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UNIFIED COURT SYSTEM
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MEMORANDUM

July 16, 2012

TO: All Interested Persons

FROM: John W. McConnell

SUBJECT: Proposed New Uniform Court Rule on the Appointment of Caretaker Attorneys

The New York State Bar Association (NYSBA) has proposed the adoption of a new Part 1250 of the Uniform Rules of the Appellate Division (22 NYCRR Part 1250) governing the appointment of caretaker attorneys. (Exhibit A). According to the NYSBA's Memorandum in Support, the purpose of the proposed uniform rule is "[t]o establish a process whereby a court may designate a caretaker attorney to assist in the temporary management, closure or sale of a law practice on behalf of an attorney who is unable to continue to practice law, either temporarily or permanently. The primary role of the caretaker attorney is to protect the clients of the attorney who has become incapacitated and, to the extent not incompatible with that obligation, to protect the interests of the disabled or deceased lawyer." (Exhibit B). The proposed uniform rule was approved by the NYSBA House of Delegates on June 25, 2005, and was updated in 2012 to reflect the adoption of the Rules of Professional Conduct in 2009.

Persons wishing to comment on this proposal should send their submissions by email to OCAcaretakercomments@nycourts.gov or by regular mail to John W. McConnell, Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. The text of the proposed amendment and other explanatory materials can be obtained at www.nycourts.gov/rules/comments/.

Comments must be received no later than August 30, 2012.

EXHIBIT A

**PROPOSED UNIFORM COURT RULE ON THE APPOINTMENT OF
CARETAKER ATTORNEYS¹**

22 NYCRR Part 1250

**Client Protection; Voluntary or Involuntary Cessation of Law Practice;
Caretaker Attorneys**

1250.1 Application

1250.2 Who May Seek Appointment of a Caretaker Attorney

1250.3 Request for Appointment of a Caretaker Attorney

1250.4 Appointment of a Caretaker Attorney

1250.5 Duties and Role of a Caretaker Attorney

1250.6 Compensation of a Caretaker Attorney

1250.7 Bar Association Involvement

1250.1 Application

(a) This rule shall apply to an attorney who:

- (1) has resigned or been suspended or disbarred from the practice of law pursuant to Judiciary Law §90(2) or (4), or who is under investigation by a departmental disciplinary committee, a grievance committee or a committee on professional standards;
- (2) has been judicially declared incompetent or incapable of caring for his or her property, involuntarily committed to a mental hospital, alleged or found to be incapacitated from continuing to practice law by reason of physical or mental illness or infirmity or because of addiction to drugs or intoxicants, or for whom a guardian has been appointed pursuant to Article 81 of the Mental Hygiene Law;
- (3) has disappeared or abandoned the practice of law;
- (4) has retired;
- (5) has died; or
- (6) has otherwise become unable to practice law, either temporarily or permanently.

(b) In the event an attorney to whom this rule applies has made adequate provision for the protection of his or her clients in compliance with court rules or court order, or by contract, designation or other arrangement, such provision shall

¹ This proposed rule was originally developed by the Special Committee on Law Practice Continuity and was approved by the NYSBA House of Delegates on June 25, 2005. The Special Committee is now part of the Committee on Law Practice Management.

govern to the extent consistent with these rules unless the Appellate Division or Supreme Court determines, upon a showing of good cause, that these rules should be invoked. If the attorney is practicing in a law partnership, professional corporation or limited liability company, this rule shall not be invoked unless a court determines, upon a showing of good cause, that the entity in which the attorney practiced is no longer legally responsible for or able to handle matters previously entrusted to the attorney.

- (c) The purpose of this rule is to protect clients and, to the extent possible and not inconsistent with the protection of clients, to protect the interests of the attorney to whom this rule applies.
- (d) "Respondent," as used in this rule, applies to an attorney who has been disciplined, or is subject to discipline, pursuant to Judiciary Law §90(2) or (4). "Assisted Attorney" refers to an attorney who is not subject to disciplinary proceedings, but to whom this rule otherwise applies.

