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Expecting the Unexpected:
Succession Planning for Lawyers

Introduction

How would your law practice fare if you disappeared tomorrow? Is there a plan in place that would permit an associate or colleague to address client and office needs, or would they be left hopelessly digging through unmarked stacks of paper and scribbled notes? Is there a qualified individual who would volunteer to start digging? As we prepare for the greatest transition of power and wealth our country has ever seen, these are vital questions for any practitioner, but too many attorneys fail to ever ask them.

The American population over the age of fifty is projected to reach 133 million by 2030, which would constitute an increase of more than seventy percent since 2000.¹ This demographic shift, coupled with the most recent economic downturn and its impact on retirement savings, means that a greater number of attorneys are working further into their twilight years. A 2016 survey by American Lawyer Media indicated that twenty-nine percent of attorneys would continue working longer to account for shortfalls in their retirement plans,² and a 2014 report of the Maine Bar Demographics Task Force found that forty-one percent of senior solo attorneys had no plans to completely retire from the practice of law.³

This is not a problem in and of itself: older attorneys have depth of experience and skill, and some individuals are perfectly capable of practicing well into their eighties or nineties. The problem is that many of these attorneys have failed to adequately prepare for their eventual, and possibly sudden, departure from practice. A proper succession plan can mean the difference between a quick and orderly winding down process and a barrage of claims from impatient creditors and angry clients. This undertaking is critical whether an attorney plans to retire at fifty-five or ninety-five.

Of course, succession planning is important for large firms in terms of preparing their next generation of associates to assume greater leadership roles and foster new business growth. This article, however, will focus on smaller firms and solo practitioners, where the lack of a succession plan has an arguably greater impact on the likelihood of a professional liability claim and the survival of the firm itself.

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¹ Joint Center for Housing Studies of Harvard University. *Housing America's Older Adults: Meeting the Needs of an Aging Population*. Sept. 2014.

² Cassens Weiss, Debra. "For Many Lawyers, Retirement Plan Is to Keep Working." *ABA Journal*. 22 Feb. 2016.

³ Board of Overseers of the Maine Bar's Task Force to Study Bar Demographics. *Report and Recommendations*. June 2014.

Ethical Requirements

Perhaps surprisingly, the ethics rules in most states do not expressly require attorneys to create a succession plan. Among the jurisdictions that address the issue, many merely recommend that attorneys take preparatory action and provide directions for doing so.⁴ Other states, such as Tennessee, declare that an attorney “may” designate an attorney to manage their practice, and focus on the ethics of *allowing* such an arrangement rather than requiring or encouraging it.⁵

All states do, however, have some variation of American Bar Association Model Rules of Professional Conduct (“Model Rules”) 1.1 and 1.3, which require attorneys to represent their clients with competence and diligence, respectively. Together, these rules have formed the basis of a “duty to plan” set forth in some ethics opinions and guides. Indeed, the final comment to Model Rule 1.3 states that “[t]o prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a [succession] plan.” Just as a retiring attorney must inform his or her clients of the firm’s closure, an attorney must be sure that clients are promptly informed and accounted for in the event of death or incapacitation.

In view of the growing number of aging attorneys and the lack of a clear, affirmative duty, a couple of states have adopted rules requiring attorneys, or at least solo attorneys, to adopt succession plans. Florida Rule 1-3.8 requires all attorneys in private practice to designate an “inventory attorney” who can manage their practice if necessary, and in November 2015 Iowa adopted Rule 39.18 which requires all solo attorneys to adopt a succession plan subject to several minimum specifications. As other states consider similar measures, ethics rules like Iowa’s may become the norm, providing clear guidance for attorneys that plan ahead and opening the door for disciplinary action against those who do not.

