



ILLINOIS STATE
BAR ASSOCIATION

What to do when a lawyer dies:

Sounds like a line from a lawyer joke, but it's not. There are some serious considerations. Being mindful that the lawyer may have assumed the responsibility for thousands of important legal actions on behalf of clients through his or her years of practice, the lawyer's family must adjust to the loss that any family faces after the death of a loved one. But the lawyer's family may need to do more if the lawyer was a sole practitioner (practiced on his or her own without a partner or partners).

In addition to all other actions that must be taken when a person dies, there are special considerations when a lawyer dies. The estate of the deceased sole practitioner lawyer must:

* Contact the Illinois Supreme Court's Attorney Registration and Disciplinary Commission and inform them of the lawyer's death.

Attorney Registration and Disciplinary Commission
One Prudential Plaza, Suite 1500
130 East Randolph Drive
Chicago, Illinois 60601
800/826-8625 or 312/565-2600

* In Illinois, the Supreme Court's Rules of Professional Conduct now allow for the "sale of a law practice" in the event of an attorney's death or in other circumstances specified in the Rule. See Rule of Professional Conduct 1.17 (copy attached).

Or, if the practice is not being sold, files of the deceased lawyer must be transferred to another lawyer or lawyers who will assume responsibility for the clients and related papers. Usually, the executor of the estate assumes responsibility for conducting the lawyer's affairs, i.e., sale or closure of the practice. This would include notification of clients, return of client files, etc.

In the event that there is no one to assume this responsibility, or the executor is a

non-attorney, an attorney in the county where the deceased attorney practiced may assume responsibility through appointment by the presiding judge in the judicial circuit where the lawyer maintained his or her practice. Contact the ARDC for additional information.

Bear in mind that all lawyers are bound by the Illinois Supreme Court's Rules of Professional Conduct which assure client confidentiality. This confidentiality must be guarded even after death. Confidentiality and attorney/client privilege must be maintained at all times during the sale or closing of the law practice.

If you are the surviving spouse or family of a deceased lawyer and have questions, the best place to call is the Illinois Supreme Court's Attorney Registration and Disciplinary Commission.

RELEVANT ILLINOIS SUPREME COURT RULES

Rule 1.17 Sale or Transfer of a Law Practice

A lawyer, the estate of a deceased lawyer, or the guardian or authorized representative of a disabled lawyer may transfer or sell, and a lawyer or a law firm may accept or purchase, a law practice, including goodwill, if the following conditions are satisfied.

(a) The lawyer whose practice is transferred or sold ceases to engage in the private practice of law in all or part of Illinois due to:

- (1) death or disability;
- (2) retirement;
- (3) declaration of inactive status with the ARDC;
- (4) becoming a member of the judiciary;
- (5) full-time government employment;
- (6) moving to an in-house counsel or other position of employment not involving the private practice of law; or
- (7) a decision to no longer be actively engaged in the private practice of law on a fee representation basis in the geographic area in which the practice has been conducted.

(b) The entire practice is transferred or sold to one or more lawyers or law firms.

(c) No less than 90 days prior to the expected date of closing or transfer, written notice shall be given to each of the seller's current clients via certified mail regarding:

- (1) the proposed sale;
- (2) the client's right to retain other counsel or to take possession of the file;
- (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within 90 days of the receipt of the notice; and

(4) the expected date of final closing or transfer.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

(e) Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

(f) Lawyers who sell or transfer their law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, Rule 1.1 (Competence); Rule 1.5 (Fees); Rule 1.6 (Confidentiality of Information); Rule 1.7 (Conflict of Interest: General Rule); Rule 1.9 (Conflict of Interest: Former Client).

(g) This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of the practice.

Adopted May 23, 2005, effective immediately.

Rule 776. Appointment of Receiver in Certain Cases

(a) Appointment of Receiver - Where it comes to the attention of the circuit court in any judicial circuit from any source that a lawyer in the circuit is unable properly to discharge his responsibilities to his clients due to disability, disappearance or death, and that no partner, associate, executor or other responsible party capable of conducting the lawyer's affairs is known to exist, then, upon such showing, the presiding judge in the judicial circuit in which the lawyer maintained his practice, or the supreme court, may appoint an attorney from the same judicial circuit to serve as a receiver to perform certain duties hereafter enumerated. Notice of such appointment shall be made promptly to the Administrator of the Attorney Registration and Disciplinary Commission either at his Chicago or Springfield office, as appropriate. A copy of said notice shall be served on the affected attorney at his or her last known residence.

(b) Duties of the Receiver - As expeditiously as possible, the receiver shall take custody of and make an inventory of the lawyer's files, notify the lawyer's clients in all pending cases as to the lawyer's disability, or inability to continue legal representation, and recommend prompt substitution of attorneys, take appropriate steps to sequester client funds of the lawyer, and to take whatever other action is indicated to protect the interests of the attorney, his clients, or other affected parties. A copy of the appointing order shall be served on the affected attorney at his or her last known residence address.