1250.2 Who May Seek Appointment of a Caretaker Attorney

- (a) Related to an attorney discipline matter. A departmental disciplinary committee, grievance committee or committee on professional standards may commence a proceeding for the appointment of a caretaker attorney or attorneys in the Appellate Division. In the event that more than one proceeding pertaining to a respondent or assisted attorney is commenced under this rule, the proceedings shall be consolidated before the Appellate Division, which may appoint a caretaker attorney or attorneys, as it deems appropriate.
- (b) Not related to an attorney discipline matter. A member of a bar association law practice continuity committee (defined in §1250.7, below), an attorney licensed to practice law in this state, or any other interested person, may commence a proceeding for the appointment of a caretaker attorney or attorneys, either in the Appellate Division or in the Supreme Court of the county in which the respondent or assisted attorney last resided or maintained his or her office. In the case of an attorney who is alleged to have disappeared or abandoned his or her law practice, a proceeding may not be commenced until a reasonable time has elapsed after the attorney's disappearance or abandonment.

1250.3 Request for Appointment of a Caretaker Attorney

- (a) the proceeding shall be commenced by an order to show cause supported by petition or affidavit for the appointment of a caretaker attorney or attorneys, pursuant to §1250.2, which, unless the court orders otherwise, shall be served personally upon the respondent or assisted attorney, upon at least one of the attorney's partners, if any, the attorney's guardian or other responsible party capable of conducting the attorney's financial affairs, or the personal

representative of the attorney's estate, if the attorney is deceased; or in such manner and upon such persons as the court directs.

- (b) The respondent or assisted attorney or his or her personal representative may designate a caretaker attorney and the court shall respect such designation unless the court determines, upon a showing of good cause, that such designation should be set aside.
- (c) All papers, records and documents pertaining to any proceeding commenced under this rule shall be closed and remain confidential until the court directs disclosure of the matter, upon a finding that such disclosure will not prejudice the interests of the respondent or assisted attorney or his or her clients. However, the court may take necessary steps to protect the interests of the attorney's clients, including notification of the proceeding to appropriate disciplinary agencies, to courts to which similar applications have been made, and to other interested persons or entities. Unless the court determines otherwise upon a showing of good cause, the court shall direct that personal or medical information pertaining to the respondent or assisted attorney and information pertaining to such attorney's clients, including their identities and the nature of their matters, be sealed.

1250.4 Appointment of a Caretaker Attorney

- (a) Upon the filing of an application for the appointment of a caretaker attorney, the court may:
 - (1) order an examination of the attorney by qualified medical and psychological experts if the respondent or assisted attorney is alleged to be incapacitated, disabled or incompetent to practice law;
 - (2) appoint an attorney to represent the respondent or assisted attorney if he or she is without adequate representation;
 - (3) appoint a *guardian ad litem* for the respondent or assisted attorney if the court has reason to believe that the attorney has a physical or mental illness or infirmity that may render the attorney incapable to practice law;
 - (4) direct that a hearing be held to determine whether a caretaker attorney should be appointed, and pending such hearing:
 - i. limit the disbursement of funds from the respondent or assisted attorney's escrow, special or operating accounts;
 - ii. restrict the transfer or removal of files and client property from the respondent or assisted attorney's office;
 - iii. direct the preparation of a list of all clients, matters pending before any court, tribunal or administrative agency and non-litigated matters entrusted to the attorney;

- iv. appoint a temporary caretaker attorney; and
- v. take such other action as is necessary to protect the interests of the clients and the respondent or assisted attorney;

(5) dismiss the proceeding.

