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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 20-0002
SUCCESSION PLANNING**

ISSUE: What are a lawyer’s ethical obligations to engage in succession planning?

DIGEST: Under certain circumstances, a lawyer may have a duty to engage in succession planning in order to protect client interests in the event the lawyer is suddenly unable to continuing practice law. [MORE...]

AUTHORITIES INTERPRETED: Rules 1.1, 1.3, 1.4, 1.15, 1.16 of the Rules of Professional Conduct of the State Bar of California.¹
Business and Professions Code sections 6068(e)(1) and 6185.

INTRODUCTION

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, client interests are at risk and should be protected.

Solo practitioners and lawyers from small firms, who often act as both lawyers and law firm managers, and older lawyers, who are more likely to be impacted by serious illness, disability and death, pose the greatest risk of prejudice to clients when an unexpected event occurs that renders the lawyer unable to continue practicing law. However, lawyers of any age practicing at a law firm of any size can be impacted by these types of unexpected events which pose a risk of prejudice to clients.

While no specific California rule requires that a California lawyer adopt a succession plan, existing rules, including the duties of competence and diligence, can be interpreted as imposing a duty on lawyers to take all reasonable steps to protect the clients’ interests during the course of the representation, including in the event of a lawyer’s sudden inability to continue to practice law. A failure to properly plan or prepare for both anticipated and unexpected departures from a lawyer’s practice may expose clients to significant damage or prejudice.

¹ Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

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36 Succession planning for law firms and lawyers encompasses a variety of issues. At this heart, a
37 succession plan forces a lawyer to consider what will happen to clients in the event the lawyer
38 is unable to continue to practicing law, and to develop a strategy for how such an event would
39 be handled, and by whom, in order to protect client interests. In many instances, this includes
40 arranging in advance for how client matters will be timely handled in the lawyer’s absence, how
41 client files will be protected and returned to clients, and how funds and property belonging to
42 clients will be returned to them, among other things.

43
44 Many law firms see succession plans for senior lawyers as a good business strategy, as such
45 plans provide a way to gradually transition client work and management roles away from aging
46 and soon-to-be retiring lawyers over a period of time in order to preserve long term client
47 relationships and to create opportunities for emerging talent and an orderly transition of new
48 leadership. However, law firms should consider succession planning as an important client
49 protective measure, and make reasonable efforts to ensure that the firm has policies and
50 procedures in place designed to protect clients in the event any particular lawyer at the firm
51 becomes unable to continuing practicing law.

52 **STATEMENT OF FACTS**

53
54 1. Lawyer A is a solo practitioner who has a general litigation practice consisting mostly of
55 representing plaintiffs in personal injury matters. Lawyer A has been a solo practitioner
56 for almost 30 years, and shares office space with a group of other solo practitioners and
57 small firms. Lawyer A has no dedicated support staff, instead sharing a group of rotating
58 assistants and paralegals with other colleagues to assist with pleadings and court filings.
59 Lawyer A handles the management and operations of the firm exclusively, including all
60 financial matters, calendar monitoring and client communications. Recently, Lawyer A
61 unexpectedly suffering a stroke and died. Lawyer A’s clients, and opposing counsel, who
62 did not immediately hear about Lawyer’s A passing, began contacting Lawyer A’s office
63 about various client and litigation related matters. By the time that Lawyer A’s spouse
64 (“Spouse”), who is not a lawyer, was able to hire an attorney to address any issues at
65 Lawyer A’s law practice, several months had passed. Some of the issues that emerged
66 after Lawyer A’s death included: missed court appearance and deposition appearances,
67 deadlines for discovery responses, court filings and motions had passed, failure to
68 finalize a settlement agreement for a client that rendered the offer withdrawn, inability
69 to respond to client demands to receive much needed settlement funds in Lawyer A’s
70 IOLTA account, and inability to respond to client’s request for transfer of file (which
71 contained original documents) to new counsel along with client’s unused retainer.

