

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, either
18 temporarily or permanently. When these events impact lawyers, client interests are at risk and
19 should be protected.

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

27
28 While no specific California rule requires that a California lawyer adopt a succession plan, existing
29 rules, including the duties of competence and diligence, can be interpreted as imposing a duty
30 on lawyers to take reasonable steps to protect the clients' interests during the course of the
31 representation, including in the event of a lawyer's sudden inability to continue to practice law.
32 A failure to properly plan or prepare for both anticipated and unexpected departures from a
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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 their clients if the lawyer is unable
37 to continue to practice law and develop a strategy for how such an event would be handled and
38 by whom to protect client interests. In many instances, this includes arranging in advance for
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41 returned to them, among other things².

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47 planning as an important client protective measure and make reasonable efforts to ensure that
48 the firm has policies and procedures in place designed to protect clients in the event a lawyer at
49 the firm becomes unable to continue practicing law.

STATEMENT OF FACTS

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52 representing plaintiffs in personal injury matters. Lawyer A has been a solo practitioner
53 for almost 30 years and shares office space with a group of other solo practitioners and
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65 that Lawyer A was in the hospital. But no one had access to client lists or files, access to
66 email or voicemail messages, or any financial information, so the shared staff could not

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assist Lawyer A's clients any further. When Lawyer A returned to the office, some of the issues that emerged during their 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 Attorney³ as part of 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 how the Law Firm could engage in succession planning at Law Firm. Law Firm Manager is particularly concerned with one of Law Firm's smaller offices, a 5-person satellite office in Ventura County, out of which Lawyer D is based, although Lawyer D works primarily remotely. Lawyer D is 66 years old and is only one of two lawyers at the entire firm who practices in a particular specialized field; no other lawyer in the Law Firm's Ventura office practices in that specialized field.

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 as solo practitioners or in a small firm

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.

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 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 "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]

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. Also, the State Bar of California has "Senior Lawyer Resources" on its website, which include a sample agreement to "Close Law Office in the Future" which may be for solo practitioners. [https://www.calbar.ca.gov/Portals/0/documents/ethics/Surrogacy/AGREEMENT_TO_CLOSE_LAW_PRACTICE_IN_THE_FUTURE_REVISIED_08-1-2011.pdf]

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.)

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 for an extended period of time, that is likely a significant development relating to the representation – the lawyer's ability 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 material to the representation.

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 forward⁶.

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,

⁶ In communicating with clients about circumstances that may give rise to a lawyer's inability to practice law, one "should maintain the privacy and other legal rights of ...[l]awyer" ... unless the [l]awyer authorizes [their] private information to be shared." See COPRAC, Formal Opn. 2021-206, p. 12, also citing to Rule 1.4(d) ("A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.").

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171 knowing that such an event may be reasonably foreseeable in certain circumstances may require
172 the lawyer to take reasonable steps to prevent this type of prejudice, such as developing a
173 succession plan. Arranging for an Assisting Attorney or another designated lawyer at the law firm
174 to step in and aid the lawyer's clients helps to safeguard client interests.

175 176 Safekeeping Funds and Property of Clients.

177
178 Lawyers have a duty to safeguard client funds and property under rule 1.15. If a lawyer is unable
179 to continue practicing law permanently or for an extended period of time, a client may be unable
180 to retrieve funds and property without significant delay. Such a delay is likely to prejudice the
181 client's ability to access needed funds or find new counsel who will take on the client's matter.

182 183 184 Analysis of Factual Scenarios

185 186 Scenario 1: Failure to Plan Results in Ethical Breaches

187
188 In scenario 1, Lawyer A did not have a plan in place to protect clients in the event circumstances
189 rendered Lawyer A unable to practice law. ("As a precaution to safeguard client interests, the
190 sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable
191 that client matters will not be neglected in the event of the sole practitioner's death." ABA Formal
192 Opn. 92-369). As a result, Lawyer A's health complications caused them to breach certain duties
193 to clients and prejudice clients' interests.

194
195 Lawyer A typically handled being out of the office by leaving a message to that effect on their
196 email and voicemail and serving a Notice of Unavailability on Opposing Counsel. However, Lawyer
197 A's typical practice did not account for unexpected absences, like Lawyer A's recent medical
198 event. As a result, no clients or opposing counsel were notified of his condition or whereabouts,
199 many deadlines were missed, and client obligations were ignored.

