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Handbook for Court-Appointed Trustees

I. INTRODUCTION

This handbook is designed to assist an attorney who is appointed as a trustee under Rule 3.27 or Rule 3.29 of the Rules of Lawyer Disciplinary Procedure.¹ Although there is not a comprehensive document or checklist that answers every question or covers every scenario which a trustee may encounter, this Handbook is intended to provide answers to the basic requirements and procedures of this process. The trustee is encouraged to contact the Office of Disciplinary Counsel when he/she finds themselves needing answers to, and guidance in, matters that are not covered in this Handbook. The Office of Disciplinary Counsel greatly appreciates the service that court-appointed trustees provide to the public and the profession.

II. APPOINTMENT

As identified in Section I, above, the provisions of appointment are contained in Rule 3.27(c) and 3.29 of the Rules of Lawyer Disciplinary Procedure.

The Office of Disciplinary Counsel may initiate proceedings under Rule 3.27(a) based “[u]pon receipt of sufficient evidence demonstrating that a lawyer (1) has committed a violation of the Rules of Professional Conduct or is under a disability and (2) poses a substantial threat of irreparable harm to the public,” The Supreme Court of Appeals “may appoint a trustee to protect the interests of the lawyer’s clients during the pendency

¹ By Order entered October 14, 2015, the Supreme Court of Appeals of West Virginia approved amendments to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure.

of these proceedings” pursuant to Rule 3.27(c) of the Rules of Lawyer Disciplinary Procedure.

Additionally, under Rule 3.29(a) of the Rules of Lawyer Disciplinary Procedure, “[t]he Supreme Court of Appeals, upon written request by Disciplinary Counsel, may authorize the chief judge in the circuit in which the lawyer maintained his or her practice, to appoint a lawyer or lawyers to serve as a trustee when there is evidence that: (1) The lawyer is unable to properly discharge the lawyer’s responsibilities to clients due to disability, disappearance or death, and no partner, executor, or other responsible party capable of conducting the lawyer’s affairs is known to exist, or (2) the lawyer failed to comply with Rule 3.28 [Duties of disbarred or suspended lawyers] after disbarment or suspension.”

III. DUTIES

Based on the type of practice the attorney for whom the trustee has been appointed, the duties and hours required of the trustee most likely will vary (i.e., an attorney not involved in a high-volume practice versus an attorney with a high-volume, heavy litigation practice).

The most important duty of the trustee is to protect the interests of the lawyer’s clients and to expeditiously facilitate the return of client files. The steps taken to accomplish this task will also most likely vary depending on the factors involved, such as the size and type of practice the attorney maintained, whether the attorney is cooperative with the trustee, the location of the attorney’s files and their accessibility, and whether the attorney is represented by counsel.

Rule 3.29(c) (as amended) of the Rules of Lawyer Disciplinary Procedure states that “[t]he trustee shall take whatever action seems indicated to protect the interests of the lawyer, and the lawyer’s clients and other affected parties, including, but not limited to the following: (1) Inventory active files and make reasonable efforts to distribute them to clients; (2) Inventory closed client files and make reasonable efforts to distribute them to former clients; (3) Take possession of and review the lawyer trust and business accounts; (4) Make reasonable efforts to distribute identified trust funds to clients or other parties (other than the lawyer); (5) After obtaining an order of the circuit court, dispose of any remaining funds and assets as directed by the court; and (6) Take any other action as seems necessary to protect the interests of the lawyer and the lawyer’s clients.”

A. Obtaining Access to Attorney’s Office and Client Files

Upon appointment by the chief judge in the circuit in which the attorney practiced, the trustee is to take the necessary steps required to gain access to the attorney’s office and files. The trustee may contact the attorney, relatives of the attorney, or a member of the

attorney's office staff to obtain a key to the attorney's office.² If the trustee encounters a problem gaining access to the attorney's office, the trustee should immediately contact the Office of Disciplinary Counsel for guidance.

Once the trustee has gained access to the attorney's offices, the trustee is to immediately take the necessary steps to secure the attorney's records and files. However, if a trustee is unable to secure the attorney's records and files on location, it may be necessary to relocate the files to the trustee's office or maintain the files in a separate storage facility. If the trustee encounters the issue of the necessity to relocate the files and records, the trustee is to contact the Office of Disciplinary Counsel for guidance. Again, the most important duty of the trustee is to protect the interests of the attorney's clients and the expeditious return of their files and records. Do not remove personal effects or other office equipment.

B. Reviewing Client Files

The trustee is to review the client files, determining which are active and which are closed. Upon completion of this review, the trustee will then contact the clients advising them accordingly. *See*, Attachment 1.

