

The Professional Guidance Committee of the Philadelphia Bar Association is aware that ethics authorities and bar associations in many jurisdictions have addressed the existence and scope of a lawyer's responsibility under the Rules of Professional Conduct to plan for the termination of his or her practice via death or disability. The purpose of this Opinion is (a) to determine whether, and to what extent, the Pennsylvania Rules of Professional Conduct ("the Rules") may govern this question and (b) to provide advice concerning best practices for anticipating the contingency of death or disability.

I. INTRODUCTION

All lawyers, of course, retire from practice one way or another. Whether by choice, disability or death, the end of a lawyer's professional activities necessarily occasions a transition of the professional responsibilities attendant on those activities.<sup>1</sup> It is the Committee's perception that it is not unusual for practitioners to have given insufficient thought to anticipate what will happen when their practices come to an end.<sup>2</sup>

The exit of a lawyer from the practice of law is complicated in two ways. First, the Rules do not presuppose that the lawyer's duties to his or her client automatically terminate once the lawyer becomes absent or the lawyer-client relationship otherwise ends. Second, the Rules do not address how these residual duties are to be dealt with in the lawyer's absence.

II. SUCCESSION PLANNING IS NOT MANDATORY UNDER THE PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT

The Rules of Professional Conduct impose a variety of professional duties on lawyers. These include duties to clients (present, former and prospective), persons other than clients (opposing counsel, witnesses and other litigants), the tribunal, the public at large and the legal profession.\* Of these, duties to prospective, present and former clients are those most likely to be affected by the closure of a lawyer's practice.

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<sup>1</sup> The Rules separately recognize the specific circumstance of the sale of a law practice. See, Rule 1.17: "Sale of a Law Practice."

<sup>2</sup> Estimates are that 63% of all lawyers in the United States work in practices of from one to five attorneys with 48% being sole practitioners.

\* See PRPC Preamble.

The Committee is of the opinion that the Rules do not impose any direct mandate on Pennsylvania lawyers to plan for the eventuality of death or disability. By the same token, *indirect* responsibilities can readily be inferred; see, for example, Rules 1.6d (“Confidentiality of Information”) (“The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated”); 1.9 (“Duties to Former Clients”); and 1.15 (“Safekeeping Property”). Accordingly, notwithstanding the absence of an explicit directive in the Rules, the Committee concludes that the continuing nature of the ethical duties imposed by the Rules weighs heavily in favor of lawyers taking steps to anticipate the closure of their practices due to death or disability even if that closure is not imminent.

This conclusion finds support in ABA Formal Opinion 92-369, where the American Bar Association Committee on Legal Ethics and Professional Responsibility opined that “to fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death.” That opinion expressly states that such a plan should, at a minimum, include the designation of another lawyer with authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death.

More recently, the ABA Model Rules of Professional Conduct have been revised and now expressly provide in Comment [5] to Rule 1.3 that:

To 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 plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

Pennsylvania's Comment [5] to Rule 1.3 is identical to Model Rule 1.3 Comment [5].

Rule 1.3, Comment [5].<sup>3</sup> Accordingly, and as noted above, the Committee concludes that there is no express ethical duty on the part of a lawyer to create and implement a succession plan .

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<sup>3</sup>In contrast to Pennsylvania and to the Model Rules, some jurisdictions have indicated that the “designation of a responsible attorney” is obligatory: “A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity.” Comment [5] to Rule 1.3 of the Virginia Rules of Professional Conduct.

### III. THE “ASSISTING ATTORNEY” CONCEPT

Notwithstanding that the Rules do not create an express affirmative duty of succession planning, the potential adverse consequences to clients of an unanticipated closing of a practice in these circumstances may result in violations of several of the Rules. Thus, given the continuing ethical duties created by the Rules, preparing a succession plan for an unanticipated death or disability is a best practice for all attorneys. A lawyer trying to anticipate the fallout from the unfortunate circumstance of disability or sudden death should, therefore, give careful thought to the mechanics of protecting his or her clients (and the value of his or her practice) by complying with the subset of duties specifically enumerated by the Rules, including, but not limited to, the following:

Diligence (Rule 1.3)

Communication (Rule 1.4)

Confidentiality (Rule 1.6)

Conflicts of interest (Rules 1.7 through 1.11)

Declining or Terminating Representation (Rule 1.16)

Safekeeping Property (Rule 1.15)

Responsibilities of Partners, Managers and Supervisory Lawyers (Rule 5.1)

Professional Independence of a Lawyer (Rule 5.4)

Along the lines suggested by Opinion 92-369, a number of jurisdictions have concluded that appointment by a lawyer of a “backup attorney” – more often called an “assisting attorney” – is the favored mechanism for dealing with the closure, sudden or otherwise, of a law practice. See, “Contingency Planning for Closing of a Law Practice”, Texas State Bar (2011), “Succession Planning Handbook for New Mexico Lawyers”, “Lawyer Succession and Transition Committee of the New Mexico Supreme Court (July, 2012); “Plan Ahead: Are You Prepared For The Unthinkable,” Michaelis, Beverly, Oregon State Bar Bulletin (July, 2005).

