

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 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, 1.7, 1.9, 1.15, 1.16, 1.18, 5.1 of the Rules of Professional Conduct of the State Bar of California.<sup>1</sup>  
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.

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<sup>1</sup> 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 continue 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. Lawyer A did not have a succession plan in place, and no one else has access to Lawyer A's calendar, emails, client files, law firm bank accounts, or financial information.

Recently, Lawyer A had some health complications and was hospitalized for almost a month. Some of the issues that emerged during and after Lawyer A's hospitalization included: missed court appearance and deposition appearance, missed deadlines for discovery responses, court filings and motion deadlines 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 a file transfer (which contained original documents) to new counsel along with client's unused retainer.

2. Lawyer B is a solo practitioner who has been asked by Lawyer C to be an Assisting Attorney as part of a Lawyer C's succession plan. Lawyer B and Lawyer C are both solo practitioners who practice in the same area of estates and trusts planning and litigation and represent clients in the same general jurisdictions. Also, Lawyer C has been practicing for about 20 years longer than Lawyer B, so Lawyer C may also be interested

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in retiring soon. Lawyer B wants to know what ethical obligations are implicated by agreeing to be an Assisting Attorney for Lawyer C.

3. Law Firm Manager is the managing partner of a large law firm, Law Firm, with ten offices throughout California. Law Firm Manager is reviewing Law Firm's policies and procedures with outside ethics counsel to determine whether the Law Firm needs to engage in any succession planning at the law firm.

## DISCUSSION AND ANALYSIS

### **Ethical Duties Implicated for All Lawyers and Law Firms**

A lawyer who does not properly plan or prepare for both anticipated and unexpected departures from the practice of law may expose clients to significant damage or prejudice. While no specific Rule of Professional Conduct requires that a California lawyer develop or adopt a succession plan, existing rules, including the duties of competence and diligence, can be reasonably interpreted as imposing a duty on lawyers to take all reasonable steps to protect the clients' interests during the course of the representation. This would include taking affirmative steps to plan for an interruption or cessation of practice, voluntary or otherwise, particularly for those practicing in the solo practitioner or small firm setting<sup>2</sup>. (See ABA Formal Opn. 92-369, Disposition of Deceased Solo Practitioners' Client Files and Property, Pg. 2: "As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death."). [Rule 5.1?]

### **Duty of Diligence**

"A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client." [Rule 1.3(a)]. "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)]. It is reasonable to conclude that lawyer's duty to act "with commitment to the dedication and interests of the client," includes making sure that those interests are protected if an unexpected event occurs, and failure to do so may be viewed as reckless or gross negligence. Lawyers must plan for clients' needs when lawyers go on vacation, retire, or take a sabbatical. [Cite] Lawyers also have duties with respect to disaster planning. [Cite] A lawyer's duty to plan for unexpected but reasonably foreseeable events should not be analyzed any differently. [Cite.] It is undisputed that important client matters, such as court dates, statutes of limitations, or document filings, would be neglected, and harm or prejudice to clients would likely result if the lawyer does not engage in planning for these types of events.

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<sup>2</sup> Most professional liability carriers now require solo or small firm practitioners to make arrangements for office an office closure in the event of a death or disability as prerequisite to obtaining coverage.

Duty of Competence

“A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.” [Rule 1.1(a)] For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably\* necessary for the performance of such service” [Rule 1.1(b)]. “Attorney competence includes anticipating events or circumstances that may adversely affect client representation. By planning ahead for the orderly disposition of his or her law practice, an attorney can ensure that clients will continue to be represented without significant interruption in the event the attorney dies or becomes incapacitated.” (Sources of Duty of Competence, Cal. Prac. Guide Prof. Resp. Ch. 6-A.)[Cite to other jurisdictions opinions]

Duty of Loyalty

The duty of loyalty requires that the lawyer act in the client’s interest and to “protect [the] client in every possible way.” (*Santa Clara County Counsel Attys. Assn v. Woodside* (1984) 7 Cal.4<sup>th</sup> 525, 548.) The fiduciary duty of loyalty continues after termination of the attorney-client relationship to the extent that a lawyer may not “act in a manner that will injure the former client with respect to the matter involved in the prior representation.” (*Oasis West Realty, LLC v. Goldman* (2011) 51 C4th 811, 821.). The American Bar Association’s Standing Committee on Ethics and Professional Responsibility concluded that a lawyer should “have a plan in place which could protect clients’ interests in the event of the lawyer’s death,” based, in part, on a lawyer’s fiduciary duties to inform clients when closing a law practice or partnership dissolution. (See ABA Formal Opn. 92-369, Pgs. 2-3)

Duty to Communicate

A lawyer’s duty to communicate with clients includes the duty to “keep the client reasonably informed about significant developments relating to the representation” and the 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.” Rule 1.4(a)(3) and (4). “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4(b)

[Under Rule 1.4, under certain circumstances, 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?]