72
73 2. Lawyer B works for a large law firm (“Law Firm”) out of its 5-person satellite office in
74 Ventura County. Lawyer B is only one of two lawyers at the entire firm who practices in
75 the specialized field of retirement and welfare plan benefits litigation, and no other
76 lawyer in the Law Firm’s California offices practice in that specialized field. Lawyer B
77 typically worked very independently, rarely involving other lawyers or staff at the firm in

78 his work, and often works remotely on computer that does not belong to Law Firm.
 79 Lawyer B also routinely failed to follow Law Firm’s policies and procedures on keeping
 80 Law Firm files up to date. For example, Lawyer B routinely kept hand-written notes on a
 81 legal pad and other documents outside the Law Firm’s servers that were never included
 82 into the Law Firm files. Lawyer B also frequently calendars his own dates, including
 83 conferences with prospective new clients, without including them on Law Firm’s
 84 calendar. Recently, Lawyer B was unexpectedly hospitalized after suffering a stroke.
 85 Based on Lawyer B’s prognosis, he will need some long-term care and suffered a
 86 memory loss, it is unknown when Lawyer B would be able to return to work. Some of
 87 the issues that emerged after Lawyer B’s disability included: Many of Lawyer B’s clients
 88 had time-sensitive deadlines that relied on work product being generated exclusively by
 89 Lawyer B for which there are no records, Law Firm is not confident that it knows about
 90 every project that Lawyer is working on for Law Firm’s clients, and Law Firm is unable to
 91 identify another lawyer at the Law Firm that has the level of learning and skill to
 92 competently take over Lawyer B’s client matters.

93
 94 Other Options for Scenarios:

- 95
- 96 • Solo Practitioner has been asked to assist as part of a lawyer/colleagues succession plan,
 97 what are ethical obligations and considerations for the assisting attorney? [This is
 98 discuss bellowed and can be included as part of a scenario or as part of scenario 1.]
 99
- 100 • Law Firm Manager is reviewing its policies and procedures with outside ethics counsel to
 101 determine whether the Law Firm needs a succession plan in place for its lawyers...
 102 [General scenario about Law Firm’s potential obligations under 5.1]

103 **DISCUSSION AND ANALYSIS**

104 **Ethical Rules Implicated**

- 105
- 106 1. Diligence, Rule 1.3:
 - 107 a. Lawyer cannot intentionally or recklessly fail to act with “reasonable diligence in
 108 representing a client.” [Rule 1.3(a)]
 - 109 b. “For purposes of this rule, ‘reasonable diligence’ shall mean that a lawyer acts
 110 with commitment and dedication to the interests of the client and does not
 111 neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.”
 112 [Rule 1.3(b)]
 - 113 c. Having commitment to the dedication and interests of the client also means
 114 making sure that those interests are protected if an unexpected event occurs.
 - 115 i. Important client matters, such as court dates, statutes of limitations, or
 116 document filings, could be neglected if no planning.
 - 117 ii. Lawyers must plan for clients’ needs when lawyers go on vacation, retire
 118 or take a sabbatical, Lawyers also have duties with respect to disaster
 119 planning, why should this be viewed differently?

- 120 2. Duty of Competency, Rule 1.1:
121 a. Lawyer cannot intentionally or recklessly fail to “perform legal services with
122 competence.” [Rule 1.1(a)]
123 b. A client is entitled to competent representation, which includes the “mental,
124 emotional, and physical ability reasonably necessary for the performance of such
125 service.” [Rule 1.1(b)]
126 c. If an unexpected event were to occur rendering a lawyer incompetent to
127 represent its clients, how would the client’s interests be protected?
128
129
130 3. Fiduciary Duty and Duty of Loyalty:
131 a. The duty of loyalty requires that the lawyer act in the client’s interest and to
132 “protect [the] client in every possible way.”
133 b. Duty of loyalty extends beyond the termination of the attorney-client
134 relationship.
135 c. Analogy to dissolutions situation and obligations to inform clients of changes
136 impacting the representation.
137
138 4. Communication with Clients
139 a. Under Rule 1.4, is there a duty to communicate with client about succession plan
140 or lack thereof? In solo practice? Would it be relevant to client in choosing an
141 attorney?
142 i. Duty to “keep the client reasonably informed about significant
143 developments relating to the representation” 1.4(a)(3)
144 ii. Duty to “advise the client about any relevant limitation on the lawyer’s
145 conduct when the lawyer knows that the client expects assistance not
146 permitted by the Rules of Professional Conduct or other law.” 1.4(b)
147 iii. “A lawyer shall explain a matter to the extent reasonably necessary to
148 permit the client to make informed decisions regarding the
149 representation.” 1.4(b)
150
151 5. Duties re Termination of Representation
152 a. Rule 1.16: Analogy for attorney to take reasonable steps to avoid reasonably
153 foreseeable prejudice to client related to a situation in which they will no longer
154 be able to represent client?
155
156 6. Safekeeping Funds and Property of Clients
157 a. Rule 1.15
158 b. This can become implicated when unexpected events occur. If attorney if
159 disabled, incompetent or dead, client unable to retrieve funds and property
160 without significant delay that would likely be prejudicial to client.
161
162 7. Business & Professions Code section 6185: Allows Superior Court to appoint an attorney
163 as “practice administrator” to take control of deceased or disabled licenses of the State

