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## **DISASTER PLANNING AND EMERGENCY PREPAREDNESS BEST PRACTICES FOR SOLOS**

An unforeseen crisis can be difficult to manage and can jeopardize your law practice. Planning ahead is essential to providing competent representation and preventing disciplinary problems. Most law firms know they need a disaster recovery plan, but don't have one. Maybe your firm has started its emergency planning procedures, but how can you be certain it is comprehensive or that you are not overlooking important functions, contingencies and considerations? Without an effective and customized plan, your firm is at risk.

### **1) STATUTES AND RULES**

- **NY RULES OF CONDUCT**

22 NYCRR §1200 RULE 1.5	FEES
22 NYCRR §1200 RULE 1.6	CONFIDENTIALITY OF INFORMATION
22 NYCRR §1200 RULE 1.14	CLIENT WITH DIMINISHED CAPACITY
22 NYCRR §1200 RULE 1.15	PRESERVING IDENTITY OF FUNDS (SAFEKEEPING PROPERTY)

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<sup>1</sup> SCALISE & HAMILTON LLP, focuses its practice on the representation of professionals (lawyers, judges, accountants, doctors, dentists, pharmacists, social workers, and government employees) in professional responsibility and ethics matters, and white-collar criminal matters.

DEBORAH A. SCALISE serves as Chair of the NYSBA CLE Committee. She is a President of the White Plains Bar Association and a Past President of the Westchester Women's Bar Association. She has also served as Vice President of the Women's Bar Association of the State of New York, where she also serves as the Co-Chair of the Professional Ethics Committee. She is the former Deputy Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department.

22 NYCRR §1200 RULE 1.16	DECLINING OR TERMINATING REPRESENTATION
22 NYCRR §1200 RULE 1.17	SALE OF LAW PRACTICE
22 NYCRR §1200 RULE 5.1	RESPONSIBILITIES OF LAW FIRMS PARTNERS MANAGERS & SUPERVISORY LAWYERS
22 NYCRR §1200 RULE 5.2	RESPONSIBILITIES OF A SUBORDINATE LAWYER
22 NYCRR §1200 RULE 5.3	RESPONSIBILITIES FOR CONDUCT OF NONLAWYERS
22 NYCRR §1200 RULE 5.4	PROFESSIONAL INDEPENDENCE OF A LAWYER
22 NYCRR §1200 RULE 5.5	UNAUTHORIZED PRACTICE OF LAW
22 NYCRR §1200 RULE 5.6	RESTRICTIONS ON RIGHT TO PRACTICE
22 NYCRR §1200 RULE 5.4	PROFESSIONAL INDEPENDENCE OF A LAWYER

## 2) **BAR OPINIONS**

- **Opinion 341 05/30/1974**

**Topic:** Notice to clients whose Wills lawyer holds when he retires

**Digest:** Neither a lawyer nor his partners need notify a client whose Will the firm holds of the lawyer's retirement, provided the client knows of the partnership

**Rules:** Code: Canon 4; EC 4-2; EC 4-6

- **Opinion 382 03/27/1975**

**Topic:** Announcements

**Digest:** Announcement that a law firm is 'successor' to a lawyer who has retired from the practice of law to assume the position of a judge is improper

**Code:** Canon 9; EC 2-9; 4-6; DR 2-101(A), (B)

- **Opinion 460 02/28/1977**

**Topic:** Preservation of closed files

Digest: Circumstances under which lawyers may dispose of closed files

Code: EC 1-5, 4-6, 7-1, 7-8, 7-11, 7-12; DR 1-102(5), 4-101

- **Opinion 570 06/07/1985**

**NOTE:** Clarifies N.Y. State 532 (1981)

**Topic:** Fee for legal services, advance payment; client, funds of; trust account

**Digest:** Fees paid to lawyer in advance of services, refundable to the extent not earned, are not client funds and need not be deposited in trust account; any interest earned on fee advances may be retained by lawyer; upon termination of employment, lawyer must promptly return to client unearned portion of fee paid in advance

**Rules:** Code: DR 2-110(A); DR 9-102

- **Opinion 622 09/10/1991**

**Topic:** Firm name; deceased partner; successor firm

**Digest:** One of two law partnerships (but not both) resulting from dissolution of law firm may use in its firm name the name of a deceased founding partner of its predecessor firm if (1) there is sufficient continuity of membership, clientele and professional practice between the new firm and the original firm such that the new firm can reasonably and justifiably claim to be next in a continuing line of succession, (2) the new firm is authorized by law or by contract to do so, and (3) such usage would not be otherwise misleading to the public

**Rules:** Code: DR 2-102(B); EC 2-11

- **Opinion 623 11/07/1991**

**Topic:** Closed files; disposition procedures; dissolution of law firm

**Digest:** Procedures for disposing of closed files; partners' ethical obligations are joint and several notwithstanding dissolution

**Rules:** Code: DR 1-102(A)(5), 4-101(B)(1), 4-101(D), 9-102(B), 9-102(D), 9-102 (G); EC 1-5, 4-4, 4-6, 7-1, 7-8, 7-11, 7-12

- **Opinion 641 02/16/1993**

**Topic:** Files; disposition procedures; compliance with recycling regulations

**Digest:** A lawyer must comply with an ordinance that requires recycling of all office paper. Confidences and secrets of clients must be given appropriate protection

**Rules:** Code: Canon 4, DR 4-101(A), DR 4-101(B), DR 4-101(C)(1), DR 4-101(C)(2), EC 4-6

- **Opinion 680 01/10/1996**

**Topic:** Record Retention By Electronic Means

**Digest:** Lawyers may retain some records in the form of computer images, but certain records must be retained in original form.

