

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 to protect client interests in the event the lawyer is  
10                              suddenly unable to continuing practice law. [MORE...]

11  
12   **AUTHORITIES**

13   **INTERPRETED:**       Rules 1.1, 1.3, 1.4, 1.7, 1.9, 1.15, 1.16, 1.18, 5.1 of the Rules of  
14                               Professional Conduct of the State Bar of California.<sup>1</sup>  
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  
26   of prejudice to clients.  
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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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<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.

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

42  
43 Many law firms see succession plans for senior lawyers as a good business strategy, as such  
44 plans provide a way to gradually transition client work and management roles away from aging  
45 and soon-to-be retiring lawyers over a period of time in order to preserve long term client  
46 relationships and to create opportunities for emerging talent and an orderly transition of new  
47 leadership. However, law firms should consider succession planning as an important client  
48 protective measure and make reasonable efforts to ensure that the firm has policies and  
49 procedures in place designed to protect clients in the event any particular lawyer at the firm  
50 becomes unable to continue practicing law.

## 51 **STATEMENT OF FACTS**

- 52 1. Lawyer A is a solo practitioner who has a general litigation practice consisting mostly of  
53 representing plaintiffs in personal injury matters. Lawyer A has been a solo practitioner  
54 for almost 30 years and shares office space with a group of other solo practitioners and  
55 small firms. Lawyer A has no dedicated support staff, instead sharing a group of rotating  
56 assistants and paralegals with other colleagues to assist with pleadings and court filings.  
57 Lawyer A handles the management and operations of the firm exclusively, including all  
58 financial matters, calendar monitoring, and client communications. Lawyer A does not  
59 have a succession plan in place, and no one else has access to Lawyer A's calendar,  
60 emails, client files, law firm bank accounts, or financial information.

61  
62 Recently, Lawyer A had some health complications and was hospitalized for almost a  
63 month. Some of the issues that emerged during and after Lawyer A's hospitalization  
64 included: missed court appearance and deposition appearance, missed deadlines for  
65 discovery responses, court filings and motion deadlines had passed, failure to finalize a  
66 settlement agreement for a client that rendered the offer withdrawn, inability to  
67 respond to client demands to receive much-needed settlement funds in Lawyer A's  
68 IOLTA account, and inability to respond to client's request for a file transfer (which  
69 contained original documents) to new counsel along with client's unused retainer.

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

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

- 78  
79 3. Law Firm Manager is the managing partner of a large Law Firm with ten offices  
80 throughout California. Law Firm Manager is reviewing Law Firm's policies and  
81 procedures with outside ethics counsel to determine whether the Law Firm needs to  
82 engage in any succession planning at the law firm.  
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## 84 DISCUSSION AND ANALYSIS

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

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

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102 "A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with  
103 reasonable diligence in representing a client." [Rule 1.3(a)]. "For purposes of this rule,  
104 'reasonable diligence' shall mean that a lawyer acts with commitment and dedication to the  
105 interests of the client and does not neglect or disregard, or unduly delay a legal matter  
106 entrusted to the lawyer." [Rule 1.3(b)]. It is reasonable to conclude that lawyer's duty to act  
107 "with commitment to the dedication and interests of the client," includes making sure that  
108 those interests are protected if an unexpected event occurs, and failure to do so may be viewed as  
109 reckless or gross negligence. Lawyers must plan for clients' needs when lawyers go on vacation,  
110 retire, or take a sabbatical. [Cite] Lawyers also have duties with respect to disaster planning.  
111 [Cite] A lawyer's duty to plan for unexpected but reasonably foreseeable events should not be  
112 analyzed any differently. [Cite.] It is undisputed that important client matters, such as court  
113 dates, statutes of limitations, or document filings, would be neglected, and harm or prejudice  
114 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 would automatically have an attorney-client relationship with all Lawyer C's clients. The answer

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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.

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 to 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 practiced fewer 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).)

- **Conflicts of Interest and Confidentiality**

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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.

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

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

- **Duty to Communicate**

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

In order to facilitate Lawyer B's role, Lawyer C's succession plan should include specific details on how to contact clients, access current deadlines and calendar, accessing law firm bank accounts and client trust accounts, access financial records, including ITOLA ledgers and accounting, and access client files and property. Any other information that Lawyer C can provide to Lawyer B about the law firm and how it is organized will likely further assist Lawyer B in fulfilling Lawyer C's 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.

272       • **Other Duties**  
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274       The duty to safeguard client funds and property under rule 1.15, and the duty to avoid  
275       reasonably foreseeable prejudice when terminating a representation under rule 1.16(d), are  
276       also duties that belong to Lawyer C, but Lawyer B will be instrumental in assisting with fulfilling  
277       these obligations. Again, providing Lawyer B with proper access to banking and financial  
278       information, client contact information and clients files will be essential to fulfilling these  
279       obligations.  
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282       Scenario 3: Law Firm's Duty to Plan  
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284       [Discussion of Law Firm succession planning policies and Rule 5.1]  
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288                                       **CONCLUSION**  
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