

1 THE STATE BAR OF CALIFORNIA
2 STANDING COMMITTEE ON
3 PROFESSIONAL RESPONSIBILITY AND CONDUCT
4 FORMAL OPINION INTERIM NO. 20-0002
5 SUCCESSION PLANNING
6

7 **ISSUE:** What are a lawyer's ethical obligations to engage in succession planning?

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

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12 **AUTHORITIES**

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

16 **INTRODUCTION**

17 There are many unfortunate circumstances that could render any lawyer unable to continue
18 practicing law. However, accidents, illness, disability, and untimely death are events that do
19 occur. When these events impact lawyers, client interests are at risk and should be protected.
20

21 Solo practitioners and lawyers from small firms, who often act as both lawyers and law firm
22 managers, and older lawyers, who are more likely to be impacted by serious illness, disability
23 and death, pose the greatest risk of prejudice to clients when an unexpected event occurs that
24 renders the lawyer unable to continue practicing law. However, lawyers of any age practicing at
25 a law firm of any size can be impacted by these types of unexpected events which pose a risk of
26 prejudice to clients.
27

28 While no specific California rule requires that a California lawyer adopt a succession plan,
29 existing rules, including the duties of competence and diligence, can be interpreted as imposing
30 a duty on lawyers to take all reasonable steps to protect the clients' interests during the course
31 of the representation, including in the event of a lawyer's sudden inability to continue to
32 practice law. A failure to properly plan or prepare for both anticipated and unexpected
33 departures from a lawyer's practice may expose clients to significant damage or prejudice.
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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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Succession planning for law firms and lawyers encompasses a variety of issues. At this heart, a succession plan forces a lawyer to consider what will happen to clients in the event the lawyer is unable to continue to practicing law, and to develop a strategy for how such an event would be handled, and by whom, in order to protect client interests. In many instances, this includes arranging in advance for how client matters will be timely handled in the lawyer's absence, how client files will be protected and returned to clients, and how funds and property belonging to clients will be returned to them, among other things.

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

STATEMENT OF FACTS

1. Lawyer A is a solo practitioner who has a general litigation practice consisting mostly of representing plaintiffs in personal injury matters. Lawyer A has been a solo practitioner for almost 30 years, and shares office space with a group of other solo practitioners and small firms. Lawyer A has no dedicated support staff, instead sharing a group of rotating assistants and paralegals with other colleagues to assist with pleadings and court filings. Lawyer A handles the management and operations of the firm exclusively, including all financial matters, calendar monitoring and client communications. Recently, Lawyer A unexpectedly suffering a stroke and died. Lawyer A's clients, and opposing counsel, who did not immediately hear about Lawyer's A passing, began contacting Lawyer A's office about various client and litigation related matters. By the time that Lawyer A's spouse ("Spouse"), who is not a lawyer, was able to hire an attorney to address any issues at Lawyer A's law practice, several months had passed. Some of the issues that emerged after Lawyer A's death included: missed court appearance and deposition appearances, deadlines for discovery responses, court filings and motions had passed, failure to finalize a settlement agreement for a client that rendered the offer withdrawn, inability to respond to client demands to receive much needed settlement funds in Lawyer A's IOLTA account, and inability to respond to client's request for transfer of file (which contained original documents) to new counsel along with client's unused retainer.
2. Lawyer B works for a large law firm ("Law Firm") out of its 5-person satellite office in Ventura County. Lawyer B is only one of two lawyers at the entire firm who practices in the specialized field of retirement and welfare plan benefits litigation, and no other lawyer in the Law Firm's California offices practice in that specialized field. Lawyer B typically worked very independently, rarely involving other lawyers or staff at the firm in

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

Other Options for Scenarios:

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

DISCUSSION AND ANALYSIS

Ethical 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 sure 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, Lawyers also have duties with respect to disaster planning, why should this be viewed differently?

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. The duty of loyalty requires that the lawyer act in the client’s interest and to “protect [the] client in every possible way.”
- b. Duty of loyalty extends beyond the termination of the attorney-client relationship.
- c. 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 would likely be prejudicial to client.

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

Discussion of Succession Planning

A. Type of Planning Needed

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

B. Key Components of 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 [Rules 1.7, 1.9, 1.10]
 3. Confidential Information and Client Confidentiality [Rules 1.6, 1.8.2, 1.9, B&P Code section 6068(e)]
 4. Termination of Employment [Rule 1.16]
 5. Preserving Identify of Funds and Property of Clients [Rule 1.15]

2. Organization and Planning

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

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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

3. Scope of Succession Plan on Various Issues

- a. Identify Assisting Attorney who will Close Practice
- b. Scope of Duty of Assisting Attorney
- c. Trust Account, IOLTA and General Bank Accounts
- d. Client Notification
- e. Confidentiality and Conflicts
- f. Office Organization
- g. Client Files
- h. Compensation to Your Assisting Attorney and Staff
- i. Letters to Family and Staff with Instruction
- j. Review Plan every few years
- k. Closing Law Practice
- l. Special Considerations with Death of Solo Practitioner

Application to Scenarios

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.

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[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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Arkansas Rules of Professional Conduct, 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 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.

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Wyoming Rules of Professional Conduct, 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, disability, extended absence, or inability to practice, and determine 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](#)