

## Solo and Small Firm Practitioners: Do you have a succession plan?

What would happen to your law practice if you were to suffer a catastrophic disability or die unexpectedly? As difficult as it may be to face the prospect of our own personal tragedy, there are reasons that compel us to face the unlikely prospect and plan ahead. A succession plan can protect your clients' interests. It can also spare your loved ones or partner the chaos that ensues when a solo or small firm practitioner dies without making appropriate arrangements.<sup>1</sup>

While Maryland Lawyers' Rules of Professional Conduct (MLRPC) do not require lawyers to have a succession plan in the event of their death, there is a good argument that having such a plan falls within a lawyer's ethical duty to protect their clients.

Comment [5] to Rule 1.3 "Diligence" of the MLRPC provides: "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. Cf. Maryland Rule 16-777 (providing for appointment of a conservator to inventory the files of an attorney who is deceased or has abandoned the practice of law, and to take other appropriate action to protect the attorney's clients in the absence of a plan to protect clients' interests.)"

Rule 1.1 "Competence" of the MLRPC specifies that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Lack of competency can take many forms, including lack of preparation, inability to access client files, failure to appear in court or for trial. Without a succession plan that designates an attorney to review client files, an essential deadline could be missed, trial date skipped, client files rendered inaccessible, and more.

MLRPC 1.15, "Safekeeping Property" requires lawyers to safeguard

the property and funds of clients or third persons that is in the lawyer's possession in connection with a representation. What happens to original documents, such as deeds, contracts, and wills when a lawyer suddenly dies? What if no one is authorized to draw on your IOLTA or other trust accounts? Client funds could be frozen for a critical period of time, preventing a client from retaining another attorney.

Rule 1.17 of the MLRPC deals with the sale of a law practice in general. Comment [9] states, in part: "This Rule applies to the sale of a law practice by representatives of a deceased or disabled lawyer, or one who has disappeared." There are many stories of surviving spouses and partners describing the harrowing experience of closing a law practice where little or no advance thought or planning had been given to the task.<sup>2</sup>

Maryland Lawyers' Rules 1.3, 1.1 and 1.15 are substantially similar to the same-numbered Model Rules of Professional Conduct of the American Bar Association (ABA). Therefore, the ABA's Formal Opinion 92-369 (1992), entitled "Disposition of Deceased Sole Practitioners' Client Files and Property," which cites to Rules 1.3, 1.1 and 1.15, offers some guidance on this topic. Formal Opinion 92-369 provides, in part: "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. Such a plan should, at a minimum, include the designation of another lawyer who would have the 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."

Rule 28 of the ABA Model Rules for Lawyer Disciplinary Enforcement provides further guidance. It directs what actions must be taken when a lawyer dies without a succession plan. Under Rule 28, the court must appoint a trustee lawyer to inventory the lawyer's files, protect the interests of the deceased lawyer's clients, and maintain the confidentiality of those files.<sup>3</sup>

Protecting clients' interests in the

event of a lawyer's death also protects loved ones from unwanted chaos and, worse, a grievance or a malpractice claim.

Comment [9] to MLRPC 1.17 "Sale of Law Practice" recognizes that: "This Rule applies to the sale of a law practice by representatives of a deceased or disabled lawyer, or one who has disappeared." According to Comment [9] to Rule 1.17, this rule applies to both lawyers and *non-lawyers*, meaning your representatives or loved ones who suddenly are standing in your shoes.

While the problems associated with closing a practice after a lawyer's death are well-known, they have not been well addressed. In 1996-97, the ABA conducted a nationwide survey, to which all fifty state bar associations responded. Roughly half of the state bars reported that they had no plan at all.<sup>4</sup> Some state bars, most notably the Oregon State Bar, have taken the lead in addressing and solving these problems. In 2006, the Oregon State Bar published a handbook with forms entitled, "Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death." The State Bar of Michigan, following Oregon's lead, adapted and supplemented Oregon's handbook and forms for use in Michigan. The Michigan bar has posted comprehensive sample forms, checklists, letters, and agreements, as well as published articles about sound record retention and planning for an orderly transition on its website.<sup>5</sup> While the list of other state bars is not exhaustive, California, Virginia, and Washington also have issued guidelines for fulfilling a lawyer's ethical obligations to protect their client's interests in the event of their death. The West Virginia Office of Disciplinary Counsel has done the same. Articles on protecting client interests after the death of a solo or small firm practitioner have been published in other jurisdictions, including Texas, Ohio, and the Philippines.

What should go into a succession plan? The following, which is not intended to be a complete analysis, are common elements of a succession plan, gleaned from the above jurisdictions:

- (1) Find a competent lawyer *now*

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who will close your law practice in the event of your incapacity or sudden death, preferably not a lawyer who represents you, for he or she may encounter an ethical dilemma between representing you as the client and your affected clients. Enter into a written agreement with that lawyer, which outlines the events that will trigger the closing of your practice and the scope of that lawyer's authority and responsibilities. At the very least, you should obtain a signed consent from your clients authorizing that lawyer to review client files, contact your clients, decide whether there is a need for immediate action, and get instructions on transferring the clients' files in the event of your death.