- (b) If the court determines upon a showing by clear and convincing evidence that the appointment of a caretaker attorney is necessary to protect the interests of the respondent's or assisted attorney's clients, the court may appoint a caretaker attorney to:
 - (1) take such action as may be indicated to protect the interests of the clients as well as the interests of the respondent or assisted attorney; and
 - (2) perform such other specific duties as are described in §1250.5.
- (c) The court shall review requests by the caretaker attorney for compensation and reimbursement, make findings as to the reasonableness and necessity of the expenses, and fix the amount and source of compensation and reimbursement to be paid to any caretaker attorney under this rule.
- (d) The court shall terminate the proceeding and discharge the caretaker attorney upon a showing that the caretaker attorney has completed his or her responsibilities or that such appointment is no longer required to protect the interests of the clients or those of the respondent or assisted attorney.

1250.5 Role, Duties and Authority of a Caretaker Attorney

- (a) The role of a caretaker attorney is to protect the clients of the respondent or assisted attorney and, to the extent possible and not inconsistent with the protection of such clients, to protect the interests of the attorney to whom this rule applies.
- (b) A caretaker attorney appointed by the court shall enter the offices of the respondent or assisted attorney and may, with the assistance of that attorney if possible, do the following as authorized by the court:
 - (1) prepare an inventory of the matters being handled by the attorney;
 - (2) protect the clients' rights, files and property;
 - (3) notify all clients represented in pending matters of the appointment of the caretaker attorney or attorneys as promptly as possible, personally or by mail, and advise them to seek counsel of their choice;
 - (4) act as interim counsel upon the request of a client;

- (5) deliver files and property to the clients upon their request, subject to the attorney's right to retain copies of such files or assert a retaining or charging lien against such files or property if fees or disbursements for past services rendered are owed to the attorney by the client;
 - (6) collect outstanding attorney's fees, costs and expenses, and make arrangements for the prompt resolution of any disputes concerning outstanding attorney's fees, costs and expenses;
 - (7) collect any monies and safeguard any assets in the office of the respondent or assisted attorney and hold the monies and assets in trust pending their disposition on order of the court;
 - (8) request compensation for his or her professional services and reasonable and necessary expenses;
 - (9) to the extent possible, assist and cooperate with the respondent or assisted attorney and his or her representative in the transition, sale or windup of his or her practice;
 - (10) act as signatory on trust, escrow, IOLA, special and operating accounts, disburse funds to clients or other persons entitled thereto, and otherwise safeguard such funds.
- (c) A caretaker attorney shall maintain or procure professional liability coverage with a carrier admitted to do insurance business in New York, which coverage shall insure his or her work as a caretaker attorney under these rules and, if requested, shall present proof of such coverage to the court appointing the caretaker attorney.
- (d) A caretaker attorney shall not disclose any information pertaining to any matter so inventoried or handled without the consent of the client to whom such matter relates, except as necessary to carry out the order of the appointing court.
- (e) In the event of the death, disappearance or incapacity of a sole practitioner, the caretaker attorney and his or her law firm:
- (1) shall not, except upon approval of the court, serve in any other capacity as counsel for the respondent or assisted attorney, or as executor or administrator of, or counsel to, the respondent or assisted attorney's estate;
 - (2) may assist the respondent or assisted attorney's personal representative, guardian, conservator or other representative, or his or her estate, in the termination or sale of the law practice under 22 NYCRR 1200.17;

- (3) shall not represent a client, other than temporarily, to protect the interest of the client, except and until the caretaker attorney purchases the law practice as permitted under 22 NYCRR 1200.17; and
- (4) may be eligible to purchase the law practice under 22 NYCRR 1200.17, upon approval of the court.
- (f) A caretaker attorney is governed by the Rules of Professional Conduct and the same rules of professional conduct applicable to the respondent or assisted attorney with respect to client matters or files.
- (g) The caretaker attorney shall be deemed to be a member of a Lawyer Assistance Committee under Judiciary Law §499 and 22 NYCRR 1200.57, except that the caretaker attorney shall be liable to the clients of the respondent or assisted attorney and third parties for acts or missions outside the scope of these rules or the court order appointing the caretaker attorney.