C. Contacting Clients

The trustee is to contact clients with active matters first, advising of the need to obtain new counsel and/or make arrangements to pick up their files (as described in detail below). Similarly, the trustee will notify the clients whose files appear to be closed or inactive, and make inquiry if the clients wish to retain their file.

The trustee may contact the client by telephone, mail, or any other means the trustee deems appropriate (i.e., such as on the attorney's website or Facebook page), based on time constraints and other considerations. It is recommended that the following steps be utilized by the trustee:

1. A letter is to be sent to the client's last known address via U.S. mail, first-class postage prepaid. This communication shall (i) advise the client of the trustee's appointment due to the suspension, disbarment, death, or disability of the attorney and of the need to obtain new counsel; (ii) advise the client how to obtain the client file from the trustee; and, (iii) advise the client that the file may be destroyed at a later time, if it remains unclaimed. *See*, Attachment 2.

² Rule 3.29(d) provides that "[t]he lawyer, to the extent possible, shall cooperate and promptly respond to reasonable requests for information from the trustee."

2. If no response is received by the trustee to the communication in 1., above, a second letter may be sent via U.S. mail, Certified, Return Receipt Requested, with proper postage prepaid, for the purpose of ensuring and confirming delivery. *See*, Attachment 3.
3. If clients who have been contacted fail to follow through in making arrangements to pick up their file(s) or consent to the destruction of same, the trustee may send a follow-up reminder by U.S. mail, first-class postage prepaid. *See*, Attachment 4.
4. The trustee may seek authorization from the Office of Disciplinary Counsel to place a notice in a local newspaper or other publication directing the attorney's clients to contact the trustee. *See*, Attachment 5.
5. When final disposition of the attorney's files has been determined, the trustee may also send a Final Notice to the attorney's clients regarding the destruction or final location of the client files. *See*, Attachment 8.

The trustee shall keep a record of all notifications and communications between the trustee and the clients regarding the disposition of the client's file(s). As provided for above, there may be occasions when the trustee is unsuccessful in the initial attempts to contact all of the attorney's clients. However, the trustee is expected to exercise due diligence in undertaking to ensure contact is made with the clients.

D. Protecting the Client's Interest

The trustee shall take steps to avoid foreseeable prejudice to the clients, remaining especially cognizant of applicable statutes of limitation or other time-sensitive considerations; this may include, but not be limited to, contacting opposing counsel, contacting the court, and reviewing incoming mail. Preferably, the trustee's review of mail will occur in the attorney's office; if this is not possible and absolutely necessary, the trustee may have the mail forwarded to another location. The trustee is not required to act as attorney for the client, or provide legal services other than those necessary to prevent harm to the clients. In addition, the trustee ***shall not*** solicit employment from the attorney's clients.

Rule 29(e), as amended, of the Rules of Lawyer Disciplinary Procedure provides that "[a]ny lawyer so appointed shall not be permitted to disclose any information contained in any files so inventoried without the informed, written consent of the client to whom such file relates, except as necessary to carry out the order of the court which appointed the lawyer to take such an inventory and to comply with any request from an

appropriate disciplinary authority. The trustee shall report professional misconduct on the part of the lawyer as required by Rule 8.3.”

E. Delivering Files to Clients

The trustee shall obtain from each client a signed release, reflecting the client’s request for the return of his or her client file and acknowledgment of receipt. *See*, Attachments 6 & 7. It is preferred that the trustee require clients to produce appropriate identification before releasing the file; absent instruction from the client, the file should not be released to anyone other than the client. The initial notification letter should advise how the files will be returned and the reason for the required security measures. In scheduling pick-up dates, the trustee may wish to designate one or more specific dates and times when clients can come to the trustee’s office, or other location, to obtain their files. This may be particularly helpful in situations in which publication is used or if the files are voluminous. A copy of the release/receipt/acknowledgment should be maintained by the trustee.

If client files are not picked up in-person, they may be returned by U.S. mail, Certified, Return Receipt Request, Restricted Delivery, with the client’s consent. Acceptance for the certified mail should be restricted for the client’s signature, and the trustee should keep proof of delivery of the file. However, this is not the preferred method of returning client files, as it can be expensive and, although it’s a trackable method, the risk of it getting lost can be substantially increased. The trustee should encourage the clients to pick up their files in-person.

F. Return/Refund of Monies to Clients

Clients who believe they are owed a refund of fees, or otherwise entitled to funds belonging to the attorney, should be encouraged to seek independent legal counsel and/or contact the Client Protection Fund at 304-553-7220, toll free at 866-989-8227, or through the West Virginia State Bar’s website, www.wvbar.org. The Client Protection Fund should be contacted directly by the client for specific information about the application of the Client Protection Fund to the client’s situation. The trustee should not act as an advocate for the clients in fee dispute matters.