Designating an Assisting Attorney

Whether directly required by a rule of professional conduct or encouraged by an ethics opinion, the cornerstone of any proper succession plan is the designation of an assisting attorney who can help manage or close the planning attorney’s practice in his or her absence. Within small firms, the assisting attorney will almost always be another attorney in the firm. Solo attorneys, however, must look outside of their own practice, bearing in mind their duty under Rules 1.1 and 1.3 to select someone trustworthy and competent. Some bar associations and state agencies, such as the Indiana Clerk of the Supreme Court, have created programs to match a planning attorney to an assisting attorney and host an online database of these arrangements.⁶ Ideally, a succession plan will incorporate both a primary assisting attorney as well as an alternate, who can assist the planning attorney should the primary designee become unavailable or unwilling to meet his or her obligations.

⁴ See, e.g., S.C. Rule Prof. Cond. 1.19 cmt. 1 (“The rule serves as an encouragement, especially to sole practitioners, to arrange for the orderly protection of clients.”); PA Eth. Op. 2014-100 (Philadelphia Bar Ass’n, 2015).

⁵ Tenn. Sup. Ct. R. 9 § 29.9.

⁶ Ind. Admis. & Disc. R. 23, § 27(b)(1).

Creating an Office Manual

Prior to selecting an assisting attorney, the planning attorney should create a written office manual that the assisting attorney can reference and rely upon if needed. The manual should contain a complete list of current and former clients, including their contact information. It should also explain how to access the firm's calendaring system so the assisting attorney can identify which active matters require immediate attention and contact clients accordingly. For similar reasons, the manual must contain a description of how client files are organized and where they are stored. Up-to-date pass-codes for the planning attorney's office computer, voicemail, and email should either be included as a part of the manual, or entrusted to a member of the support staff referenced therein. In the event of long-term incapacitation or death, the manual should explain the firm's document retention policy and how inactive files are stored.

With respect to the business side of the firm, the assisting attorney should be able to locate firm contracts, leases, and deeds, and view a current snapshot of billable hours. The manual should include all relevant bank information, including account numbers and the names of all account signatories, and list the location of all other firm records. Due to the extremely sensitive nature of the manual, the planning attorney should store it in a secure location, ideally within the firm's safe deposit box. The assisting attorney or a trusted and reliable staff member would therefore require separate instructions on how to access the box.

Even the most thorough office manual holds little value unless the planning attorney regularly and consistently updates it. The planning attorney must also keep up with time and billing records, or risk losing firm income that could otherwise help with outstanding firm liabilities or the costs of winding down the practice. Maintaining an organized system before disaster strikes is half the battle.

The Succession Agreement

Once the planning attorney selects an assisting attorney, an agreement should be memorialized in a written document, signed by both parties, which sets forth the assisting attorney's duties and scope of authority. Both attorneys should review this document annually to verify that it reflects the current needs of the practice and the intent of the assisting attorney. To enlist additional help and avoid any surprises, the planning attorney should notify his or her family and support staff of the agreement and what it entails.

The agreement should provide all necessary authorizations and charge the assisting attorney with various duties, including:

- Attending to active and inactive client matters;
- Transferring active matters to other attorneys;
- Managing client trust and general accounts;
- Coordinating with the firm's accountant;
- Collecting accounts receivable;
- Paying staff, bills, and other firm liabilities;
- Addressing potential malpractice claims;
- Notifying the planning attorney's malpractice insurer;
- Liquidating or selling the practice; and
- Securing compensation for the assisting attorney.

This list is not comprehensive, however, and attorneys should tailor their agreement to the unique needs and characteristics of their own practice.

Client Matters

The most pressing duty of the assisting attorney is to manage the planning attorney's active client matters. Model Rule 1.6 prevents disclosure of client information, including the client's identity, unless the client has provided informed consent. Rule 1.6 permits disclosure, however, if "impliedly authorized" to carry out the representation. In Formal Opinion 92-369, the ABA Committee on Ethics and Professional Responsibility opined that "reasonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded," so allowing an assisting attorney to access client files when necessary is consistent with Rule 1.6. Notably, Virginia's version of Rule 1.6 includes a specific exception permitting disclosure if "reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence."⁷ Nevertheless, the safest practice is to disclose to clients upfront, in their signed engagement agreements, that the named assisting attorney will have limited access to their files should the planning attorney become incapacitated.

