




Picking Up the Pieces

By Shaun E. O'Toole

When a sole practitioner dies or is incapacitated, a conservator must be appointed to protect the interests of the clients. Here's a look at how the process works through the eyes of someone who knows firsthand

I was working at my Harrisburg office one day in the summer of 2010 when the receptionist informed me that Paul Killion, chief counsel to the Disciplinary Board, was on the line. After taking a few moments to ponder, "What did I do now?" I took the call. Killion asked if I was aware of the passing of a local attorney who had a solo practice a few blocks from mine. I informed Killion that I did not know the deceased lawyer, but, like all diligent estate lawyers, I read the obituaries religiously and therefore I was aware that the lawyer had recently passed away. Killion informed me that when a sole practitioner passes away in Pennsylvania, it is necessary for the Disciplinary Board to act quickly to make sure that a conservator is appointed to oversee the winding down of the deceased attorney's practice. He then asked if I would be willing to serve as the conservator of the practice he had mentioned. How does an attorney say no to the commonwealth's chief disciplinary counsel?



In Pennsylvania, when an attorney abandons his or her practice, disappears, dies or is transferred to inactive status because of incapacity or disability and there is no partner or other responsible successor to the attorney's practice, a conservator must be appointed to protect the interests of that attorney's clients. The role of the conservator is not to assume or take over the practice. In fact, the conservator is prohibited from representing the attorney's clients during this period. The purpose of the conservator is to wind down the practice in a way that assures that the clients are protected.

Procedure for Appointment of Conservator

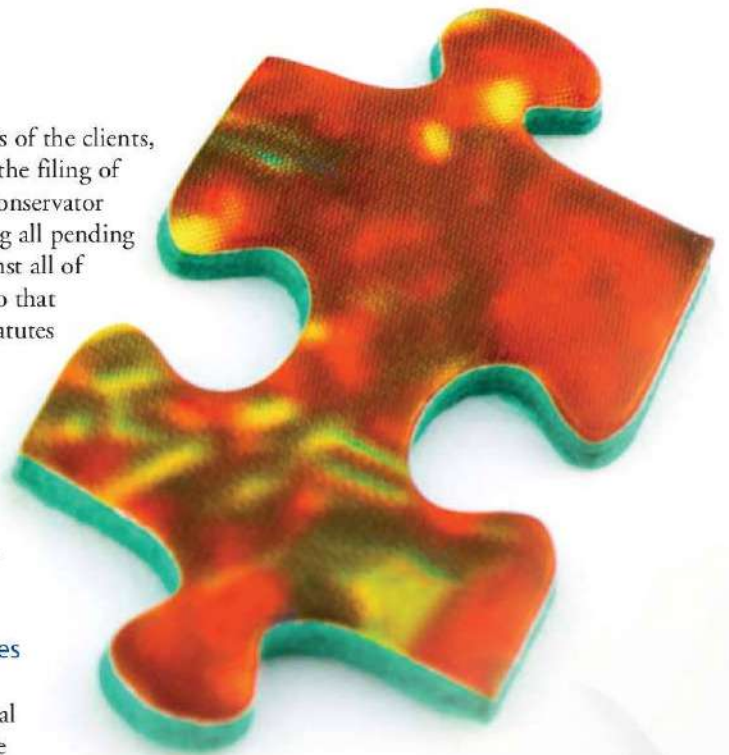
The rules governing the appointment and the responsibilities of a conservator are found in the Pennsylvania Rules of Disciplinary Enforcement. Under these rules, disciplinary counsel (or any other interested person with the written concurrence of disciplinary counsel) can file an application with the president judge of the court of common pleas of the county where the attorney's practice was located, seeking the appointment of a conservator. The president judge, within seven days of the filing, is to conduct a hearing on the application and, within three days of the hearing, issue an order granting or denying the application. The conservator must be a member of the bar of the commonwealth and can be a member of the Office of Disciplinary Counsel. Precluded are attorneys who represent a party who is in an adverse position to any known client of the absent attorney.

To protect the interests of the clients, the rules provide that the filing of the application for a conservator has the effect of staying all pending legal proceedings against all of the attorney's clients so that filing deadlines and statutes of limitation are not missed. How long this stay is in effect depends on different factors, so the substitute counsel should be made aware of these rules.

Return or Destroy Files

The conservator's initial responsibility is to take immediate possession of all files. The conservator is required to make a written inventory of all the files; make a reasonable effort to identify all clients whose files were opened within five years of the appointment of the conservator, regardless of whether the case is active or not; and identify all clients whose cases are active, regardless of the age of the file.

Written notice is sent to the clients whose files are active or were opened within the last five years. The notice informs them of the appointment of a conservator, the grounds that required such appointment (death, disappearance, transfer to inactive status) and the possible need for the clients to obtain substitute counsel. All clients whose files are both inactive and older than five years are





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given notice by publication. The specific method and duration of publication must be approved by the appointing court. To prevent delay of this publication, it is advisable to request the court's guidance regarding the publication in the application that is filed with the president judge seeking the appointment of the conservator.

The conservator may return a file to a client upon the client executing a written receipt. The conservator may also release the file to substitute counsel upon the request of the client and execution of a written receipt by such counsel. On approval by the appointing court, all files not returned to the clients are destroyed by the conservator in a manner that protects the privacy of the client (i.e., shredded).

