WHAT IF?
ANSWERS TO FREQUENTLY ASKED QUESTIONS

If you are planning to close your office or if you are considering helping a friend or colleague close his or her practice, you should think through a number of issues. How you structure your agreement will determine what the Assisting Attorney must do if the Assisting Attorney finds (1) errors in the files, such as missed time limitations, or (2) misappropriation of client funds.

Discussing these issues at the beginning of the relationship will help to avoid misunderstandings later when the Assisting Attorney interacts with the Planning Attorney's former clients. If these issues are not discussed, the Planning Attorney and the Assisting Attorney may be surprised to find that the Assisting Attorney (1) has an obligation to inform the Planning Attorney's clients about a potential malpractice claim or (2) may be required to report the Planning Attorney to the Idaho State Bar.

The best way to avoid these problems is to have a written agreement with the Planning Attorney and, when applicable, with the Planning Attorney's former clients. If there is no written agreement clarifying the obligations and relationships, an Assisting Attorney may find that the Planning Attorney believes the Assisting Attorney is representing the Planning Attorney's interests. At the same time, the former clients of the Planning Attorney may also believe that the Assisting Attorney is representing their interests. It is important to keep in mind that an attorney-client relationship may be established by the reasonable belief of a prospective client.

This section reviews some of these issues and the various arrangements that the Planning Attorney and the Assisting Attorney can make. All of these frequently asked questions, except question 8, are presented as if the Assisting Attorney is posing the questions.

1. If the Planning Attorney is unable to practice and I am assisting with the office closure, must I notify the former clients of the Planning Attorney if I discover a potential malpractice claim against the Planning Attorney?

The answer is largely determined by the agreement you have with the Planning Attorney and the Planning Attorney's former clients. If you do not have an attorney-client relationship with the Planning Attorney, and you are the new lawyer for the Planning Attorney's former clients, you must inform your client (the Planning Attorney's former client) of the error, and advise him or her to submit a claim to the their malpractice carrier, if any, unless the scope of your representation of the client excludes actions against the Planning Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

If you are the Planning Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Planning Attorney and inform the Planning Attorney of his or her obligation to inform the client of the error. As the attorney for the Planning Attorney, you are obligated to follow the instructions of the Planning Attorney. You must also be careful that you do not make any misrepresentations. See IRPC 8.4(c). This situation could arise if the Planning Attorney refused to fulfill his or her obligation to inform the client – and also instructed you not to tell the client. If that occurred, you must be sure you do not say or do anything that would mislead the client.

In most cases, the Planning Attorney will want to fulfill his or her obligation to inform the client. As the Planning Attorney's lawyer, you and the Planning Attorney can include a clause in your agreement that gives you (the Assisting Attorney) permission to inform the Planning Attorney's former clients of any malpractice errors. This would not be permission to represent the former clients on malpractice actions against the Planning Attorney. Rather, it would authorize you to inform the Planning Attorney's former clients that a potential error exists and that they should seek independent counsel.

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

Again, the answer is based on your relationship with the Planning Attorney and the Planning Attorney's clients. If you are the Planning Attorney's lawyer, you would be limited to disclosing only information that the Planning Attorney wished you to disclose. You would, however, want to make clear to the Planning Attorney's clients that you do not represent them and that they should seek independent counsel.

3. Since the Planning Attorney is now out of practice, does the Planning Attorney have malpractice coverage?

When attorneys leave private practice, they may purchase extended reporting coverage or tail coverage.

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

Whether you are permitted to represent the former clients of the Planning Attorney depends on (1) whether the clients want you to represent them and (2) who else you represent.

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

Even if a conflict check reveals that you are permitted to represent the client, you may prefer to refer the case to another lawyer. A referral is advisable if the matter is outside your area of expertise or if you do not have adequate time or staff to handle the case. In addition, if the Planning Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her may make you vulnerable to an allegation of a personal interest conflict. See IRPC 1.7(a)(2). To avoid this potential exposure, you should provide the client with names of other attorneys or refer the client to the Idaho State Bar Lawyer Referral Service.

5. What procedures should I follow for distributing the funds in the trust account?

If your review or the Authorized Signer's review of the lawyer trust account indicates that there may be conflicting claims to the funds in the trust account, you should consult IRPC 1.15(d) and (e) and if the dispute cannot be resolved by the conflicting claimants, you should initiate a procedure for distributing the existing funds, such as a court-directed interpleader, pursuant to I.R.Civ.P 22.

6. If there is a violation of the IRPC, must I tell the Planning Attorney's former clients?

The answer depends on the relationships. The answer is (1) no, if you are the Planning Attorney's lawyer; and (2) maybe, if you are not representing the Planning Attorney.