The succession agreement should also expressly authorize the assisting attorney to contact clients and attend to client matters. When called upon, the assisting attorney must review active files to ascertain the name of the client and the opposing parties to determine whether a conflict of interest exists. In the absence of a conflict, the assisting attorney should conduct a more substantial review of the client's file to determine whether immediate action is required to protect that client's interests. Where such action is required, the attorney should contact the client immediately and discuss how the client wishes to proceed, and obtain extensions of time or continuances if necessary. For all other matters, the assisting attorney should contact the clients within a reasonable amount of time, notify them of the circumstances, and request further instructions. Former clients should be promptly notified as well and given an opportunity to retrieve their files, although the assisting attorney should retain a copy of each file in case it becomes necessary in defending a claim.

The assisting attorney might not want, or might not be qualified, to represent any of the planning attorney's clients. In this case, the assisting attorney would focus his or her efforts on helping clients obtain successor counsel and transferring client files. There is nothing inherently unethical about the assisting attorney taking on client matters formerly handled by the planning attorney, however, as long as the client consents and the assisting attorney has the competencies and the time to assume the work. Either way, given the assisting attorney's involvement in client matters and intimate role in the firm, the attorneys should make certain the clients understand that the assisting attorney does not automatically represent them.

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⁷ Virg. Rule Prof. Cond. 1.6(b)(4).

Nature of the Relationship

While the succession agreement may resemble an attorney-client retainer agreement in some respects, its language should reflect that the assisting attorney does not, in fact, represent the planning attorney. This will permit the assisting attorney to disclose discovered errors to the planning attorney's clients, in accordance with the planning attorney's ethical duties under Model Rule 1.4, where the planning attorney's disability renders him or her unable to do so. For the sake of clarity, the planning attorney may wish to include a clause in the agreement that places a duty on the assisting attorney to disclose any errors to the planning attorney's clients and advise them to consult an independent attorney with respect to those potential claims.

In addition to ensuring that the planning attorney satisfies his or her ethical obligations, a clause disclaiming an attorney-client relationship between the assisting and planning attorneys reduces the likelihood of a conflict of interest should the assisting attorney represent one of the planning attorney's former clients. Irrespective of such a clause, however, the assisting attorney should not represent a former client of the planning attorney in an action against the planning attorney or his or her estate. This representation would almost certainly run afoul of Model Rule 1.7(a)(2), which prohibits an attorney from representing a client if there is a significant risk that the representation would be limited "by a personal interest of the lawyer." The personal interest, in this case, would be the assisting attorney's duties to the planning attorney, especially where the two attorneys shared a close personal or professional relationship.

On similar grounds, the assisting attorney should avoid representing a former client of the planning attorney in a matter where the planning attorney previously erred, or risk facing a circumstance in which the client's interest fails to align with the assisting attorney's interest in protecting the planning attorney. Alternatively, the assisting attorney should only proceed pursuant to conflict waiver, signed by the client, which carefully outlines the potential risks of such a representation. The assisting attorney should also be aware that, regardless of any language in the succession agreement, Rule 8.3 requires an attorney to notify the local disciplinary authority of any ethical infraction "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

The Triggering Event

The succession agreement should address the circumstances under which the assisting attorney assumes his duties, and should contemplate situations in which the planning attorney is only partly incapacitated, yet unable to conduct his or her affairs. This calls for a clear, detailed definition of "incapacitated" under the agreement, and likely requires a Health Insurance Portability and Accountability Act ("HIPAA") authorization granting the assisting attorney access to the planning attorney's medical information. In the event of a temporary disability or incapacitation, the agreement should contain a description of just how long the assisting attorney is expected to manage the practice before its sale or liquidation.

