 (4th Dep't 1997) ("Plaintiff submitted no proof that defendant was discharged for cause. Thus, defendant was entitled to reimbursement for his disbursements before returning the files to the client."). In any event, this may nevertheless be the best option to get what you need.

With respect to your interest in potentially purchasing the deceased lawyer's practice, we see two issues: (1) the husband may not be in a position at this time to make decisions regarding the sale of the practice unless he has been appointed as a legal representative of the deceased lawyer's estate; and (2) you should know that you will not be able to pick and choose which cases you want and do not want to take over from the practice. The estate's sale of the law practice is controlled by RPC 1.17, and provides that the personal representative of a deceased lawyer "may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice." RPC 1.17(a). According to Professor Roy Simon's annotation on RPC 1.17(a), this section "will not come into play unless a court appoints a legal representative" for the deceased lawyer. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 983 (2016 ed.). Moreover, the rule "requires that the seller's *entire* practice be sold" and that "[t]he buyers are required to undertake all client matters in the practice subject to client consent." RPC 1.17 Comment 6. The purpose of this rule is to protect the clients whose matters are less lucrative and might have a hard time finding other counsel. *See id.* Accordingly, unless a court has already appointed the husband as the legal representative for his wife's estate, he may not even be able to sell the practice at this point and he certainly cannot sell off certain cases.

But even if a legal representative has been appointed for the estate, and that legal representative approaches you about a potential sale offer, a conflict of interest may exist here with your current client, which may prevent you from purchasing the practice unless certain conditions are met. Specifically, RPC 1.7(a)(1) prohibits representation of a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing different interests." RPC 1.7(a)(1). Comment 10 to RPC 1.7 notes that, "[t]he lawyer's own financial, property, business or other personal interest should not be permitted to have an adverse effect on representation of a client." *Id*. If you are seeking to have the seller turn over litigation materials and escrowed funds for your client at the same time you are negotiating the purchase price of a solo practice for your personal benefit, your client's needs could become a source of leverage in the sale negotiation thereby creating a significant conflict of interest between you and your client. Professor Simon examines a similar risk in his discussion of payments to non-lawyers after an attorney's death under RPC 5.4(a)(2). *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1424 ("The drafters [of the RPC] may have believed that there would be too great a risk that a widow, child, or relative of a deceased lawyer would seek to influence the handling of a particular pending matter in order to increase or expedite the payment of the deceased lawyer's share."). You may be able to avoid the conflict by resolving the file, escrow, and attorney fee issues to your client's satisfaction before considering the sale offer and then obtaining the informed consent of your current client in writing (*see* RPC 1.7(b, d)).

The unexpected death or disability of an attorney will be devastating to family, coworkers, colleagues, and clients on a personal level and creates numerous issues particularly where there is no plan in place providing for the continuity of the law practice and maintenance and protection of client files and interests. The designation of an another attorney to manage or dissolve a solo practice in the event of death or disability, with basic written instructions and authorizations for the designated attorney, should be considered a bare minimum for all solo practitioners. In other words, it is wise to plan ahead for the benefit of your family and clients. For substituting counsel, your best option to retrieve your client's files and funds is to recommend to the unrepresented party that he retain counsel immediately and to communicate with the attorney assuming responsibility for the client files of the deceased lawyer. Alternatively, you should make a motion to the appropriate court seeking an order directing that the files and escrowed funds be turned over to you.

Sincerely,

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BECOMING A LAWYER

BY LUKAS M. HOROWITZ

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Contracts, Torts, and Property, Oh My!

What a semester it has been. Midterms, objective memos, unhealthy quantities of coffee, a presidential election, and, in the next two weeks, finals. The thought of finals brings to mind a line from one of my favorite childhood movies, "The Wizard of Oz." In the words of the Cowardly Lion, "Talk me out of it!" Feeling a bit like the Andrea Gail in "The Perfect Storm," I remind myself that all storms pass, and with every passing storm comes a new day.

Finals came so quickly, the first sign being the notification that the library, my home away from home, was extending its already generous hours. I have never spent so much time in a single place, and I know every ceiling tile above my study carrel. While I joke about it being a second home, I will enjoy the long holiday break from the library.

As I gear up for what I expect will be a difficult finals period, I cannot help but notice that I am quite the different 1L than I was three short months ago. While I am by no means proficient in the language of law, I have acquired a few key phrases. My uncle Brian once told me the most important thing to know in another language is to be able to ask, "Where is the bathroom?" Within the language of law, I am confident that I can, at the very least, navigate to the bathroom. The only thing different about the language of law is that the answer will probably be something along the line of "There are several possible bathrooms, and some of them are correct, however, one is the most correct."

I have been thinking quite a bit lately about how I have changed in the last three months, and ask myself from time to time: What is the most important take-away from my first semester at law school? Surprisingly, it sounds more physical than mental. Put simply, it is that I can work in a way I did not think possible in late August. Did I ever think that I could spend 60 hours a week working? Never! Read hundreds of pages a week, and describe it as, "Oh yeah, homework?" Impossible! I am actually capable of far more than I gave myself credit for.

So the rewards of choosing to attend law school, and pursue a career in law, have made up for the sleep deprivation, caffeine-heavy diet, and constant intestinal distress. Things just seem

Continued on Page 60

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am the managing partner in a 50-plus attorney firm. We are in the process of re-evaluating our document retention policies for closed litigation and transactional files. While some attorneys at my firm retain their files indefinitely, others destroy their client files 30 days after the representation has concluded. We would like to develop a firm policy, not only for consistency sake, but primarily to reduce the costs associated with the mounting volume of documents being stored in our records department, off-site and on our servers.

What are our ethical obligations to retain and preserve client files after the matter has concluded? After a litigation has been resolved, either through a settlement or judgment, must we continue to maintain the client's files, and if so, for how long? Are the rules the same for transactional matters? How long after a transaction has closed or been completed before we can destroy the client files for that representation?

I am also concerned about electronic files and emails, since I recently learned from one of my partners that he routinely deletes all emails after reading them and does not keep copies of "sent" emails. Do lawyers have an obligation to keep emails?

Does the firm have an obligation to notify our clients before destroying the files? One of our partners destroyed his copies of a client's transactional documents 30 days after the deal closed. The client called a year after that deal closed asking for the files and has threatened to sue the firm because those files were destroyed. The partner never contacted the client to tell him that he was disposing of the files. However, our engagement letter with that client expressly provides that we can dispose of the client's files upon the conclusion of the engagement. We understood that to be permissible but would appreciate your guidance.

Sincerely,

John Q. Manager