(2) Ask your bank what it requires to give someone else authority to sign on your IOLTA and other trust accounts should you die. That person should be someone other than the lawyer who will be closing your law practice so that a check and balance system is put in place. There are, of course, risks when you give another person access to your trust accounts, but if you do not make such arrangements, the money in those trust accounts—your clients' money—will remain in the accounts until a court determines otherwise.

(3) Start a file and put all related paperwork in it. Put written instructions in the file to your office staff, the attorney who will be overseeing and/or closing your practice, and any other persons assisting you. These instructions should include a list of contacts, passwords, and any other essential information that will be necessary to access your files and bank accounts immediately. Put the file in a secure but accessible place.

(4) After you have a lawyer in place to close your practice and an authorized signer on your trust accounts, you may wish to consider letting your clients know what will happen in the event that you die. This could be done by a clause in your retainer agreement. Not only would you be informing the client, but you would also have their signature on the retainer agreement, giving permission to the lawyer closing your practice to proceed on that client's behalf.

(5) There are some additional things that you can do to make it easier for the lawyer and others closing your practice.

Keep your client contact information up to date and make sure that the information is accessible. Keep your calendars with discovery deadlines, court dates, and your time and billing matters up to date as well. Not only will this make closing the practice easier and faster, it will make it cheaper, saving money for your loved ones. If you are a sole practitioner, it is important to have a will and to make sure that the person you name as your personal representative will authorize the lawyer closing your practice and the person accessing your trust accounts to proceed. Consider getting a disability/life insurance policy in an amount projected to cover the costs of closing your practice.

This topic would not be complete without mentioning the ethical obligations that are superimposed on the lawyer assuming responsibility for a deceased lawyer's practice. ABA Formal Opinion 92-369, cited above, requires the lawyer who assumes responsibility for the client files and property of a deceased lawyer to "review the files carefully to determine which need immediate attention;" to review "only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention;" and to make reasonable efforts "to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with Rule 1.15."

"Issues commonly confronting the lawyer in this situation involve the nature of the lawyer's duty to inspect client files, the need to protect client confidences and the length of time the lawyer should keep the client files in the event that the lawyer is unable to locate certain clients of the deceased lawyer." [*Id.*] The lawyer is advised to review client files carefully to determine which files need immediate attention, for "failure to do so would leave the clients in the same position as if their attorney died without any plan to protect their interests". [*Id.*] The lawyer is advised to contact all clients and notify them of the death of their lawyer and to request instructions, in accordance with Rule 1.15. However, "[b]ecause the reviewing lawyer does not represent the clients, he or she should review only as much of the file as is needed to identify the client and to make a determination as

to which files need immediate attention." [*Id.*]

The ABA opinion concludes: "There is no simple answer to this question. Each file must be evaluated separately. Reasonable efforts must be made to contact the clients and inform them that their lawyer has died, such as mailing letters to the last known address of the clients explaining that their lawyer has died and requesting instructions... Finally, questions arise with regard to unclaimed funds in the deceased lawyer's client trust account. In this situation, reasonable efforts must be made to contact the clients. If this fails, then the lawyer should maintain the funds in the trust account. Whether the lawyer should follow the procedures as outlined in the applicable Disposition of Unclaimed Property Act that is in effect in the lawyer's state jurisdiction is a question of law that this Committee cannot address." [*Id.*]

While it is hard to think about your own death or disability, the possible chaos, harm to clients and subsequent malpractice considerations make having a succession plan for a solo or small firm practitioner a worthwhile endeavor. For further reading, see the handbook originally prepared by the Oregon State Bar, entitled "Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death;" ABA-sponsored CLE "So It's Time: Responsible Planning for Closing the Law Office;" and ABA book, entitled "Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events," by Debra and Lloyd D. Cohen.

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<sup>1</sup> See, e.g., <http://www.americanbar.org/publications/youraba/2014/november-2014/closing-a-law-office-after-a-death-or-incapacity.html>

<sup>2</sup> See [http://www.abajournal.com/magazine/article/death\\_of\\_a\\_practice\\_terminally\\_ill\\_lawyers\\_friend\\_faces\\_closing\\_down\\_firm/](http://www.abajournal.com/magazine/article/death_of_a_practice_terminally_ill_lawyers_friend_faces_closing_down_firm/)

<sup>3</sup> See [http://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement/rule\\_28.html](http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_28.html)

<sup>4</sup> See [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/masaleris.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/masaleris.html)

<sup>5</sup> See <http://www.michbar.org/pmrc/articles/planningahead.pdf>