In addition to the mechanics of planning – forms, client notifications, records updating – appointment of an Assisting Attorney presents a number of complicating issues. To this end, it is strongly advisable for the exiting attorney and his or her intended Assisting Attorney to enter into a written agreement for services to address these complications for the protection of the exiting attorney’s clients. Among these complications are questions such as:

(a) *Who does the Assisting Attorney represent?*

The Assisting Attorney can represent the lawyer or the clients of the lawyer but obviously not both:

If the assisting attorney represents the planning attorney, he or she may be prohibited from representing the planning attorney's clients on some or possibly all matters. The assisting attorney would be prohibited, without consent, from informing clients of any legal malpractice or ethical violations. If the assisting attorney is not representing the planning attorney, he/she may be able to become the successor attorney for some or all client matters and may have an ethical obligation to advise clients of any malpractice or ethical problems discovered in winding up or handling the practice.

"Handling an Attorney's Death, Disability or Disappearance," Shaw, Betty M., Minnesota Lawyer (October 8, 2001).<sup>4</sup> See also, "The Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of your Disability, Retirement or Death", New York State Bar Association Committee on Lawyer Practice Continuity, Appendix 1.

(b) *Access to Trust Accounts*

Will the Assisting Attorney become a signatory on the lawyer's trust and/or business accounts? Alternatively, will there instead be a power of attorney contingent upon the happening of a triggering event?<sup>5</sup> The requirements about supervision of escrow account signatories as found in Rule 1.15 need to also be considered.

(c) *How are conflicts of interest between the lawyer and the Assisting Attorney to be handled?*

Designation by agreement of the role to be played by the Assisting Attorney will determine how conflicts are to be addressed in some measure. At the very least, the lawyer

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<sup>4</sup> Jurisdictions deal with this issue in different ways. Virginia Rule of Professional Conduct 1.6(b)(3) provides, for example: "To the extent a lawyer reasonably believes necessary, the lawyer may reveal information necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence."

<sup>5</sup> "When and under what circumstances should the assisting attorney have access to your trust account in order to disburse client money? If the assisting attorney has signatory power on the trust account, client consent to this arrangement would need to be obtained. Conflicts issues may also make this a difficult or unworkable option. If authorization is only upon the occurrence of an event and for a limited time (using a power of attorney), there will need to be an agreement regarding who will determine whether the planning attorney is disabled, incapacitated or otherwise unable to conduct business affairs and for how long the power of attorney will last. A close relative and/or the personal representative of the planning attorney's estate should be made aware of the agreement and the planning attorney should consult his or her bank regarding these documents." Minnesota Lawyer, *id.*

and the proposed Assisting Attorney must prepare a comprehensive inventory of their respective clients and matters, jointly review it to identify matters in which the Assisting Attorney may be prohibited from undertaking the representation of either the lawyer or the lawyer's clients and establish a mechanism for obtaining waivers or making referrals as appropriate. These inventories and the review process should be updated on a regular periodic basis.

#### IV. POSSIBLE 'BEST PRACTICES'

Whether or not a lawyer chooses to appoint an Assisting Attorney as a hedge against the closure of his/her practice, there are certain practice organization steps – or updates – which can smooth the path for an attorney's successors. There are a number of resources from state bar associations and ethics authorities accessible online which set out, some in greater detail than others, such steps. (For reference, the Committee has appended a list of representative "Resources.") Many of these resources include or refer to "checklists." Common items on these "checklists" include:

(a) Preparing a written office manual containing key details of the practice such as: (1) names, addresses, phone numbers and job descriptions of support and other key personnel (office sharers, of counsel attorneys, office manager, secretary, bookkeeper, accountant, landlord, malpractice carrier and other insurance brokers—disability, life and property), the personal representative and other important contacts; (2) location, account numbers and signatory name(s) for business and trust accounts; (3) location and access information for safety deposit box and/or storage facilities; (4) computer and voice mail access codes; and (5) location of important business documents such as leases, maintenance contracts, business credit cards, client ledgers and other books and records relating to the business and trust accounts, etc.;