G. Representing Clients and Recommending New Attorneys

It is expected and anticipated that the attorney’s clients will ask the trustee to recommend successor counsel; however, the trustee should not recommend successor or substitute counsel to any client on matters relating to the inventory. The trustee should refer the attorney’s clients to the local bar associations for new counsel, or to the West Virginia State Bar’s Lawyer Referral Service (www.wvlawyerreferral.org).

The trustee may represent the attorney's former clients only after he or she has been relieved of his or her trustee duties by the appointing court and/or the Office of Disciplinary Counsel. Furthermore, the representation of the client must be on a new matter and not related to the inventory.

H. Preservation and Disposal of Files and Records

Before taking any action with client files which have been inventoried and remain in the trustee's possession, the trustee should consult Legal Ethics Opinion entitled L.E.O. 2002-01, "Destruction of Closed Client Files," issued by the West Virginia Lawyer Disciplinary Board and which can be found at www.wvoddc.org. This Legal Ethics Opinion provides more detailed instruction regarding the destruction of client files older than five (5) years. However, the trustee is reminded that there are some instances where files older than five years should not be destroyed, i.e., files involving juveniles, files containing certain original documents, some contract cases, etc. In the event the trustee has received client permission to destroy his or her client file, the trustee can use his or her discretion in choosing a method of destruction which may include shredding or incinerating. The trustee can contact the Office of Disciplinary Counsel for guidance on the proper destruction of closed client files older than five (5) years.

The disposition of the unclaimed closed client files, which do not fall under the purview of L.E.O. 2002-01, is a more complicated issue and the resolution varies among the jurisdictions across the country. The West Virginia Lawyer Disciplinary Board recognizes that the trustee should not bear the cost of storing these files for five (5) years. Rule 3.29 of the Rules of Lawyer Disciplinary Procedure does not require that the trustee take possession of any remaining client files. See Rule 3.29(c)(1) and (2) which provides that the trustee shall "inventory active files and make reasonable efforts to distribute them to clients and also that the trustee shall "inventory closed client files and make reasonable efforts to distribute them to former clients." Likewise, the Office of Disciplinary Counsel is also not required to take possession of closed client files in these situations when all attempts have been exhausted by the trustee to return the client files. Accordingly, the Lawyer Disciplinary Board proposes that in the course of the trustee's attempt to contact clients and former clients about their files, the trustee should advise the clients that if they do not contact the trustee about the disposition of their client file, then it is assumed that the file has been abandoned by the client and the file will be destroyed. The trustee should publish notice for at least three weeks in a local newspaper where the office of the suspended/disbarred/dead/disabled/disappeared attorney is located, advising that **all** unclaimed client files, if not picked up by a certain date, will be destroyed. The trustee should, as part of the trustee's final report, request an order from the appointing court granting permission to destroy all remaining client files in the trustee's possession. See Rule 3.29(f)(3) which provides that in the trustee's final report, the trustee can make "requests for disposition of remaining files and property." The Office of Disciplinary

Counsel should be provided with a list of all client files which were either provided to clients, an attorney of the clients' choice, or destroyed.

Finally, the trustee should deliver to the Office of Disciplinary Counsel, the complete record of all files and documents related to his or her appointment as trustee. These records should include the inventory file review form, correspondence, executed receipts, motions, and other such documents mentioned in this Handbook. These records will be maintained by the Office of Disciplinary Counsel.

I. Dealing with the Attorney's Bank Accounts

Rule 3.29(c)(3) (as amended) specifically provides that the trustee should take possession of and review the lawyer's trust and business accounts. Furthermore, Rule 3.29(c)(4) states that the trustee should make a reasonable effort to distribute identified trust funds to clients or other parties (other than the lawyer). In the event another individual or attorney is appointed to serve as successor signatory, or to take control of such records for the purpose of disbursing funds from such accounts, the trustee should comply with a request for the turnover of such records. Rule 3.29(c)(5) provides that the trustee can obtain an order from the circuit court to dispose of any remaining funds and assets as directed by the court. The Office of Disciplinary Counsel should be provided notice of all activity so that it can monitor and assist the trustee as necessary. Bank and bookkeeping records relating to the attorney's practice should be preserved by the trustee and upon discharge, all bank and bookkeeping records remaining in the trustee's possession should be delivered to the Office of Disciplinary Counsel.

The trustee is not obligated to take extraordinary steps to collect fees owed to the attorney. If the attorney in question is deceased or has some other legal representative, the trustee should contact the representative of the estate.

J. Immunity

Rule 3.29(g) (as amended) provides that "[a]ll trustees appointed pursuant to this Rule 3.29 shall be immune from liability for conduct in the performance of their official duties in accordance with Rule 3.29."