If the Planning Attorney violated a disciplinary rule and you are his or her lawyer, you are not obligated to inform the Planning Attorney's former clients of any professional conduct violations or report any of the Planning Attorney's professional conduct violations to the Idaho State Bar if your knowledge of the misconduct is the result of confidential information obtained from your client, the Planning Attorney. I.R.P.C. 8.3(a). Although you may have no duty to report, you may have other responsibilities. For example, if you discover that some of the client funds are not in the lawyer trust account as they should be, you, as the attorney for the Planning Attorney, should discuss this matter with the Planning Attorney and encourage the Planning Attorney to correct the shortfall. If you are the attorney for the Planning Attorney and the Planning Attorney is deceased, you should contact the personal representative of the estate. If the Planning Attorney is alive but unable to function, you (or the Authorized Signer) may have to disburse the amounts that are available and inform the Planning Attorney's former clients that they have the right to seek legal advice.

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

If you are a signer on the trust account and (1) you are not the attorney for the Planning Attorney and (2) you are not representing any of the former clients of the Planning Attorney, you may still have a fiduciary obligation to notify the clients of a shortfall, and you may have an obligation under IRPC 8.3(a) to report the Planning Attorney to the Idaho State Bar.

If you are the attorney for a former client of the Planning Attorney, you have an obligation to inform the client about a shortfall and advise the client of available remedies. These remedies may include (1) pursuing the Planning Attorney for the shortfall, (2) filing a claim with the Client Assistance Fund, (3) filing a claim with the malpractice carrier, if any, or (4) filing a complaint with the Idaho State Bar. You may also have an obligation under IRPC 8.3(a) to report the Planning Attorney to the Idaho State Bar. If you are a friend of the Planning Attorney, this is a particularly important issue. You should determine *ahead of time* whether you are prepared to assume (1) the obligation to inform the Planning Attorney's former clients of the Planning Attorney's errors and (2) the potential duty to report the Planning Attorney to the Idaho State Bar if a violation of a rule of professional conduct occurs. Even if you limit the scope of your representation, that does not eliminate your potential duty to report pursuant to IRPC 8.3(a).

7. If the Planning Attorney stole client funds, do I have exposure to a professional conduct complaint against me?

You do not have exposure to a professional conduct complaint for stealing the money, unless you in some way aided or abetted the Planning Attorney in the misconduct.

Whether you have an obligation to inform the Planning Attorney's former clients of the misappropriation depends on your relationship with the Planning Attorney and the Planning Attorney's former clients. (See question 6 above.)

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

8. What are the pros and cons of allowing someone to have access to my trust account? How do I make arrangements to give my Authorized Signer access?

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you (the Planning Attorney) suddenly become unable to continue in practice, an Authorized Signer is able to transfer money from the trust account to pay appropriate fees, provide your clients with settlement checks, and refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account until a court allows access. This court order may be through a conservatorship or an order pursuant to Idaho Code § 15-5-401 et seq. This delay may leave the clients at a disadvantage, since settlement funds, or unearned fees held in trust, are often needed to hire a new lawyer.

On the other hand, the most important "con" of authorizing trust account access is your inability to control the person who has been granted access. An Authorized Signer with unconditional access has the ability to write trust account checks, withdraw funds, or close the account at any time, even if you are not dead, disabled, impaired, or otherwise unable to conduct your business affairs. It is very important to carefully choose the person you authorize as a signer and, when possible, to continue monitoring your accounts.

If you decide to have an Authorized Signer, decide whether you want to give (1) access only during a specific time period or when a specific event occurs or (2) access all the time. (See *The Duty to Plan Ahead* in Chapter 1 of this handbook.)

9. The Planning Attorney wants to authorize me as a trust account signer. Am I permitted to also be the attorney for the Planning Attorney?

Although this generally works out fine, the arrangement may result in a conflict of fiduciary duties. As an Authorized Signer on the Planning Attorney's trust account, you would have a duty to properly account for the funds belonging to the former clients of the Planning Attorney. This duty could be in conflict with your duty to the Planning Attorney if (1) you were hired to represent him or her on issues related to the closure of his or her law practice and (2) there were misappropriations in the trust account and the Planning Attorney did not want you to disclose them to the clients. To avoid this potential conflict of fiduciary duties, the most conservative approach is to choose one role or the other: be an Authorized Signer **OR** be an Assisting Attorney representing the Planning Attorney on issues related to the closure of his or her practice. (See question 4 above.)