

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 continue practicing 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.¹
15 Business and Professions Code sections 6068(e)(1) and 6185.

16 **INTRODUCTION**

17 Many circumstances could render any lawyer unable to continue practicing law. When these
18 events impact lawyers, client interests are at risk and should be protected.
19

20 There is a great risk of prejudice to clients when an unexpected event occurs that renders the
21 lawyer unable to continue practicing law. This risk applies to all lawyers, including solo
22 practitioners and lawyers from small firms, who often act as both lawyers and law firm managers;
23 older lawyers, who may be impacted by serious illness, disability, and death, as well as lawyers
24 of any age practicing at a law firm of any size, who may be impacted by unexpected events
25 rendering them unable to practice law.
26

27 While no specific California rule requires that a California lawyer adopt a succession plan, existing
28 rules, including the duties of competence and diligence, can be interpreted as imposing a duty
29 on lawyers to take reasonable steps to protect the clients' interests during the course of the
30 representation, including in the event of a lawyer's sudden inability to continue to practice law.
31 A failure to properly plan or prepare for both anticipated and unexpected departures from a
32 lawyer's practice may expose clients to significant damage or prejudice.
33

34 Succession planning for law firms and lawyers encompasses a variety of issues. At its heart, a
35 succession plan forces a lawyer to consider what will happen to clients if the lawyer is unable to

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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continue to practice law and develop a strategy for how such an event would be handled and by whom 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 things².

Many law firms see succession plans for senior lawyers as a good business strategy. Such plans provide a way to gradually transition client work and management roles over a period of time to preserve long-term client relationships and create opportunities for emerging talent and an orderly transition of new leadership. However, law firms should also 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 a 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 firm's management and operations exclusively, including all financial matters, calendar monitoring, and client communications. Lawyer A does 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 Nationwide, there are many succession planning resources, including handbooks, guides, and ethics opinions, to assist lawyers in navigating how to think about and move forward with a succession plan. While mostly from other jurisdictions, these resources provide valuable information for all lawyers. ("Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered" for guidance on proper professional conduct. See Rule 1.0, Comment [4].). Any lawyer looking for guidance on this issue may wish to review the American Bar Association's website page on succession planning, which has a compilation of resources on this subject. (https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/)

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2. Lawyer B is a solo practitioner who has been asked by Lawyer C to be an Assisting Attorney³ 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. Lawyer C has been practicing for about 20 years longer than Lawyer B, so Lawyer C may also be interested 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 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 should 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, obligate lawyers to take 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 setting⁴. (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 requires law firm managers to make reasonable efforts to ensure the law firm has measures in place for all lawyers to comply with the rules.

Duty of Diligence

Rule 1.3(a) provides that a "lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client." "Reasonable diligence" means that "a lawyer acts with commitment and dedication to the interests of the client and

³ An Assisting Attorney is a lawyer with whom another lawyer has made arrangements to close down their practice or to handle it in the event the other lawyer is unable to continue practicing law.

⁴ 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.

does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.” [Rule 1.3(b)]. It is reasonable to conclude “reasonable diligence” as defined includes making sure that client interests are protected if an unexpected event occurs, and failure to do so may be viewed as reckless or gross negligence⁵. 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.] 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 plan for these types of events.

Duty of Competence

Lawyers must provide legal services with “competence,” which means that they must “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.4th 525, 548.) 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 to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4(a)(3) and 1.4(b). If a lawyer knows that the lawyer may be unable to practice law, that is a significant development relating to the representation – the lawyer’s ability

⁵ While the ABA Model Rules, and several other jurisdictions, have a comment [5] in their rule 1.3, which states the duty of diligence may require a lawyer’s to develop a succession plan, other jurisdiction have implied a duty without such language. (See New York State Bar, Oregon State Bar, Washington State Bar, etc.)

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to represent the client goes to the heart of the attorney-client relationship. Thus, the lawyer would have a duty to communicate circumstances like imminent retirement or unavailability to practice law, if known.