If the planning attorney dies, the triggering event is more straightforward, but the assisting attorney must be prepared to coordinate with the administrator of the decedent's estate. Upon the death of a solo practitioner, his or her executor becomes ultimately responsible for administering assets of the estate, including the law practice. It is crucial, therefore, that the executor is aware of the succession agreement, is able to contact the assisting attorney, and understands the assisting attorney's responsibilities so that the succession arrangements may proceed as intended.

Access to Bank Accounts

The agreement must also provide the assisting attorney with access to the planning attorney's trust accounts. In addition to earned revenue the practice may need to cover expenses, the firm's clients will require prompt access to their funds in order to pay substitute counsel. Absent a predetermined agreement, client money would remain in the accounts until a court authorizes access by way of a guardianship or interpleader order, which will cause delays and potentially give rise to malpractice liability.

Different mechanisms are available for allowing another attorney access to the trust accounts, and which option is appropriate will depend on the relationship between the parties. One option is to appoint the assisting attorney as a signatory on the accounts at the time the succession agreement is executed and before the onset of any disability. While this creates the easiest transition upon the planning attorney's incapacity, it carries an added risk of liability for both attorneys in the event that a signatory misappropriates trust funds. The best option may be to execute a springing power of attorney, pertaining only to the trust accounts, that takes effect only after the planning attorney's death or incapacity. This reduces the risk of misappropriation, and prevents the disclosure of confidential information to the assisting attorney until absolutely necessary. Regardless of the selected method, the attorneys should discuss the plan with their bank to confirm that they will respect the arrangement when the time comes.

The assisting attorney must also have prompt access to the firm's general operating account to pay firm bills and overhead. Like the trust account arrangement, this plan will require written authorization in the agreement and cooperation from the planning attorney's bank.

Compensation

The role of an assisting attorney demands considerable time and effort. As such, in addition to reimbursement for necessary expenses associated with managing or winding down the practice, the assisting attorney should be compensated for services rendered. The assisting attorney, therefore, should maintain careful records of time spent attending to the planning attorney's affairs.

The agreement should also specify the source of this payment. If the firm's operating account receivables would be insufficient, the planning attorney may consider securing a small disability or life insurance policy, naming his or her executor or a family member as the beneficiary, with the instruction that proceeds be used to cover these costs.

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Insurance Considerations

A typical professional liability policy will provide an unlimited extended reporting period, free of charge, to any insured who dies or becomes totally and permanently disabled during the policy period. This means that the insurer will extend coverage to claims based upon acts or omissions that occurred when the policy was in force, even though the claims were not reported until after the policy expired. The insurer will require timely notice of the planning attorney's death or permanent disability, within a time period ranging from thirty to one hundred eighty days, as well as documented proof. Where the planning attorney is only temporarily disabled or incapacitated, the assisting attorney must see that premiums are still paid on time, or risk losing coverage for claims that arise while the planning attorney is away from the office.

Whether the assisting attorney is covered under the planning attorney's policy for mistakes in the administration of the planning attorney's practice is a more complex issue. Coverage will depend on how the planning attorney's policy defines "insured," which varies among insurers. Some policies, for example, will include any attorney retained by the practice to provide legal services, or any party who serves as an administrator or representative of the planning attorney after their death or incapacity, while others are more narrowly drawn. Attorneys should consult with their insurance broker to discuss the coverage that may be available for attorneys acting pursuant to a succession agreement.

Conclusion

Ethics rules aside, attorneys owe a duty to their clients, colleagues, and family to ensure that their practice will not represent a burden after their passing. Even attorneys who plan to retire early, sell their firms or transition to a successor must account for a sudden disability, as uncomfortable as that may be to think about. There is no better time than now to take stock, plan ahead, and avoid becoming the attorney who failed to expect the unexpected.

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