**Rules:** Code: DR 9-102(D), 9-102(H)

- **Opinion 699 01/23/1998**

**Topic:** Sale of law practice by newly-elected judge.

**Digest:** Purchase price of law practice of newly-elected judge may not be contingent upon future success of acquiring firm in attracting and retaining work from existing clients.

**Rules:** Code: DR 2-111; Code of Judicial Conduct: Canon 2; 4(D)(1)

- **Opinion 707 09/15/1998**

**Topic:** Sale of portion of law practice

**Digest:** A lawyer may not sell a portion of a law practice

**Rules :** Code: DR 2-111; EC 4-6 (former)

- **Opinion 710 11/06/1998**

**Topic:** Lawyer as escrow agent; Release of funds in escrow to client

**Digest:** Absent authorization by all parties, lawyer who serves as escrow agent may not release funds to client except as provided in the escrow agreement; while lawyer may resign as escrow agent, provision must be made to protect funds in escrow.

**Rules:** Code: DR 9-102

- **Opinion 724 11/30/1999**

**Topic:** Wills; obligations of law firm in regard to wills in its custody

**Digest:** A lawyer who drafts a client's will should agree in advance whether the lawyer will maintain the original will for safekeeping and, if so, what obligations the lawyer will thereby assume. At least absent agreement to the contrary, if the lawyer has maintained the client's original will, after the client's death the lawyer must assure that the executor and/or beneficiaries are aware of its existence, unless the lawyer knows of a later valid will. Absent agreement, the lawyer has no obligation to take steps to learn of the client's death or to file the original will with an appropriate court. However, the lawyer should clarify in advance whether or not the lawyer is to undertake these or other additional obligations and must comply with whatever agreement is made.

**Rules:** Code: DR 2-103(A), 4-101; EC 2-3, 4-6

- **Opinion 733 (10/05/2000)**

**Topic:** Sharing legal fees with non-lawyer employees

**Digest:** Non-lawyers may be compensated based on a profit sharing arrangement but may not be paid a percentage of profits or fees attributable to particular client matters referred by the employee.

**Rules:** Code: DR 2-103(B); DR 3-102(A)(3); EC 3?8

- **Opinion 758 12/10/2002**

**NOTE:** *Modifies* N.Y. State 680 (1996)

**Topic:** Retention of Original Trust Account Documents

**Digest:** Trust account documents required to be retained in original form should be retained as paper copies where available to lawyer in the ordinary course of business; otherwise, these documents may be retained in electronic form.

**Rules:** Code: DR 9-102(D) (Rules: Rule 1.15(d))

- **Opinion 766 09/10/2003**

**NOTE:** *Overrules* N.Y. State 398 (1975)

**Topic:** Disposition of files of former client

**Digest:** Former client and/or successor counsel is presumptively entitled to access all attorney files.

**Rules:** Code: DR 2-106(A); DR 9-102(C)

- **Opinion 775 05/04/2004**

**Topic:** Incapacitated client; safeguarding wills; client property

**Digest:** When a possibly incapacitated former client asks a lawyer to return the client's original will, the lawyer may communicate with the former client and others to ascertain the former client's condition and wishes.

**Rules:** Code: DR 2-103; DR 7-104(A)(1); DR 9-102(C)(4); EC 7-11; EC 7-12

- **Opinion 780 (12/08/2004)**

**Topic:** Retaining copies of client's file over client's objection; limitation of attorney liability.

**Digest:** Generally proper for a lawyer to retain copies of a client's file; proper to require a release of malpractice liability as a condition of returning the file without retaining copies.

**Rules:** Code: DR 2-110(A)(2), 4-101(C)(4), 6-102(A), 9-102(C)(4); EC 4-6.

- **Opinion 842 (09/10/2010)**

**Topic:** Using an outside online storage provider to store client confidential information.

**Digest:** A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.

**Rules:** 1.4, 1.6(a), 1.6(c)

- **Opinion 850 (01/19/2011)**

**Topic:** Law firm name – former partner

**Digest:** A law firm may not use the name of a former partner in the firm name if the former partner continues to practice law elsewhere.

**Rules:** 7.5(b), 8.4(d)

- **Opinion 853 (3/1/11)**

**Topic:** Law firm name including name of partner who becomes inside counsel to a corporation.

**Digest:** A name partner who becomes inside counsel to a corporation will not be “retired” under Rule 7.5(b) so as to allow the firm to retain the partner’s name in the firm’s name. The firm also may not retain the partner’s name in the firm’s name if the partner’s time working as inside counsel is considered an open-ended leave of absence, or if the partner becomes of counsel to the firm and minimizes his participation in the firm while working as inside counsel. Finally, if the partner is simultaneously associated with both the law firm and the corporation’s legal department, the conflicts of one may be imputed to the other.

**Rules:** 1.7(a), 1.10(a)&(e), 5.1, 7.5(a)&(b).

### **3) REGISTRATION AND CLE REQUIREMENTS UPON RETIREMENT**

Judiciary Law 468-A

22 NYCRR § 118 (g) Registration (defines retirement)

22 NYCRR § 1500.5(b)(4)

### **4) INCOMPETENT OR INCAPACITATED LAWYERS**

- 22 NYCRR §§ 603.16 (1<sup>st</sup> Dept); 691.13 (2<sup>nd</sup> Dept) 806.16 (3<sup>rd</sup> Dept); 1022.23 (4<sup>th</sup> Dept).