1250.6 Compensation of a Caretaker Attorney

The court may order that the caretaker attorney or attorneys receive compensation for professional services rendered and for reasonable and necessary expenses incurred as a caretaker attorney, to be paid from the assets or estate of the respondent or assisted attorney; or from fees generated from clients of the respondent or assisted attorney; or from such other available source as the court may direct.

1250.7 Bar Association Involvement

- (a) The New York State Bar Association or any duly established local or specialty bar association may sponsor a law practice continuity committee to assist attorneys who are unable to continue to practice law or appropriately manage their law practices and to address the needs of clients of such attorneys who have not made other arrangement for the representation of their clients or the orderly transition or termination of their law practices. Such law practice continuity committees shall, among other things, recruit attorneys willing to serve as caretaker attorneys; maintain a list of potential caretaker attorneys for consideration by the Supreme Court or Appellate Division when appointing caretaker attorneys; and provide such resources as are available to facilitate the work of appointed caretaker attorneys.
- (b) Executive officers or governing bodies of the respective bar association(s) may appoint members to such law practice continuity committees, or appointment may be made in such other manner as may be provided in the govern rules of the bar associations.
- (c) If a law practice continuity committee is notified by a client, judge, attorney, grievance committee or any other interested party, that there is an attorney to

whom this rule may apply, the committee shall determine whether it would be in the best interest of the respondent's or the assisted attorney's clients to commence a proceeding under this Rule for the appointment of a caretaker attorney. In the event that the law practice continuity committee determines that it is in the best interest of the attorney's clients to act, or upon referral of a case pursuant to the other provisions of this rule, the committee through its chair or other designated party may apply to the Appellate Division or the Supreme Court, pursuant to §1250.2 and §1250.3, for the appointment of a caretaker attorney or attorneys, who shall be a member of the Bar of the State of New York in good standing and who may be a member of a law practice continuity committee.

- (d) The confidential information and communications between a client and the respondent or assisted attorney, if learned or discovered by a member or authorized agent of a law practice continuity committee, shall be deemed to be privileged on the same basis as provided by law between attorney and client, and may be waived only by the client.
- (e) A member of a law practice continuity committee or a caretaker attorney possessing knowledge, gained in either capacity, of the respondent or assisted attorney's violation of 22 NYCRR 1200.58 is exempt from the reporting requirements of 22 NYCRR 1200.57.

EXHIBIT B

Memorandum in Support
22 NYCRR Part 1250
Client Protection; Voluntary or Involuntary Cessation of Law Practice;
Caretaker Attorneys

Purpose:

To establish a process whereby a court may designate a caretaker attorney to assist in the temporary management, closure or sale of a law practice on behalf of an attorney who is unable to continue to practice law, either temporarily or permanently. The primary role of the caretaker attorney is to protect the clients of the attorney who has become incapacitated and, to the extent not incompatible with that obligation, to protect the interests of the disabled or deceased lawyer.

Summary of Provisions:

Part 1250.1 "Application" describes in what circumstances the court rule shall be applied.

Subdivision (a) describes an attorney to whom the rules apply as one who has been suspended or disbarred from the practice of law, or is under investigation in an attorney discipline matter; one who has been judicially declared incompetent, involuntarily committed to a mental hospital, incapacitated from continued practice by reason of illness, infirmity, addiction to drugs or intoxicants, or for whom a guardian has been appointed; one who has disappeared or abandoned the practice of law; has retired, died or otherwise become unable to practice law either temporarily or permanently.

Subdivision (b) provides that if the attorney has made adequate provision for the protection of clients, that provision shall govern; and, if the attorney was other than a solo practitioner, the rules would not apply unless the entity in which the attorney practiced is no longer legally responsible for that attorney's matters.

Subdivision (c) states that the purpose of the rule is to protect clients, and to the extent possible and not inconsistent with such protection, to protect the interests of the attorney to whom the rule applies.