200
201 Here, Lawyer A should have considered arranging for another lawyer or trusted individual to have
202 access to Lawyer A's calendar, emails, client files, and banking or financial information in the
203 event of an emergency. Or, Lawyer A could have prepared a list of important passwords and
204 access codes to be shared by a close family member with someone only in the event of an
205 emergency.

206
207 There are many approaches to succession planning that are viable and could help protect clients'
208 interests in the event Lawyer A was unable to practice law temporarily or permanently. Here,
209 Lawyer A had no plan in place for this type of event, which exposed their clients to considerable
210 risk of harm.

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 implicated⁷.

- **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 Administrator⁸) 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' consent⁹.

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

⁷ 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.

⁸ [CITE to succession planning opinions from other jurisdictions]

⁹ 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.

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 field 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 is "reasonably* necessary in the circumstances." (Rule 1.1(d).)

- **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 could 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 so¹⁰.

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 the 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 an extended period of time, that information is likely 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 calendars, access 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.

- **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 client files will be essential to fulfilling these obligations.

Scenario 3: Law Firm's Duty to Plan

In scenario 3, 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(a)] Rule 5.1 "requires lawyers with managerial authority

¹⁰ 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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within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.” [Rule 5.1, Comment 1]

Here, Law Firm Manager’s review of 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 is an important step to comply with Rule 5.1.

The scenario involving Lawyer D presents some heightened risks for Law Firm and its clients given that Lawyer D is isolated both geographically and in terms of Lawyer D’s practice area. Lawyer D is also over 65-year-old, which places Lawyer D at a higher risk for developing dementia or other health-related complications. It is not known whether the other lawyer who practices in the same field as Lawyer D regularly coordinates and connects with Lawyer D on client matters or if anyone else at Law Firm is, or can, supervise Lawyer D’s work. Regular supervision of Law Firm’s lawyers to assess compliance with duties of competence and diligence, regardless of the lawyer’s age, is also an important aspect of Rule 5.1

Some of the issues that Managing Partner should consider and analyze with respect to Lawyer D, as well as all of its lawyers, are: (1) If necessary, 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?; (3) How would Law Firm communicate unexpected events and Law Firm’s plan for handling client matters to clients as soon as possible?; and (4) What is the best approach to supervising the work of Lawyer D or other lawyers at Law Firm who are similarly situated?

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. Whether the Law Firm has implemented policies giving reasonable assurance that the Law Firm has complied with the rules protecting clients in these instances in accordance with Rule 5.1 will likely be a fact-intensive inquiry.

CONCLUSION

REDLINE

THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT FORMAL OPINION INTERIM NO. 20-0002 SUCCESSION PLANNING

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Many circumstances could render any lawyer unable to continue practicing law, ~~either~~ temporarily or permanently. When these events impact lawyers, client interests are at risk and should be protected.

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

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 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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57 ~~financial matters, calendar monitoring, and client communications. Lawyer A does not~~
58 ~~have a succession plan in place, and~~ no one else has access to Lawyer A's calendar,
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(https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/)

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87 ~~outside ethics counsel to determine whether the Law Firm should engage in any~~
88 ~~succession planning at the law firm.~~ how the Law Firm could engage in succession planning
89 at Law Firm. Law Firm Manager is particularly concerned with one of Law Firm's smaller
90 offices, a 5-person satellite office in Ventura County, out of which Lawyer D is based,
91 although Lawyer D works primarily remotely. Lawyer D is 66 years old and is only one of
92 two lawyers at the entire firm who practices in a particular specialized field; no other
93 lawyer in the Law Firm's Ventura office practices in that specialized field.
94

DISCUSSION AND ANALYSIS

Ethical Duties Implicated for All Lawyers and Law Firms

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98 A lawyer who does not properly plan or prepare for both anticipated and unexpected departures
99 from the practice of law may expose clients to significant damage or prejudice. While no specific
100 Rule of Professional Conduct requires that a California lawyer develop or adopt a succession plan,
101 existing rules, including the duties of competence and diligence, obligate lawyers to take
102 reasonable steps to protect the clients' interests during the course of the representation. This
103 would include taking affirmative steps to plan for an interruption or cessation of practice,
104 voluntary or otherwise, particularly for those practicing ~~in the~~as solo ~~practitioner~~practitioners or

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.

in a 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 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 "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~~jurisdictions' opinions]

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. Also, the State Bar of California has "Senior Lawyer Resources" on its website, which include a sample agreement to "Close Law Office in the Future" which may be for solo practitioners. [https://www.calbar.ca.gov/Portals/0/documents/ethics/Surrogacy/AGREEMENT_TO_CLOSE_LAW_PRACTICE_IN_THE_FUTURE_REVISED_08-1-2011.pdf]

⁵ While the ABA Model Rules, and several other jurisdictions, have a ~~comment~~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.)

