

THE **RECORDER**

COMMENTARY

Every attorney should make a succession plan

Elisa Reiter and Daniel Pollack | September 25, 2023



As COVID fades, we are left with many important lessons. Among them, the need to recognize the importance of having a professional succession plan (professional will) in place in the event an attorney is temporarily or permanently incapacitated. Such a succession plan may also come into

play in the event the attorney chooses to retire, or simply dies. Here are some pertinent provisions from the ABA Model Rules of Professional Conduct:

- **Rule 1.15. Safekeeping Property**: This rule requires lawyers to safeguard client property and to keep complete records of client funds and property. In the event of a lawyer's incapacity or death, the lawyer's executor or other representative must take steps to protect client property.
- **Rule 1.16 Declining or Terminating Representation**: This rule requires attorneys to take steps to protect their clients' interests when terminating representation. It includes the need to give reasonable notice to the client, returning client property, and refunding any unearned fees.
- **Rule 1.17 Sale of Law Practice**: This rule allows lawyers to sell their legal practice in the event of retirement, disability or death. However, they must take steps to assure that clients are notified of the sale and that the clients' interests are protected.
- **Rule 1.18 Duties to Prospective Clients**: Attorneys must protect the confidentiality of prospective clients and to avoid conflicts of interest. If an attorney becomes incapacitated or dies, they must take steps to ensure that the prospective clients' confidential information is protected.
- **Rule 8.01 Duty to Report**: Attorneys must report professional misconduct by other attorneys. If a lawyer becomes incapacitated or dies, and the person handling their files (representative and/or executor, as applicable) finds that the attorney committed malpractice, the representative and/or attorney must report that act to the bar.

- **Rule 8.04 Misconduct**: Lawyers are prohibited from engaging in certain types of misconduct, including dishonesty, fraud and misrepresentation. If an attorney becomes incapacitated or dies, their representative and/or executor may be required to report professional misconduct the attorney committed during their practice.
- **Rule 8.05 Disciplinary Authority**: If an attorney becomes incapacitated or dies, their representative and/or executor may be subject to disciplinary action if they fail to take steps to protect client interests.

In addition to these professional cannons, it is important to take practical steps to ensure a smooth transition in the event of incapacity or retirement. Practical steps include:

1. Notifying clients.
2. Assuring client confidentiality in the course of transitioning files.
3. Notifying malpractice carriers and making decisions regarding whether or not to obtain tail coverage. An attorney's risk of being accused of malpractice extends well beyond their last day of practice. Tail coverage is the insurance policy term that may defend an attorney against claims by former clients.
4. Terminating leases on office rentals.

Lawyers should be prepared for personal disaster, be it occasioned by death, disability, disappearance, or force of nature. For example, in Texas, an incapacitated person includes a minor under the age of 18, or any adult who is unable to provide for his or her own food, clothing, physical health, financial affairs, or need for shelter due to physical or

mental condition. Moreover, a durable power of attorney may be triggered if two physicians certify that an individual lacks the cognitive ability to make decisions regarding their physical and/or financial needs. What might indicate to others that an attorney is incapacitated?

- Inability to understand and/or communicate with others.
- Issues with recognizing individuals and/or objects who were familiar to them.
- Inability to think and reason logically.
- Signs of hallucinations and/or delusional actions.
- Mood dysregulation.
- Inability to understand the consequences of one's actions, due to addiction, traumatic brain injury, or mental health issues.

Who can assist a lawyer in need?

- Law partners.
- The lawyer's guardian.
- The lawyer's executor.
- A colleague at another firm who has agreed to cover cases for the attorney.
- The lawyer's surviving spouse, if that spouse is also licensed to practice law.
- An attorney sent in by the appropriate state bar, appointed to supervise and/or wind down the practice.
- The individual who purchases the law practice.

Other considerations include:

- Slowing the flow by accepting fewer cases once the decision to retire.
- Communicating not only with clients, but with opposing counsel and the courts to communicate the change in responsibility on files.
- Taking into account tax issues. Certain state and federal tax returns may need to be filed.
- Selling the practice. Notice must be given, as may be required by the state bar.

What should a succession plan include?

A road map of where and how client files are stored (current and closed files).

- Bank information pertaining to operating accounts and client trust funds.
- Ledgers of accounts, including receivables, billing, and monies due to clients.
- An outline of monthly overhead, including accounting, property lease, utilities, payroll, and essential tax documents.
- Information regarding maintaining digital and/or physical files, IT coverage, and other applicable leases, such as copy machines and maintenance.
- Information regarding key collaterals such as an expert witness index, webpage access, passwords for internet accounts, etc.

The named successor should not be surprised by being so designated. The attorney should have the good sense to engage the successor in a dialogue about being trusted as to assume authority over the incapacitated/retired/deceased lawyer's practice. Just because one

attorney in a practice has a succession plan, that should not relieve their colleagues of the need to address a succession plan as well. The successor needs to realize that even if there is ease of access at the firm, there is likely a need to run a check of appropriate county ledgers to ascertain what cases the attorney handled, as well as which cases are delineated as pending or closed.

Something as simple as checking a cell phone for client contact information, and/or pending court dates is practical and crucial to the transition of files. If an office has been closed, there likely is a need to take the appropriate steps to have mail forwarded to another address that the successor has access to. Also, noting a new address on the applicable state bar site may also be helpful.

Regarding solo practitioners, ABA Model Rule 28 provides that if an attorney is deemed incapacitated or deceased, and the attorney has no partner, executor nor successor in place, the court may appoint someone to inventory the attorney's files and take action to protect that individual and their clients. In the course of conducting such an inventory, the person appointed must maintain client confidentiality unless doing otherwise is necessitated by court order.

In California, for instance, sole practitioners are subject to unique rules, requiring them to designate another attorney to be available to review and transition files upon the originating attorney's disability or death. Many malpractice carriers also mandate such a designation for sole practitioners. Failure by a sole practitioner to leave a succession plan likely means that the state bar will designate someone to wind down the practice, and further, that a local court will have authority to issue

appropriate orders, as needed, to facilitate closing and/or selling the practice.

IOLTA accounts are an essential part of a law practice. Part of the succession plan, therefore, is to take steps to assure that a successor attorney will have the ability to sign on to a client trust account. If death is the issue, motions may need to be filed to assure that court orders are issued allowing the executor or successor representative to access the file. Simply establishing a POD designation on the account may ease transition.

Lawyers are often charged with assisting clients with disaster. Like plumbers whose pipes go untended, lawyers do not always consider the fact that we may suffer incapacity, death, or simply need to take proactive steps on retirement.

Make a plan.

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