Subdivision (d) contains definitions of "respondent" (referring to the disciplined attorney) and "assisted attorney (an attorney not subject to disciplinary proceedings, but to whom the rule otherwise applies).

Part 1250.2 "Who May Seek Appointment of a Caretaker Attorney" describes the two general categories of persons or parties who may seek such appointment. First, in subdivision (a), the process related to attorney discipline is described, and a departmental disciplinary committee, grievance committee or committee on professional standards may commence a proceeding in the Appellate Division. Otherwise, as described in subdivision (b), a member of a bar association law practice continuity committee, an attorney licensed to practice law in New York, or any other interested person may commence a proceeding for the appointment of a caretaker

attorney(s) either in the Appellate Division or in the Supreme Court of the county in which the respondent or assisted attorney resided or maintained an office.

Part 1250.3 "Request for Appointment of a Caretaker Attorney" describes the process by which the proceeding may be commenced by order to show cause supported by petition or affidavit, describes service upon required individuals (subdivision [a]); contemplates that the respondent or assisted attorney may designate a caretaker, which the court should respect, unless upon a finding of good cause shown, such designation is set aside (subdivision [b]); and directs that all papers, records and documents pertaining to the proceeding are closed and confidential, unless the court directs disclosure upon a finding that such disclosure will not prejudice the interests of the attorney or his or her clients.

Part 2150.4 "Appointment of a Caretaker Attorney," subdivision (a), describes the options the court has upon receipt of an application for the appointment of a caretaker attorney; e.g., ordering an examination by experts of the respondent or assisted attorney; appointing an attorney to represent the respondent or assisted attorney; appointing a guardian for such attorney; directing a hearing concerning whether a caretaker should be appointed; acting pending that hearing; or, the court may dismiss the proceeding.

Pursuant to subdivision (b), if the court determines that appointment of a caretaker is necessary to protect the interests of the clients, it may appoint a caretaker to take action to protect the interests of the clients and the attorney; and to fulfill the other duties set forth in Part 1250.5.

Pursuant to subdivision (c), the court may review requests made by the caretaker attorney for compensation and reimbursement, may make findings and fix the amount and source of compensation and reimbursement to be paid to the caretaker attorney(s).

Pursuant to subdivision (d), the court may terminate the proceeding and discharge the caretaker attorney once his or her responsibilities are completed.

Part 1250.5 "Roles, Duties and Authority of a Caretaker Attorney" states that the role is to protect the clients of the respondent or assisted attorney, and to the extent possible and not inconsistent with such protection, to protect the interests of the respondent or assisted attorney (subdivision [a]).

Subdivision (b) lists the responsibilities of the caretaker attorney, including acting as interim counsel upon request of a client; delivering files and property to the clients at their request; collecting outstanding attorney's fees, costs and expenses and resolving disputes about such matters; collecting money and safeguarding assets; acting as signatory on trust, escrow, IOLA, special and operating accounts, and disbursing or safeguarding funds as appropriate.

Subdivision (c) expects that the caretaker attorney shall maintain or procure malpractice insurance to cover his or her work as a caretaker.

Subdivision (d) prohibits caretaker attorneys from disclosing information pertaining to any matter handles as caretaker, without the consent of the client, except as necessary to carry out the order of the appointing court.

Subdivision (e) states that in the event of the death, disappearance or incapacity of a sole practitioner, the caretaker attorney or his or her firm shall not serve in any other capacity on behalf of the respondent or assisted attorney; and shall not represent a client, other than temporarily; but the caretaker may assist in there termination or sale of the law practice and may be eligible to purchase the law practice of the respondent or assisted attorney, upon approval by the court.

Subdivision (f) affirmatively states that the Rules of Professional Conduct apply to the caretaker acting in that capacity.