(1) The attorney appointed to serve as receiver shall be designated from among members of the bar from the same judicial circuit who are not representing any party who is adverse to any known client of the disabled, absent or deceased lawyer, and who have no adverse interest or relationship with that lawyer or his estate which would affect the receiver's ability to perform the duties above enumerated.

(2) An attorney appointed as receiver may decline the appointment for personal or professional reasons. If no available members of the bar from the same judicial circuit can properly serve as receiver as a result of personal or professional obligations, the Administrator of the Attorney Registration and Disciplinary Commission shall be appointed to serve as receiver.

(3) Any objections by or on behalf of the disabled, absent, or deceased lawyer, or any other interested party to the appointment of or conduct by the receiver shall be raised and heard in the appointing court prior to or during the pendency of the receivership.

(c) Effect of Appointment of Receiver - Where appropriate, a receiver appointed by the court pursuant to this rule may apply to the court for a stay of any applicable statute of limitation, or limitation on time for appeal, or to vacate or obtain relief from any judgment, for a period not to exceed 60 days. An application to the court setting forth reasons for such application shall constitute a pleading sufficient to toll any limitations period. For good cause shown, such stay may be extended for an additional 30 days.

(d) Liability of Receiver.

A receiver appointed pursuant to this rule shall:

(1) not be regarded as having an attorney-client relationship with the clients of the disabled, absent or deceased lawyer, except that the receiver shall be bound by the obligations of confidentiality imposed by the Rules of Professional Conduct with respect to information acquired as receiver;

(2) have no liability to the clients of the disabled, absent or deceased lawyer except for injury to such clients caused by intentional, willful or gross neglect of duties as receiver; and

(3) except as herein provided, be immune to separate suit brought by or on behalf of the disabled, absent, or deceased lawyer.

(e) Compensation of the Receiver.

(1) The receiver shall normally serve without compensation.

(2) On application by the receiver, with notice to the Administrator of the Attorney Registration and Disciplinary Commission, and upon showing by the receiver that

the nature of the receivership was extraordinary and that failure to award compensation would work substantial hardship on the receiver, the court may award reasonable compensation to the receiver to be paid out of the Disciplinary Fund, or any other fund that may be designated by the supreme court. In such event, compensation shall be awarded only to the extent that the efforts of the receiver have exceeded those normally required in an amount to be determined by the court.

(f) Termination of Receivership. - Upon completion of the receiver's duties as above enumerated, he shall file with the appointing court a final report with a copy thereof served upon the Administrator of the Attorney Registration and Disciplinary Commission.

Adopted October 20, 1989, effective November 1, 1989; amended March 25, 1991, effective immediately.

ILLINOIS STATE BAR ASSOCIATION
ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

Opinion No. 98-09
May, 1999

Topic: Fees; Sharing fees with estate of deceased lawyer

Digest: The estate of a deceased lawyer may enforce an otherwise proper fee sharing agreement pursuant to which the lawyer was to receive a portion of a contingency fee resulting from his referral of a matter to another lawyer.

Ref.: Illinois Rules of Professional Conduct, Rules 1.5(g) and 5.4(a)
Illinois Judicial Ethics Committee Opinion No. 94-16
Chicago Bar Association Opinion No. 87-2
Lewsader v. Wal-Mart Stores, Inc., 296 Ill.App3d 169, 694 N.E.2d 191 (1988)
Elane v. St. Bernard Hospital, 84 Ill.App.3d 865, 672 N.E.2d 820 (1996)

FACTS - Lawyer A refers a personal injury matter to Lawyer B. Lawyer B agrees

with the client to handle the matter on a contingent fee basis. Lawyer A is not to perform any services in the matter following the referral. A fee sharing agreement is entered into by Lawyers A and B whereby Lawyer A is to receive one-third of any fee that ultimately becomes payable as a result of settlement or recovery in the action. Such agreement is consented to in writing by the client, and all other procedural and disclosure requirements as set forth in the Rules of Professional Conduct for such a fee sharing agreement have been met.

During the pendency of the personal injury action, Lawyer A dies. Some time later, the action is settled, generating substantial fees.

QUESTION - Is Lawyer A's estate entitled to receive the agreed one-third of the fees? Would enforcement of the agreement constitute an improper sharing of fees with a non-lawyer, or otherwise violate the Illinois Rules of Professional Conduct?

OPINION - As recited in the facts, the fee-sharing agreement between two lawyers is fully in compliance with the requirements of Rule 1.5(g). Such Rule provides that a division of fees shall be made in proportion to the services performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and:

1. The receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and
2. The referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer.

Thus, had Lawyer A survived through the resolution of the litigation, he clearly would have been entitled to share in the fee pursuant to the fee-sharing agreement.

Is the answer different because of Lawyer A's death prior to the resolution of the action? We do not believe so.

