

MEMORANDUM

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To: Committee on Professional Responsibility and Conduct (COPRAC)
From: Dena Roche
Date: February 18, 2020
Re: 20-0002 Re: Succession Planning Issues Outline

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ISSUE:

What are a lawyers ethical obligations to engage in succession planning?

OVERVIEW:

There are many unfortunate circumstances that could render any lawyer unable to continue practicing law. However, accidents, illness, disability, and untimely death are events that do occur. When these events impact lawyers, clients’ interests must be protected. Solo practitioners and lawyers from small firms, who often act as both lawyers and law firm managers, tend to pose the greatest risk for prejudice to clients if they do not have a succession plan. However, lawyers and law firms of any size firm, should engage in succession planning.

While no specific California rule or requirement that a California lawyer adopt a succession plan, existing rules can be interpreted as imposing a duty to take all reasonable steps to protect the clients’ interests during course of representation, which would include succession planning. Lawyers also should plan for their eventual retirement since older attorneys are more likely to be impacted by serious illness, disability and death.

ETHICAL ISSUES:

It is a lawyer’s duty to plan ahead to protect client interests. Some jurisdictions have Succession Planning Rules (South Caroline, Rule 1.19); some rely on existing rules to make this argument.

The biggest issues to decide as a committee is how comfortable we are with stating that California lawyers have duties to engage in succession planning. While there is no specific requirement that a California attorney adopt a succession plan, existing rules can be interpreted as imposing a duty to take all reasonable steps to protect your clients’ interests during the course of the representation which, read together, could imply a duty.

- 44 Compare with some states with specific requirements and what those say:
45 1. South Carolina (Rule 1.19) (See Appendix)
46 2. Other jurisdictions strongly encourage (Arkansas, Wyoming, etc.)
47 3. Rules that call for naming of Proxy, Attorney Surrogates, etc.
48

49 California Ethical Duties to Clients/Rules Implicated:
50

51 1. Diligence, Rule 1.3:

- 52 a. Lawyer cannot intentionally or recklessly fail to act with “reasonable diligence in
53 representing a client.” [Rule 1.3(a)]
54 b. “For purposes of this rule, ‘reasonable diligence’ shall mean that a lawyer acts
55 with commitment and dedication to the interests of the client and does not
56 neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.”
57 [Rule 1.3(b)]
58 c. Having commitment to the dedication and interests of the client also means
59 making such that those interests are protected if an unexpected event occurs.
60 i. Important client matters, such as court dates, statutes of limitations, or
61 document filings, could be neglected if no planning.
62 ii. Lawyers must plan for clients’ needs when lawyers go on vacation, retire
63 or take a sabbatical, why should this be viewed differently?
64 iii. Many jurisdictions have a Comment 5 to Rule 1.3 that requires succession
65 planning. See Appendix
66

67 2. Duty of Competency, Rule 1.1:

- 68 a. Lawyer cannot intentionally or recklessly fail to “perform legal services with
69 competence.” [Rule 1.1(a)]
70 b. A client is entitled to competent representation, which includes the “mental,
71 emotional, and physical ability reasonably necessary for the performance of such
72 service.” [Rule 1.1(b)]
73 c. If an unexpected event were to occur rendering a lawyer incompetent to
74 represent its clients, how would the client’s interests be protected?
75

76 3. Fiduciary Duty and Duty of Loyalty:

- 77 a. Protection of client interests
78 b. Analogy to dissolutions situation and obligations to inform clients of changes
79 impacting the representation.
80

81 4. Communication with Clients

- 82 a. Under Rule 1.4, is there a duty to communicate with client about succession plan
83 or lack thereof? In solo practice? Would it be relevant to client in choosing an
84 attorney?
85 i. Duty to “keep the client reasonably informed about significant
86 developments relating to the representation” 1.4(a)(3)

- 87 ii. Duty to “advise the client about any relevant limitation on the lawyer’s
88 conduct when the lawyer knows that the client expects assistance not
89 permitted by the Rules of Professional Conduct or other law.” 1.4(b)
90 iii. “A lawyer shall explain a matter to the extent reasonably necessary to
91 permit the client to make informed decisions regarding the
92 representation.” 1.4(b)
93

94 5. Duties re Termination of Representation

- 95 a. Rule 1.16: Analogy for attorney to take reasonable steps to avoid reasonably
96 foreseeable prejudice to client related to a situation in which they will no longer
97 be able to represent client?
98

99 6. Safekeeping Funds and Property of Clients

- 100 a. Rule 1.15
101 b. This can become implicated when unexpected events occur. If attorney if
102 disabled, incompetent or dead, client unable to retrieve funds and property
103 without significant delay that may be prejudicial.
104

105 7. Role of Business & Professions Code section 6185: Allows Superior Court to appoint an
106 attorney as “practice administrator” to take control of deceased or disabled licenses of
107 the State Bar to windup practice.
108

109 DISCUSSION:

110
111 A. Type of Planning Needed

- 112
113 1. Imperative for death or disability, incapacity or impairment
114 2. Important practice to consider for retirement and transfer/sale of practice
115 3. Most professional liability carriers now require as prerequisite to obtaining coverage
116

117 B. Key Components to Proper Succession Planning

- 118
119 1. Identifying and designating one or more attorneys to assist you in this process
120 a. Criteria for choosing these attorneys to help
121 1. Similar practices, knowledge of subject matter?
122 b. Types of attorneys:
123 1. Planning Attorney or Affected Attorney: Lawyer whose disability,
124 incapacity, retirement or death is the occasion for actions.
125 2. Assisting Attorney, Successor Attorney, Practice Administrator: Lawyer
126 called upon to respond to the disability, incapacity, retirement or
127 death of another lawyer.
128 c. What will Assisting Attorney’s role be?
129 1. Close practice;
130 2. Operate practice; or