(b) Consulting with the bank to ensure that the provisions of any backup agreement pertaining to authority over bank accounts will be honored. It may be necessary to prepare a separate, specific durable power of attorney to satisfy the bank's preferences;

(c) Ensuring that staff or software can produce an accurate list of current clients, addresses and telephone numbers;

(d) Ensuring that staff or software can produce an accurate list of deadlines in pending matters;

(e) Maintaining complete and updated billing and trust account records;

(f) Consolidating and indexing the holdings of original client documents (e.g., wills, abstracts) in a safe location (not in client files) or returning them to clients;

(g) Periodically purging old files after proper notice to the clients and passage of the suggested minimum retention periods;

(h) Including provisions in engagement letters and fee contracts regarding disposition of client files once a matter is concluded, and notice regarding the existence of the backup plan.

## V. CONCLUSION

In summary, the Committee is of the opinion that succession planning for attorneys practicing in the Commonwealth of Pennsylvania is not mandatory under the Pennsylvania Rules of Professional Conduct. Nevertheless, the Committee emphasizes that solo or small firm practitioners should, pursuant to the language of Comment [5] to Pennsylvania Rule of Professional Conduct 1.3, pay special attention to planning for the contingency of death or disability as a bulwark against breaches of ongoing professional duties to clients which may occur after the lawyer is no longer able to personally comply with those duties. Finally, the Committee notes that the above discussion should in no way be understood as relieving attorneys practicing in settings other than those specifically described in Comment [5] to Rule 1.3 of the ongoing post-practice obligations identified in this Opinion.

## RESOURCES

Model Rule of Professional Conduct 1.3:

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_3\\_diligence.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence.html)

Pennsylvania Rule of Professional Conduct 1.3:

<http://www.pacode.com/secure/data/204/chapter81/s1.3.html>

State Bar of Michigan Opinion R-5, December 15, 1989:

[http://www.michbar.org/opinions/ethics/numbered\\_opinions/r-005](http://www.michbar.org/opinions/ethics/numbered_opinions/r-005)

"Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death", New York State Bar Association's Committee on Law Practice Continuity, © 2005: <http://www.nysba.org/PlanningAheadGuide2015/>

"Sole Practitioner Succession Planning: It Is Time to Stop Recommending -Action and Start Requiring It", Cook, Erica L., 9 Ohio State Entrepre. L.J. 63

"Guide to Closing Your Law Practice", Law Society of Upper Canada, September, 2010:

<http://lsuc.on.ca/with.aspx?id=2147499389>

"Contingency Planning for Closing of a Law Practice", Texas State Bar (2011):

<http://www.texasbarcle.com/materials/closingapractice.html>

Succession Planning Handbook for New Mexico Lawyers, Lawyer Succession and Transition Committee of the New Mexico Supreme Court (July, 2005):

<http://www.nmbar.org/NmbarDocs/forMembers/Succession/SuccessionHandbook.pdf>

"Handling an Attorney's Death, Disability or Disappearance", Shaw, Betty M., Minnesota Lawyer, (October 8, 2001):

<http://lprb.mncourts.gov/articles/Articles/Handling%20an%20Attorney's%20Death,%20Disability%20or%20Disappearance.pdf>

"Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death", Oregon State Bar Professional Liability Fund, © 2009: [http://myshingle.com/wp-content/uploads/2012/05/succession\\_planning-ahead.pdf](http://myshingle.com/wp-content/uploads/2012/05/succession_planning-ahead.pdf)

"Checklist for Lawyers Planning to Protect Clients' Interests in the Event of the Lawyer's Death, Disability, Impairment or Incapacity", Wisconsin State Bar Association:

[http://www.wsba.org/~media/Files/Resources\\_Services/LOMAP/CHECKLIST%20FOR%20LAWYERS%20PLANNING%20TO%20PROTECT%20CLIENTS.ashx](http://www.wsba.org/~media/Files/Resources_Services/LOMAP/CHECKLIST%20FOR%20LAWYERS%20PLANNING%20TO%20PROTECT%20CLIENTS.ashx)

"Planning Ahead: Protecting Your Client's Interests in the Event of Your Disability or Death",  
Ethics Department, Virginia State Bar Association:  
[https://www.vsb.org/site/publications/planning-aheadConference Report, 29 Law. Man. Prof.  
Conduct 338 \[Subscription Required\]](https://www.vsb.org/site/publications/planning-aheadConference%20Report,%2029%20Law.%20Man.%20Prof.%20Conduct%20338)

ABA Formal Opinion 92-369. Available for Purchase at  
<http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=219934>