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 for an extended period of time, that is likely a significant development relating to the representation – the lawyer's ability 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,~~ if material to the representation.

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?]~~⁶.

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

⁶ In communicating with clients about circumstances that may give rise to a lawyer's inability to practice law, one "should maintain the privacy and other legal rights of ... (l)awyer" ... unless the (l)awyer authorizes [their] private information to be shared." See COPRAC, Formal Opn. 2021-206, p. 12, also citing to Rule 1.4(d) ("A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.").

REDLINE

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 ~~an~~ extended 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. "plan in place to protect clients in the event circumstances rendered Lawyer A unable to practice law. ("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-). As a result, Lawyer A's health complications caused them to breach certain duties to clients and prejudice clients' interests.~~

Lawyer A typically handled being out of the office by leaving a message to that effect on their email and voicemail and serving a Notice of Unavailability on Opposing Counsel. However, Lawyer A's typical practice did not account for unexpected absences, like Lawyer A's recent medical event. As a result, no clients or opposing counsel were notified of his condition or whereabouts, many deadlines were missed, and client obligations were ignored.

Here, Lawyer A should have considered arranging for another lawyer or trusted individual to have access to Lawyer A's calendar, emails, client files, and banking or financial information in the event of an emergency. Or, Lawyer A could have prepared a list of important passwords and

access codes to be shared by a close family member with someone only in the event of an emergency.

There are many approaches to succession planning that are viable and could help protect clients' interests in the event Lawyer A was unable to practice law temporarily or permanently. Here, Lawyer A had no plan in place for this type of event, which exposed their clients to considerable risk of harm.

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 implicated⁷.

- **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 Administrator⁸) 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

⁷ 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.

⁸ [CITE to succession planning opinions from other jurisdictions]

is an agreement that Lawyer B will continue to operate the law firm and service Lawyer C's clients subject to each clients' consent⁹.

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~~field 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

⁹ 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.

lawyer does not have the skill ordinarily required” as long as it is limited to what is “reasonably* necessary in the circumstances.” (Rule 1.1(d).)

- **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~~could 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 so¹⁰.

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 the 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 ~~an~~an extended period of time, that information is likely 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~~calendars, access 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

¹⁰ 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.

REDLINE

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.

- **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'~~client files will be essential to fulfilling these obligations.

Scenario 3: Law Firm's Duty to Plan

In scenario 3, 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~~[Rule 5.1(a)] Rule 5.1 "requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised." [Rule 5.1, Comment 1]

Here, Law Firm Manager's review of 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 is an important step to comply with Rule 5.1.

~~For example,~~The scenario involving Lawyer D presents some heightened risks for Law Firm and its clients given that Lawyer D is isolated both geographically and in terms of Lawyer D's practice area. Lawyer D is also over 65-year-old, which places Lawyer D at a higher risk for developing dementia or other health-related complications. It is not known whether the other lawyer who practices in the same field as Lawyer D regularly coordinates and connects with Lawyer D on client matters or if ~~one or more~~anyone else at Law Firm is, or can, supervise Lawyer D's work. Regular supervision of Law Firm's lawyers ~~become unable to continue practicing law: (assess compliance with duties of competence and diligence, regardless of the lawyer's age, is also an important aspect of Rule 5.1)~~

Some of the issues that Managing Partner should consider and analyze with respect to Lawyer D, as well as all of its lawyers, are: (1) If necessary, could someone else at Law Firm handle the clients and matters that the lawyer was handling?; (2) ~~could~~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 unexpected~~ events; and Law Firm's plan for handling client matters; to clients as soon as

REDLINE

possible?; and (4) What is the best approach to supervising the work of Lawyer D or other lawyers at Law Firm who are similarly situated?

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. Whether the Law Firm has implemented policies giving reasonable assurance that the Law Firm has complied with the rules protecting clients in these instances in accordance with Rule 5.1 will likely be a fact-intensive inquiry.

CONCLUSION