Duty to Avoid Reasonably Foreseeable Prejudice when Terminating a Representation

Rule 1.16(d) requires a lawyer to take “reasonable\* steps to avoid reasonably\* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel” in the event the lawyer terminates a client representation. This rule highlights the very real concern about avoiding prejudice to a client when a lawyer abruptly

ends a representation, which may result in insufficient time for the client to find replacement counsel and missed deadlines, among other issues. While a lawyer's death or incapacity does not typically involve a scenario in which the lawyer anticipates terminating the client representation, knowing that such an event may be reasonably foreseeable in certain circumstances, may require the lawyer to take reasonable steps this type of prejudice, such as developing a succession plan. Arranging for an Assisting Attorney or another designated lawyer at the law firm to step in and aid the lawyer's clients, safeguards against circumstances in which clients' interests are completely unprotected.

#### Safekeeping Funds and Property of Clients.

Lawyers have a duty to safeguard client funds and property under rule 1.15. If a lawyer is unable to continue practicing law permanently or for a period of time, a client may be unable to retrieve funds and property without significant delay. Such a delay is likely to prejudice the client's ability to access needed funds or find new counsel who will take on client's matter.

#### Analysis of Factual Scenarios

##### Scenario 1: Failure to Plan Results in Ethical Breaches

In scenario 1, Lawyer A did not have a succession plan in place, nor did Lawyer A arrange for another lawyer or trusted individual to have access to Lawyer A's calendar, emails, client files, or banking or financial information in the event of an emergency.

[Details on Impact of failure to plan related to all the issues that emerged during Lawyer A's hospitalization.]

##### Scenario 2: Ethical Duties Implicated for Assisting Lawyers

In scenario 2, Lawyer B has been asked to take on the role of an Assisting Attorney as part of Lawyer C's succession plan and wants to understand what ethical duties are implicated<sup>3</sup>.

- **The Existence of an Attorney-Client Relationship Between Lawyer B and Lawyer C's Clients**

Assuming Lawyer B agreed to be Lawyer C's Assisting Attorney, the foundational question for Lawyer B is whether, if Lawyer C was suddenly unable to continue practicing law, Lawyer B

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<sup>3</sup> If Lawyer C does not arrange for an Assisting Attorney to take control of Lawyer C's law practice, under Business and Professions Code section 6185, the California Superior Court is authorized to appoint an attorney as "practice administrator" "to take control of the practice of a deceased or disabled licensee of the State Bar" and to windup it up. This process involves considerably greater burdens to clients (who are waiting to get funds, files and new representation, and whose legal matters have been put on hold), the court system and the personal estate of the deceased or disabled lawyer who will likely be responsible for paying for the appointment and court intervention.

would automatically have an attorney-client relationship with all Lawyer C's clients. The answer is not necessarily. In most cases, the role of Assisting Attorney (or sometimes called Successor Attorney or Practice Administrator) is simply to step in and respond, administratively, to the unexpected event. Depending on the unexpected event, Lawyer B may need to access Lawyer C's calendar, review upcoming deadlines and communicate with clients, the court, and opposing counsel about Lawyer C, obtain any necessary extensions, and evaluate the short-term and long-term implications for clients and client matters. In the event of a death or permanent incapacity, Lawyer B's actions are usually dictated by whether Lawyer B has been asked to close Lawyer C's practice or if there is an agreement that Lawyer B will continue operate the law firm and service Lawyer C's clients subject to each clients' consent<sup>4</sup>.

Under these circumstances, whether or not an attorney-client relationship would form between Lawyer B and Lawyer C's clients would depend in large part on what arrangements were made between Lawyer B, Lawyer C, and Lawyer C's clients in advance on this issue, what each individual client's understanding of Lawyer B's role is, and whether any client would choose to have Lawyer B represent that client going forward. [Case law on formation on A-C relationship, contractual and implied]. Clear communication with Lawyer C's clients on exactly what role Lawyer B is taking on in assisting with matters, whether purely administrative or as counsel on a temporary or permanent basis, is essential for clients to make informed decisions about their future representation. It is also important to understanding whether Lawyer B will owe duties to Lawyer C's clients as their lawyer.

