

MEMORANDUM

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.

Compare with some states with specific requirements and what those say:

1. South Carolina (Rule 1.19) (See Appendix)
2. Other jurisdictions strongly encourage (Arkansas, Wyoming, etc.)
3. Rules that call for naming of Proxy, Attorney Surrogates, etc.

California Ethical Duties to Clients/Rules Implicated:

1. Diligence, Rule 1.3:

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

2. Duty of Competency, Rule 1.1:

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

3. Fiduciary Duty and Duty of Loyalty:

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

4. Communication with Clients

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

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

5. Duties re Termination of Representation

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

6. Safekeeping Funds and Property of Clients

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

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

DISCUSSION:

A. Type of Planning Needed

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

B. Key Components to Proper Succession Planning

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

3. Both
- d. Legal Ethics Considerations for the Assisting Attorney
 1. No Attorney-Client relationship with Planning Attorney's clients unless agreement by Planning attorney and client to assume that role and Assisting Attorney agrees;
 2. Avoiding the Representation of Adverse Interests [Rule 3-310]
 3. Confidential Information and Client Confidentiality [Rule 3-100 and B&P Code section 6068(e)]
 4. Termination of Employment [Rule 3-700]
 5. Preserving Identify of Funds and Property of Clients [Rule 4-100]
2. Organization and Planning
 - a. Evaluate Current Practice
 1. What types of structures are currently in place?
 2. How is it organized?
 3. Others who know of key information or can access (this is imperative for solos)
 - b. Develop Plans for Succession
 - c. Advise appropriate parties of plans and where to find details of plans
- C. Developing Succession Plan on Various Issues
 1. Identify Assisting Attorney who will Close Practice
 2. Scope of Duty of Assisting Attorney
 3. Trust Account, IOLTA and General Bank Accounts
 4. Client Notification
 5. Confidentiality and Conflicts
 6. Office Organization
 7. Client Files
 8. Compensation to Your Assisting Attorney and Staff
 9. Letters to Family and Staff with Instruction
 10. Review Plan every few years
 11. Closing Law Practice
 12. Special Considerations with Death of Solo Practitioner

HYPOTHETICAL:

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

OTHER RESOURCES:

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

APPENDIX:

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

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

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

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

Comment

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

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

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

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

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

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

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

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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235 ABA Model Rule, Comment 5, Rule 1.3 Diligence

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