IV. GETTING PAID

Rule 3.29(h) (as amended) provides for the payment of the trustee: "[t]he lawyer for whom a trustee has been appointed or the estate of a deceased lawyer for whom a trustee has been appointed is liable to the trustee for all reasonable fees, costs, and expenses incurred by the trustee as approved by the appointing court. To the extent that the approved trustee's fees, costs, and expenses are paid by the disciplinary authority or other third party,

the lawyer or the estate shall be liable to make reimbursement to the disciplinary authority or other third party for such payment.”

Rule 3.29(i) (as amended) provides that the “[a]pplication for allowance of fees, costs, and expenses shall be made by affidavit to the appointing court, which may enter a judgment in favor of the trustee and against the attorney or the estate of a deceased attorney for whom a trustee has been appointed. Notice of the application for fees, costs, and expenses shall also be made to the Office of Disciplinary Counsel, the lawyer or, if deceased, to the lawyer’s personal representative, or heirs. For good cause shown, an interim application for fees, costs, and expenses may be made. As approved by the appointing court, the trustee shall be entitled to reimbursement from the lawyer or the deceased lawyer’s estate for: (1) Reasonable expenses incurred by the trustee for costs, including, but not limited to, clerical, paralegal, legal, accounting, telephone, postage, moving, and storage expenses, and (2) Reasonable attorneys’ fees. In the absence of other funding sources, the Office of Disciplinary Counsel may pay the approved fees, costs, and expenses.”

Compensation Rate:

\$75.00 per hour (subject to approval by the Office of Disciplinary Counsel)
- time for travel not compensable

Time is recorded by tenths of an hour as follows:

.10 = 6 minutes
.20 = 12 minutes etc.

***Office overhead, including rent, for both the trustee
and the subject attorney will not be reimbursed.***

Expenses:

Faxes: Only the costs of long-distance facsimile transmissions may be reimbursed. Copies of paid bills must be submitted.

Phone Charges: Only long-distance telephone charges may be reimbursed. Copies of telephone bills must be submitted.

Photocopying: 15¢ per copy limit, the number of copies must be indicated. A receipt must be submitted for copying in excess of 50 copies.

- Postage: \$5.00 limit without receipts. Federal Express, Certified Mail, etc., may be reimbursed with receipts.
- Other expenses: Other expenses not mentioned above must have prior approval from the Office of Disciplinary Counsel. This includes any fees for the destruction of client files.
- Time Records: Trustees are expected to maintain detailed and accurate time records. Those records should include client names, dates, work performed, time expended, and costs incurred. Descriptions should be specific and detailed to enable one to understand the nature and extent of the services performed. Where appropriate, including appointments that are lengthy or financially burdensome, a trustee may contact the Office of Disciplinary Counsel to discuss interim applications for reimbursement of expenses prior to the completion of all services.
- Use of Office Staff: In discharging his or her duties, the trustee should be as frugal as possible by, among other things, using support staff to do the clerical work. The rate for support staff will be paid up to \$20.00 an hour. Expenses associated with using support staff must have prior approval from the Office of Disciplinary Counsel.

V. REPORTING REQUIREMENTS TO THE OFFICE OF DISCIPLINARY COUNSEL AND APPOINTING CIRCUIT COURT JUDGE & DISCHARGE

Rule 3.29(f) (as amended) provides that the trustee shall file written reports with the Office of Disciplinary Counsel and the clerk of the appointing circuit court judge. The Rule states that the written report shall be filed within 120 days of appointment, prior to being discharged if later than 120 days of appointment, and at such other times as directed by the appointing court. The Rule provides that “. . . [t]he reports shall describe the nature and scope of the work accomplished and to be accomplished under this Rule 3.29 and the significant activities of the trustee in meeting the obligations under this Rule 3.29. The final report must include accountings for any trust and business accounts, the disposition of active and closed case files, and any requests for disposition of remaining files and property. The trustee may apply to the appointing court and/or Disciplinary Counsel for instructions whenever necessary to carry out or conclude the duties and obligations imposed by this Rule 3.29.”

Although trustee reports may vary depending on the situation, please keep in mind that the trustee's report should include, at a minimum, a description of the number of files delivered to clients and/or their attorneys, the efforts made to contact clients, the number and identity of all unclaimed files which were destroyed. The trustee may also include any information the trustee may feel is appropriate under the circumstances of the situation.

VI. CONCLUSION

Being a trustee can be a difficult and time-consuming matter; however, it is often a very rewarding experience. As the trustee, you are rendering a great service to the public, to the other members of the profession, the courts, and to the Office of Disciplinary Counsel. Each trustee's experience and problems are unique and it is impossible to answer every question ahead of time. We encourage you to contact the Office of Disciplinary Counsel any time a problem arises. The Office of Disciplinary Counsel is here to help you through the process.