Subdivision (g) provides that a caretaker attorney shall be deemed to be a member of a Lawyer Assistance Committee as described in Judiciary Law section 499 and 22 NYCRR 1200.57, except that the caretaker would be responsible to clients or third parties for acts or omissions outside the scope of these rules.

Part 1250.6 "Compensation of a Caretaker Attorney" indicates that the court may order compensation to a caretaker attorney for professional services rendered and for reasonable expenses to be paid from the assets or estate of the respondent or assisted attorney; from fees generated by that attorney; or from such other available source as the court may direct.

Part 1250.7 "Bar Association Involvement" describes the process by which the New York State Bar Association or any local or specialty bar association may sponsor a "law practice continuity committee" to assist attorneys to manage their practices or assist in the orderly transition or termination of their practices, as appropriate. Such committees would recruit attorneys willing to serve as caretakers, maintain a list for consideration by the Appellate Division or Supreme Court when making appointments, and provide available resources to facilitate the work of appointed caretakers (subdivision [a]). Committee members are appointed by executive officers or governing bodies of bar associations (subdivision [b]). Such committees have standing to commence a proceeding for the appointment of a caretaker (subdivision [c]). Members of such committees shall be deemed to be members of a lawyer assistance committee under Judiciary Law section 499, except that they may be responsible to clients for acts or omissions outside the scope of the caretaker attorney rule (subdivision [d]).

Existing Law.

There is no current law or regulation that provides a process for the appointment of caretaker attorneys to assist in the temporary management of, assist in the transition or closing of, a law practice on behalf of an attorney unable to practice law, either temporarily or permanently.

Prior History.

In 2001, the New York State bar Association Committee on Attorney Professionalism identified the need for a process, following a study of the consequences of attorneys' failure to plan for the management or dissolution of their law practices upon their disability or death, and the dearth of appropriate policy or regulation in New York State to address the problem identified.

It was learned that an ad hoc approach had developed in various counties, whereby an attorney was contacted, often by a local Bar Association executive or staff member, to assist with the management of a practice for an attorney who for one reason or another was unable to continue practicing. These attorneys, in many of these situations, devote numerous hours of work sorting through reams of paperwork, analyzing case files, addressing court calendars, etc., often without compensation and with uncertain standing for professional liability issues. In many parts of the state, there is no organized response to the problem.

Motivated by the Committee's report, NYSBA President Steven Krane appointed the Committee on Law Practice Continuity to address the topic of the planned or unplanned cessation of law practice, whether temporary or permanent, and the development of this set of rules calling for the appointment of caretaker attorneys became one aspect of the work of the Committee.

Statement in Support.

This proposed uniform court rule is intended to address several situations in which lawyers leave the practice of law suddenly or without adequate advance planning or both. The purpose of the rule is primarily to protect the interests of the clients of such lawyers and, to the extent compatible with that goal, to protect the interests of the lawyers themselves. The Appellate Divisions presently have rules providing for the appointment of a receiver to inventory the files of disbarred, resigned and suspended attorneys, as well as attorneys who become incapacitated, mentally or physically, and are unable to continue practicing law. Presently, such appointments generally occur following a request from a disciplinary or grievance committee, acting upon client complaints. However, studies have shown that there is a far greater need for "caretaker" attorneys, often in situations where the incapacitated lawyer has not been the subject of any complaint or disciplinary proceeding.

Lawyers may be incapacitated temporarily or permanently, physically or mentally, often in circumstances in which their inability to continue practicing was not anticipated. Lawyers practicing in partnerships or professional corporations generally, although not always, have built-in protections for their clients, who are usually represented by the law firm and not by the individual lawyer. In those cases, it is the law firm's responsibility to make sure that the client's interests are fully protected. However, sole practitioners may or may not have done adequate advance planning for their unforeseen incapacity. And, even when a sole practitioner has made adequate advance plans, it may be advisable for the lawyer who is assuming responsibility for the practice of another attorney to be formally appointed by a court as a "caretaker" attorney, pursuant to this rule.