The conservator and any attorney practicing with the conservator are forbidden to make any recommendation of counsel to any client identified as a result of the conservatorship, and neither the conservator nor any attorney practicing with the conservator may represent these clients in any matter identified during the conservatorship or in any other matter for a period of three years after the conclusion of the conservatorship.

Bank Accounts

The conservator is required to notify all banks holding either professional or trustee accounts of the appointment of the conservator. The rules provide that service on a bank of a certified copy of the order appointing the conservator operates as a modification of any agreement involving the bank, the absent attorney and any other party to the account so as to make the conservator a necessary signatory on the account. The conservator is responsible for the return to the client of all funds of the client that were in the custody of the absent attorney, minus deductions for expenses or other charges owed by the client to the absent attorney.

Expenses and Compensation of Conservator

The necessary expenses of the conservatorship, including the compensation of the conservator, are to be paid by the absent attorney or his or her estate, if possible. Any expenses that are not reimbursed are borne by the Disciplinary Board. A conservator who is not an employee of the Office of Disciplinary Counsel is compensated at the hourly rate identical to that received by court-appointed counsel in the judicial district in which the conservator was appointed.

Take Your Own Advice and Plan

As I noted above, I did not know the deceased lawyer whose practice I was responsible for winding down. I certainly knew nothing about his practice. Fortunately for me, this sole practitioner's practice was, until a few years ago, a firm that consisted of the deceased lawyer, associate attorneys, an office manager, legal assistants and a staff of secretaries. As such, there were others I could turn to for some direction. The former office manager, a woman who cared deeply for her former boss, was more than willing to assist me. She provided me with a description of the attorney's practice — where he banked, where he kept current files, how he organized his closed files, etc. Whenever I could not locate the file of a client who requested the return of the file, she more often than not knew where to find it. I could not imagine the nightmare this project would have been without her.

We lawyers advise our clients to plan and we assist our clients in organizing their personal and business affairs. Yet how many sole practitioners heed their own advice and plan for their untimely death or disability? With some very basic planning, the conservatorship process can be simplified tremendously. For example:

- Put in writing who you desire to be the conservator of your practice. Remember that it must be a lawyer licensed to practice in Pennsylvania. Although the rules do *not* provide for a process whereby the attorney can designate his or her conservator (as one does an agent in a power of attorney document), I cannot imagine disciplinary counsel or the president judge not honoring the written request of an attorney regarding who he or she desires to be appointed as conservator of the practice.



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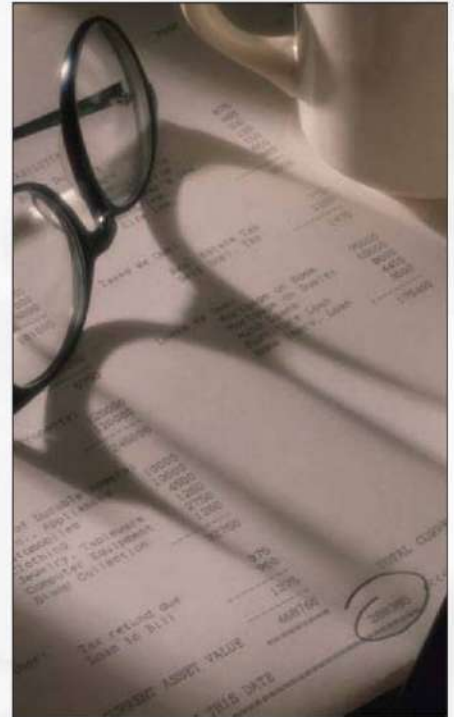
- Keep your files organized and destroy old files.

- Prepare a written plan on how to close down your practice. Describe where you keep the active files and where you keep your closed files. Keep an updated list of client addresses and lists of active and closed files and a description (including access logins and passwords) of how to access these lists. Include a list of banks where you have accounts, not just your firm's general accounts and IOLTA account but also accounts for trusts and estates for which you may be serving as a fiduciary. Include the account numbers of these accounts.

- Be diligent in calendaring all important dates (meetings, closings, filing dates, etc.) and do so in such a way that another lawyer looking at the notes would understand them and know which client they involve.

- When it comes time to destroy all of the unclaimed files, it is impossible for the conservator to sort through each file to see if there are any original documents in the files. Therefore, do not keep any of your clients' original documents. If your firm offers the service of keeping the clients' original estate planning documents, keep them all in one location, with an updated inventory that includes addresses and telephone numbers of the clients, and provide in your written plan a description of where these documents are kept.

Finally, it should be noted that Rule 1.17 of the Pennsylvania Rules of Professional Conduct permits sole practitioners to sell their practices. If you have a written agreement with another practitioner whereby that practitioner has the right to purchase your practice in the event of your death or disability, there is clearly a "responsible successor to the attorney's



Prepare a written plan for how to close down your own practice.

practice" and there will be no need for the appointment of a conservator upon your death or disability. ♦



Shaun E. O'Toole

Shaun E. O'Toole is a sole practitioner in Harrisburg. His practice focuses on estate planning and administration, elder law and estate litigation. He is a member of a hearing committee

of the Disciplinary Board of the Supreme Court of Pennsylvania. He can be reached at sotoole@otoolelawoffice.com.

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