164 Bar to windup practice. Implication of professionalism guidelines. Although not
165 disciplinary rule, reminder that planning for unexpected events protects clients and
166 does not unnecessarily burden colleagues and court system with having to clean up your
167 mess for you. (Would not be part of central analysis, but maybe reference in footnote)
168

169 **Discussion of Succession Planning**

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171 A. Type of Planning Needed

- 172
173 1. For death or disability, incapacity or impairment where failure to do so would violate
174 one or more of the above rules.
175 2. Important practice to consider for retirement and transfer/sale of practice (Rule
176 1.17)
177 3. Most professional liability carriers now require as prerequisite to obtaining coverage
178 for solo practitioners
179

180 B. Key Components of Proper Succession Planning

- 181
182 1. Identifying and designating one or more attorneys to assist you in this process
183 a. Criteria for choosing these attorneys to help
184 1. Similar practices, knowledge of subject matter?
185 b. Types of attorneys:
186 1. Planning Attorney or Affected Attorney: Lawyer whose disability,
187 incapacity, retirement or death is the occasion for actions.
188 2. Assisting Attorney, Successor Attorney, Practice Administrator: Lawyer
189 called upon to respond to the disability, incapacity, retirement or
190 death of another lawyer.
191 c. What will Assisting Attorney's role be?
192 1. Close practice;
193 2. Operate practice; or
194 3. Both
195 d. **Legal Ethics Considerations for the Assisting Attorney**
196 1. No Attorney-Client relationship with Planning Attorney's clients unless
197 agreement by Planning attorney and client to assume that role and
198 Assisting Attorney agrees;
199 2. Avoiding the Representation of Adverse Interests [Rules 1.7, 1.9, 1.10]
200 3. Confidential Information and Client Confidentiality [Rules 1.6, 1.8.2,
201 1.9, B&P Code section 6068(e)]
202 4. Termination of Employment [Rule 1.16]
203 5. Preserving Identify of Funds and Property of Clients [Rule 1.15]
204

205 2. Organization and Planning

- 206 a. Evaluate Current Practice
207 1. What types of structures are currently in place?

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248 [2] A detailed succession plan should include written instructions concerning how and where
249 client information is stored; bank account details, including operating and trust account
250 information; information concerning disposition of closed client files, law office equipment, and
251 payment of current liabilities; instructions to gain access to computer and voicemail passwords;
252 and information detailing how the successor will be compensated.

253 [3] Where a detailed succession plan has been prepared, the designated successor should step
254 in to wind down the practice without need of a court appointment.

255 [4] The client retains the power to select other counsel. The successor lawyer should ensure
256 that the client is aware of that discretion and of any arrangement under which a portion of the
257 fee is to be shared with the absent lawyer or his estate.

258 [5] The lawyer may designate multiple, different successors for different types of cases.
259 Individual client interests may be better served if multiple lawyers agree to be successors.

260 [6] Law firms may also designate successors for lawyers, even if such successors are not
261 members of the firm. Such a designation would be done according to the governing approval
262 process of the particular law firm.

263 [7] A registry is maintained for the voluntary designations. There is no requirement that a
264 successor be listed in the registry. The registry, however, can serve as a starting point to
265 determine if there is a succession plan in the event of the unexpected death or disappearance
266 of a lawyer. A lawyer who names a successor should contact the South Carolina Bar and inform
267 the Bar of the designation.

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

269 ...

270

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

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274 [5] To prevent neglect of client matters in the event of a sole practitioner's death or disability,
275 the duty of diligence may require that each sole practitioner prepare a plan that designates
276 another competent lawyer to review client files, notify each client of the lawyer's death or
277 disability, and determine whether there is a need for immediate protective action.

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279 ...

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

282

283 [5] To prevent neglect of client matters in the event of a sole practitioner's death or disability,
284 the duty of diligence may require that each sole practitioner prepare a plan, in conformity with
285 applicable rules, that designates another competent lawyer to review client files, notify each
286 client of the lawyer's death, disability, extended absence, or inability to practice, and determine
287 whether there is a need for immediate protective action.

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ABA Model Rule, Comment 5, Rule 1.3 Diligence

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

OTHER RESOURCES:

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