The duty to communicate is also implicated when a lawyer becomes temporarily or permanently unable to practice law because the lawyer's inability to practice law must be communicated to clients. Ideally, either another lawyer at the law firm or an Assisting Attorney should communicate with clients about the impact this event will have on their matter and how things can and should be handled going forward. [In footnote, cite to Impairment Opinion regarding maintaining the privacy and other legal rights of Lawyer when communicating with clients to the extent reasonably possible?]

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 to prevent 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 helps to safeguard client interests.

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 the 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. As a result, Lawyer A's health complications caused him to breach certain duties to clients and prejudice their interests.

Given Lawyer A was a solo practitioner who had practice for 30 years and had no dedicated support staff or another person to assist Lawyer A in his practice, it was reasonably likely that such an event would eventually occur and that client interests would be impacted. As such, Lawyer A should have had a succession plan in place. “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.” ABA Formal Opn. 92-369.

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 implicated⁶.

- **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, one 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 is not necessarily.

In most cases, the role of Assisting Attorney (or sometimes called Successor Attorney or Practice Administrator⁷) 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, 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’ consent⁸.

⁶ 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.

⁷ [CITE to succession planning opinions from other jurisdictions]

⁸ 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

Under most circumstances, there should be a written fee agreement between Lawyer B and Lawyer C's clients if Lawyer B will represent these clients going forward. (See Cal. Bus. & Prof. Code §§ 6147, 6148.) However, there may be circumstances in which the attorney-client relationship can be implied from the conduct of the parties. (See *Lister v. State Bar* (1990) 51 Cal. 3rd 1114; *Davis v. State Bar* (1983) 33 Cal. 3rd 213; *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441.) Whether 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 client's understanding of Lawyer B's role is, and if any client would choose to have Lawyer B represent that client going forward, among other factors. (See Formation of Relationship, Cal. Prac. Guide Prof. Resp. Ch. 3-B, for discussion of factors used to determine attorney-client relationship generally.)

Here, we do not opine on all the factors that may be used to determine whether an implied attorney-client relationship may be formed between Lawyer B and Lawyer C's clients under certain circumstances. However, clear communication with Lawyer C's clients about exactly what role Lawyer B will be undertaking - whether purely administrative or as counsel on a temporary or permanent basis - is essential to avoid creating an implied attorney-client relationship where none is intended. It is also critical for helping clients understand the scope of their relationship with Lawyer B during this time to assist clients in making informed decisions about their future representation.

- **Duty of Competence**

Before considering whether Lawyer B could permanently take on the representation of any of Lawyer C's clients, 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 have the requisite competence to take on the representations. 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, in an emergency, Lawyer B is permitted 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).)

related administrative support team members, since there can be considerable work and expenses involved in closing a law office.

• **Conflicts of Interest and Confidentiality**

Before assuming 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 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 would 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 if it becomes necessary to do so⁹.

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, and how acquiring information that is protected by Cal. Bus. & Prof. 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.

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 IOLTA 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.

⁹ 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. Still, 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

Law Firm Manager must "make reasonable efforts" to ensure that Law Firm has implemented "measures giving reasonable assurance" that all lawyers in Law Firm comply with the rules and the State Bar Act. (Rule 5.1) Here, the Law Firm Manager may be required to examine the Law Firm's policies and procedures to determine whether they adequately protect client interests in the event any lawyer at the firm becomes unable to continue practicing law.

For example, if one or more of Law Firm's lawyers become unable to continue practicing law: (1) could someone else at Law Firm handle the clients and matters that the lawyer was handling?; (2) could the Law Firm access the entirety of that lawyer's client files and other needed data?; and (3) How would Law Firm communicate these events, and Law Firm's plan for handling matters, to clients as soon as possible?

If Law Firm does not have a plan for addressing such circumstances, Law Firm Manager should consider whether one is ethically required to protect client interests.

CONCLUSION