- 131 3. Both
132 d. Legal Ethics Considerations for the Assisting Attorney
133 1. No Attorney-Client relationship with Planning Attorney's clients unless
134 agreement by Planning attorney and client to assume that role and
135 Assisting Attorney agrees;
136 2. Avoiding the Representation of Adverse Interests [Rule 3-310]
137 3. Confidential Information and Client Confidentiality [Rule 3-100 and
138 B&P Code section 6068(e)]
139 4. Termination of Employment [Rule 3-700]
140 5. Preserving Identify of Funds and Property of Clients [Rule 4-100]
141

142 2. Organization and Planning

- 143 a. Evaluate Current Practice
144 1. What types of structures are currently in place?
145 2. How is it organized?
146 3. Others who know of key information or can access (this is imperative
147 for solos)
148 b. Develop Plans for Succession
149 c. Advise appropriate parties of plans and where to find details of plans
150

151 C. Developing Succession Plan on Various Issues

- 152 1. Identify Assisting Attorney who will Close Practice
153 2. Scope of Duty of Assisting Attorney
154 3. Trust Account, IOLTA and General Bank Accounts
155 4. Client Notification
156 5. Confidentiality and Conflicts
157 6. Office Organization
158 7. Client Files
159 8. Compensation to Your Assisting Attorney and Staff
160 9. Letters to Family and Staff with Instruction
161 10. Review Plan every few years
162 11. Closing Law Practice
163 12. Special Considerations with Death of Solo Practitioner
164

165 HYPOTHETICAL:
166

167 Is there a hypothetical that would work here? Or is it okay to do a best practices opinion?
168

169 OTHER RESOURCES:
170

- 171 • California State Bar website Attorney Surrogacy: [Sample Agreement to Close Practice of](#)
172 [Law in the Future.](#)
173
174 • [ABA Succession Planning Resource Page](#)

175 APPENDIX:

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177 South Carolina Rules of Professional Conduct, Rule 1.19 Succession Planning.

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179 (a) Lawyers should prepare written, detailed succession plans specifying what steps must be
180 taken in the event of their death or disability from practicing law.

181 (b) As part of any succession plan, a lawyer may arrange for one or more successor lawyers or
182 law firms to assume responsibility for the interests of the lawyer's clients in the event of death
183 or disability from practicing law. Such designation may set out a fee-sharing arrangement with
184 the successor. Nothing in this rule or the lawyer's designation shall prevent the client from
185 seeking and retaining a different lawyer or law firm than the successor. The lawyer to be
186 designated must consent to the designation.

187 (c) A registry shall be maintained by the South Carolina Bar. The successor lawyer(s) shall be
188 identified on the lawyer's annual license fee statement.

189

Comment

190 [1] The rule serves as an encouragement, especially to sole practitioners, to arrange for the
191 orderly protection of clients.

192 [2] A detailed succession plan should include written instructions concerning how and where
193 client information is stored; bank account details, including operating and trust account
194 information; information concerning disposition of closed client files, law office equipment, and
195 payment of current liabilities; instructions to gain access to computer and voicemail passwords;
196 and information detailing how the successor will be compensated.

197 [3] Where a detailed succession plan has been prepared, the designated successor should step
198 in to wind down the practice without need of a court appointment.

199 [4] The client retains the power to select other counsel. The successor lawyer should ensure
200 that the client is aware of that discretion and of any arrangement under which a portion of the
201 fee is to be shared with the absent lawyer or his estate.

202 [5] The lawyer may designate multiple, different successors for different types of cases.
203 Individual client interests may be better served if multiple lawyers agree to be successors.

204 [6] Law firms may also designate successors for lawyers, even if such successors are not
205 members of the firm. Such a designation would be done according to the governing approval
206 process of the particular law firm.

207 [7] A registry is maintained for the voluntary designations. There is no requirement that a
208 successor be listed in the registry. The registry, however, can serve as a starting point to
209 determine if there is a succession plan in the event of the unexpected death or disappearance
210 of a lawyer. A lawyer who names a successor should contact the South Carolina Bar and inform
211 the Bar of the designation.

212 Adopted by Order dated February 11, 2013, effective July 1, 2013.

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215 Arkansas Rules of Professional Conduct, Comment 5, Rule 1.3 Diligence

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218 [5] To prevent neglect of client matters in the event of a sole practitioner's death or disability,
219 the duty of diligence may require that each sole practitioner prepare a plan that designates
220 another competent lawyer to review client files, notify each client of the lawyer's death or
221 disability, and determine whether there is a need for immediate protective action.

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225 Wyoming Rules of Professional Conduct, Comment 5, Rule 1.3 Diligence

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227 [5] To prevent neglect of client matters in the event of a sole practitioner's death or disability,
228 the duty of diligence may require that each sole practitioner prepare a plan, in conformity with
229 applicable rules, that designates another competent lawyer to review client files, notify each
230 client of the lawyer's death, disability, extended absence, or inability to practice, and determine
231 whether there is a need for immediate protective action.

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235 ABA Model Rule, Comment 5, Rule 1.3 Diligence

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237 [5] To prevent neglect of client matters in the event of a sole practitioner's death or disability,
238 the duty of diligence may require that each sole practitioner prepare a plan, in conformity with
239 applicable rules, that designates another competent lawyer to review client files, notify each
240 client of the lawyer's death or disability, and determine whether there is a need for immediate
241 protective action.

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