Rule 5.4(a) generally provides that a lawyer or law firm shall not share legal fees with a non-lawyer. However, subsection (2) of the Rule provides a specific exception to the effect that a lawyer who undertakes to complete unfinished business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation fairly representing the services rendered by the deceased lawyer. Subsection (1) of the Rule similarly recognizes an exception allowing a deceased lawyer's firm, partner or associate to pay money over to a deceased lawyer's estate for a period of time after the lawyer's death.

Such exceptions make clear that the sharing of fees with a deceased lawyer's estate, under proper circumstances, does not constitute an improper sharing of fees with a

non-lawyer.

Lawyer B in the present instance is essentially completing the unfinished business of he and Lawyer A, for which business Lawyer A, prior to his death, had assumed the same legal responsibility as would a partner of Lawyer B. (See Rule 1.5(g)(2)).

Thus, under Rule 5.4(a)(2), Lawyer A's estate could be entitled to "that portion of the total compensation which fairly represents the services rendered by the deceased attorney."

What are the services rendered by the referring lawyer in this instance? As recited in Rule 1.5(g), the primary service performed by Lawyer A was the referral of the client to Lawyer B. But for Lawyer A's continuing legal responsibility for the performance of the services in question, his services were completed at the time of the referral. Thus, he had at that point performed all services contemplated to be performed by him. Whether viewed as being measured in *quantum meruit* or in accordance with the percentage contained in the fee-sharing agreement, Lawyer A's estate should be entitled to recover the fees as provided for in the agreement.

It should be noted that the recent case of *Lewsader v. Wal-Mart Stores, Inc.*, 296 Ill.App.3d 169, 694 N.E.2d 191 (1998), held that when a lawyer provides services to a client under a contingency agreement, recovery of lawyer's fees is not barred by the death of the lawyer. The court additionally held that the estate's remedy in such instance is not limited to *quantum meruit*, and that the estate of a deceased lawyer who rendered services under a contingency agreement may seek recovery under several theories, including equitable lien. The court concluded that the award should be based on the contribution of the deceased lawyer to the eventual recovery.

In this instance, the contribution of Lawyer A was his referral of the matter to Lawyer B. This is all it was ever contemplated to be. His death did not change this, or render his contribution any less.

The question is also raised whether Rule 1.5(g)(2), requiring the referring lawyer seeking entitlement to a sharing of fees to assume the same legal responsibility for the performance of the services as would a partner of the receiving lawyer, poses any impediment to recovery where the referring lawyer's death preceded the matter's conclusion.

Again, we do not see this as a problem. As recognized in *Elane v. St. Bernard Hospital*, 284 Ill.App.3d 865, 672 N.E.2d 820 (1996), the legal responsibility foreseen by Rule 1.5(g)(2) is one of financial responsibility, not one of actual participation. To this effect, the court cites the Illinois Judicial Ethics Committee's Opinion No. 94-16, which stated that "legal responsibility" consists solely of potential financial responsibility for any malpractice action against the recipient of

the referral. The Court additionally relied upon Chicago Bar Association Opinion No. 87-2, which interpreted the legal responsibility as contained in the substantially identical predecessor to the present Rule as involving "the acceptance of passive, financial guaranty obligations."

Premised on such interpretation, the Court in *Elane* held that a judge, who upon ascending to the bench was prohibited by Supreme Court Rule from engaging in the practice of law, was nonetheless entitled to the benefit of a fee-sharing agreement entered into upon his referral of a case to another lawyer prior to his becoming a judge. The Court concluded that "a fee arrangement involving a referring attorney who later becomes a judge is enforceable as long as it is consistent with Rule 1.5's provisions as to client consent and the assumption of legal responsibility by the referring lawyer."

The same rationale applies in the present instance. Following Lawyer A's death, the financial responsibility contemplated by the Rule can be borne by the estate to the same effect as it was borne by the judge in the *Elane* case. Accordingly, Rule 1.5(g)(2) is not an impediment to enforcement of the fee-sharing agreement by the estate.

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Resources

Illinois State Bar Association Advisory Opinion on Professional Conduct No. 98-09, the subject of which is sharing fees with the estate of a deceased lawyer.

"Death and the Lone Ranger," by George W. Overton
CBA Record, April 1993

"Solo's Death or Illness Shouldn't Be Catastrophic for Clients," by Cornelia Honchar Tuite, *Chicago Daily Law Bulletin*, Vol. 139, No. 90, May 7, 1993

"Handling Files of a Dead Lawyer," by Peter Geraghty, *The Professional Lawyer*, November 1992

American Bar Association Informal Decision No. C-475, "Announcement of Temporary Removal of Office and Association With Another Lawyer."

American Bar Association Informal Decision No. 648, "Agreement for Handling Work of Another Lawyer Upon His Death"

American Bar Association Formal Opinion No. 92-369, "Disposition of Deceased Sole Practitioners' Client Files and Property"