- **Duty of Competence**

Before considering whether Lawyer B could take on the representation of any of Lawyer C's clients on a permanent basis, Lawyer B would need to have the necessary competence to handle the representation. (Rule 1.1.) Specifically, Lawyer B would need to have the skill, support, and resources necessary to handle each matter. Here, because Lawyer B and Lawyer C both practice in the area of estates and trusts planning and litigation and represent clients in the same general jurisdictions, Lawyer B is a good match to assist Lawyer C under these circumstances because Lawyer B will likely to have the requisite competence to take on the representations even though Lawyer B has practice few years. If not, Lawyer B can either acquire sufficient knowledge before performance is required, refer the matter to a competent lawyer (Rule 1.1(c).), or continue to assist in the termination of the representation on behalf of Lawyer C. However, Lawyer B is permitted, in an emergency, to "give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required" as long as it is limited to what "reasonably\* necessary in the circumstances." (Rule 1.1(d).)

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<sup>4</sup> If Lawyer C's succession plan involved an agreement between Lawyer B and Lawyer C regarding the sale of the law practice upon Lawyer C's death, then Lawyer B must also comply with rule 1.17. If no such an agreement in place, it is customary to make plans to compensate an Assisting Attorney, and related administrative support team members, since there can be considerable work and expenses involved in closing a law office.

236       • **Conflicts of Interest and Confidentiality**  
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238       Before considering whether Lawyer B could take on the representation of any of Lawyer C's  
239       clients on a temporary or permanent basis, Lawyer B must also analyze whether any potential  
240       representations would implicate conflicts for Lawyer B with respect to any of Lawyer B's  
241       current, former or prospective clients. (Rules 1.7, 1.9, and 1.18) Because Lawyer B and Lawyer C  
242       practice in the same area of law, there may be a higher probability of conflicts between the two  
243       practices. If it was anticipated that Lawyer B was going to take over Lawyer C's practice, it might  
244       be reasonable to try to clear conflicts in advance of any event that would necessitate Lawyer C  
245       being unable to practice law. Otherwise, as part of the succession plan for Lawyer C, Lawyer C  
246       should maintain a list of active clients with contact information and provide Lawyer B with  
247       information on how to access this list and any related conflicts database in the event that it  
248       becomes necessary to do so<sup>5</sup>.

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250       Even if Lawyer B's role as Assisting Attorney is limited to administratively helping close Lawyer  
251       C's office, Lawyer B will nonetheless be interacting with Lawyer C's clients and may need to  
252       obtain information related to those clients and the clients' matters as part of this process. In  
253       doing so, Lawyer B should be mindful of duties of confidentiality to Lawyer C's clients, as well as  
254       how acquiring information that is protected by Business and Professions Code section 6068(e)  
255       and rules 1.6 and 1.9(c) that is material to the matter, may also give rise to conflicts of interest  
256       for Lawyer B.

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258       • **Duty to Communicate**  
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260       If Lawyer C is unable to continue practicing law permanently, or for a period of time, that  
261       information is "significant development relating to the representation" of which Lawyer C's  
262       clients must be kept "reasonably informed." Rule 1.4(a)(3). While this rule implicates Lawyer  
263       C's duties to clients, Lawyer B, as the Assisting Attorney, has agreed to assist Lawyer C in  
264       fulfilling obligations to clients since Lawyer C is unable to do so.

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266       In order to assist in fulfilling this obligation to clients, Lawyer C's succession plan should include  
267       specific details on how to contact clients, access current deadlines and calendar, accessing law  
268       firm bank accounts and client trust accounts, access financial records, including ITOLA ledgers  
269       and accounting, and access client files and property. Any other information that Lawyer C can  
270       provide to Assisting Attorney about the law firm and how it is organized will likely further assist  
271       Lawyer B in fulfilling its duty to communicate with clients.

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<sup>5</sup> There are likely to be confidentiality and other privacy concerns with providing Lawyer B access to this  
information in the present. However, Lawyer C should advise Lawyer B where information related to Lawyer C's  
succession plan, practice information, logins and access codes, etc. are located (i.e. in an envelope or file with  
Lawyer B's name on it in the possession of an office administrator or spouse) if an unexpected event were to  
occur.

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- **Other Duties**

The duty to safeguard client funds and property under rule 1.15, and the duty to avoid reasonably foreseeable prejudice when terminating a representation under rule 1.16(d), are also duties that belong to Lawyer C, but Lawyer B will be instrumental in assisting with fulfilling these obligations. Again, providing Lawyer B with proper access to banking and financial information, client contact information and clients files will be essential to fulfilling these obligations.

### Scenario 3: Law Firm's Duty to Plan

[Discussion of Law Firm succession planning policies.]

## CONCLUSION